IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. IOWA BOARD OF PHARMACY, Respondent.	)))))))))	Case No. CVCV051068 **RESPONDENT'S JUDICIAL REVIEW BRIEF**

COMES NOW the Iowa Board of Pharmacy and for its Brief on Judicial Review respectfully submits the following:

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STATEMENT OF THE CASE

The Petitioner Carl Olsen filed a Petition for Agency Action to Reschedule Marijuana before the Iowa Board of Pharmacy. The Petition requested that the Board recommend to the Iowa General Assembly that marijuana be rescheduled under the Controlled Substance Act. After considering the Petition at three separate meetings, the Board issued an Order Denying the Petition in early 2015. While the Board declined to recommend the wholesale rescheduling of marijuana, the Board did recommend, consistent with Medical Cannabidiol Act, that cannabidiol be rescheduled. Petitioner seeks judicial review from this decision.[1] Many of the issues presented in this Petition will be resolved by *Olsen vs. Iowa Board of Pharmacy*, No. 14-2164, which is currently pending before the Iowa Court of Appeals.

FACTUAL AND PROCEDURAL HISTORY

On July 7, 2014, the Petitioner Carl Olsen filed a Petition for Agency Action requesting that the Iowa Board of Pharmacy recommend to the Iowa General Assembly the removal of marijuana from Schedule I of the Controlled Substances Act. (Order Denying Petition at 1). The Petition did not request or suggest what schedule marijuana should be placed in, merely that it be removed from Schedule I. (*Id.*) The Board first considered the Petition at its August 2014 meeting. The Board tabled consideration of the Petition at that time and appointed a committee to further study the request. (*Id.*) The committee met on November 17, 2014, and invited public comment on the Petition. (*Id.*) Several government agencies, advocacy groups, and private citizens submitted both oral and written comments at the November meeting. (*Id.*)

[1] In his Petition for Judicial Review, Mr. Olsen challenged two separate agency actions, the Board's 2015 order denying his petition and the Board's 2016 scheduling recommendations. In its Answer, the Board asserted that Mr. Olsen was not "aggrieved or adversely affected" by the Board's 2016 recommendations. Unlike 2015, Mr. Olsen did not file a Petition for Agency Action in 2016. In any event, Mr. Olsen appears to have abandoned any challenge to the Board's 2016 scheduling recommendations as they are not mentioned in his brief.

On November 19, 2014, the Board met in open session to deliberate the Petition. At that time, the Board voted to table the Petition until the January 2015 meeting. (*Id.*) On January 5, 2015, the Board met in open session to deliberate and render a decision on the Petition. (*Id.*) The Board voted to deny the Petition. (*Id.*) The Board noted that under federal law, marijuana remains a Schedule I controlled substances, meaning that it has no medical use. (*Id.* at 3) The Board further noted that through policy, but not by law, the federal government has permitted states to experiment with medical marijuana program. (*Id.*) Given the instability of federal law and its enforcement, the Board concluded to it was not appropriate to recommend the state rescheduling of a marijuana to conflict with federal law. (*Id.*) However, the Board determined that given the passage of the Medical Cannabidiol Act, the Board would recommend the rescheduling of cannabidiol. (*Id.*) The Board's decision was memorialized.

Mr. Olsen sought reconsideration of the order, which was denied without written decision at the Board's March 2015 meeting.

STANDARD OF REVIEW

Administrative law's most fundamental tenet is that "administrative decisions are to be made by the agencies, not the courts." *Midwest Auto. III, Inc. v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 422 (Iowa 2002) (quoting *Leonard v. Iowa State Bd. of Educ.*, 471 N.W.2d 815, 815 (Iowa 1991)). Judicial review under Iowa Code section 17A.19 is for correction of errors at law, not *de novo*, and the reviewing court functions solely in an appellate capacity to correct errors of law on the part of the agency. *Garcia v. Naylor Concrete Co.*, 650 N.W.2d 87, 89 (Iowa 2002). A reviewing court is not empowered to substitute its own judgment for that of the agency, as the court's authority is only to correct properly preserved errors occurring under

section 17A.19. *McClure v. Iowa Real Estate Comm'n*, 356 N.W.2d 594, 597 (Iowa Ct. App. 1984).

Under the terms of section 17A.19, "[t]he burden of demonstrating the required prejudice and invalidity of [challenged] agency action is on the party asserting the invalidity." Iowa Code § 17A.19(8)(a) (2015). The scope of judicial review is limited to the grounds for relief set forth in subsection 17A.19(10). This court must conduct its review of the issues raised by Petitioner within the narrow framework of these standards.

Mr. Olsen alleges that the Board's interpretation of its statutory duty under the Controlled Substances Act to makes annual recommendations about the scheduling of controlled substances is incorrect. The standard of review for this appeal, therefore, depends on whether the Board's statutory interpretation is entitled to deference. Iowa Code §§ 17A.19(10)(*c*), (*l*). Interpretation of the statutory language at issue has clearly been vested by a provision of law in the agency's discretion. *Houck v. Iowa Bd. of Pharmacy Exam'rs*, 752 N.W.2d 14, 16 (Iowa 2008). If the agency has been clearly vested with the interpretive authority, the court generally defers to the agency's action and may only grant relief if the agency's action is "irrational, illogical, or wholly unjustifiable." *Id.* (quoting Iowa Code § 17A.19(10)(*l*)).

The Iowa Supreme Court recently reviewed the standards for determining whether an agency's interpretation of law should be afforded deference. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8 (Iowa 2010). In determining whether an agency has been "clearly vested" with the authority to interpret a word or phrase, the court will "take a careful look at the specific language the agency has interpreted as well as the specific duties and authority given the agency with respect to enforcing particular statutes." *Id.* at 13.

Under the factors articulated in *Renda*, the Board's interpretation of its duty is to make scheduling recommendations under the Controlled Substance Act is entitled to deference. First, the legislature has delegated broad authority to the Board to review the scheduling of controlled substances. *See* Iowa Code § 124.201(1) ("The board shall administer the regulatory provisions of this chapter. Annually . . . the board shall recommend to the general assembly any deletions from, or revisions in the schedules of substances . . . which it deems necessary or advisable."). If the Board finds that a drug is improperly scheduled, the Board must issue a recommendation to the General Assembly. *Id.* § 124.201(2). The Board has also been given general policymaking and rulemaking authority under Iowa Code section 135.31. Second, at issue here is the Board's interpretation of its own duty. This is not a question of the Board's regulation of someone else. In order to fulfill its own obligation under chapter 124, the Board must *necessarily* interpret the words and phrases at issue.

Most importantly, the decision to recommend rescheduling of controlled substances necessarily evokes the Board's expertise. Five of the seven Board members must be licensed pharmacists and all are appointed by the governor. Iowa Administrative Code rule 657—1.2. The recommendation for the rescheduling of controlled substances is a highly technical decision for which the Board's expertise is particularly suited. *See State v. Bonjour*, 694 N.W.2d 511, 514 (Iowa 2005) ("[T]he Board of Pharmacy Examiners . . . is far better equipped than this court—and the legislature, for that matter—to make critical decisions regarding the medical effectiveness of marijuana use. . . ."). Even assuming that the Board's interpretation is not entitled to deference, however, the Board's interpretation of chapter 124 was correct.

ARGUMENT

I. The Board's Decision Not to Recommend the Wholesale Rescheduling of Marijuana was Not Irrational, Illogical, or Wholly Unjustifiable Under Iowa Code Chapter 124.

The Controlled Substances Act, Iowa Code chapter 124, creates five schedules for the classifications of controlled substances. Schedule I is the most heavily regulated, while Schedule V is the least. Marijuana is listed as a Schedule I drug. *See* Iowa Code § 124.204(4)(*m*) ("Marijuana, except as otherwise provided by rules of the board [of pharmacy] for medicinal purposes." Marijuana is also listed as a Schedule II drug "when used for medicinal purposes pursuant to rules of the board." *Id.* § 124.206(7)(*a*).

Chapter 124 further directs the Board to make annual recommendations to the General Assembly on the proper scheduling of controlled substances. Iowa Code section 124.203 directs the Board to recommend "as appropriate" the removal of a controlled substance from Schedule I classification if the Board determines the substance no longer meets the Schedule I classification. Iowa Code § 124.203. Further, section 124.201 directs the Board to make recommendations for the scheduling of controlled substances "which it deems necessary or advisable." Iowa Code § 124.201.

Based upon this statutory duty, Mr. Olsen sought to compel the Board to recommend the removal of marijuana from Schedule I. The Board denied Mr. Olsen's request. The Board does not dispute that it has an affirmative duty to make annual scheduling recommendations to the General Assembly. Where the parties differ is whether the Board has discretion as to what *specific* recommendations it makes.

Mr. Olsen interprets chapter 124 to afford the Board no discretion in making recommendations. According to Mr. Olsen if the criteria for schedule I is no longer met, the Board must recommend that the substance be rescheduled. This interpretation, however, is inconsistent with the specific language in chapter 124. As noted above, the Board's duty to make recommendations is conditioned on that recommendation being "appropriate," "necessary", and "advisable."

The words "appropriate," "necessary," and "advisable" are not defined in chapter 124. Nor are these words generally considered terms of art. In the absence of statutory definition, words are given their plain and ordinary meaning. *Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541, 543-44 (Iowa 1996). *Merriam-Webster's Dictionary* defines "appropriate" as "right or suited for some purpose or situation;" "necessary" as "so important that you must do it;" and "advisable" as "wise, sensible, or reasonable." *Merriam-Webster's Dictionary* (Online ed. 2014). Chapter 124 is silent on what criteria the Board should consider in deeming which recommendations are "wise, sensible, or reasonable." Nothing prohibits the Board from refusing to make a recommendation because it does not believe the recommendation will be acted upon.

Furthermore, if the Board was required to recommend rescheduling a controlled substance solely because it arguably no longer meets the Schedule I criteria, the words "as appropriate" in section 124.203 and "which it deems necessary and advisable" in section 124.201 would be superfluous. Words have meaning. *See State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003) (noting that courts "avoid rendering any part of the enactment superfluous."). Because the Board has discretion to determine the specific recommendations it makes, its decision not to

recommend the wholesale rescheduling of marijuana was not contrary to Iowa Code sections 17A.19(10)(*c*),(*l*), (*k*).

II. The Board's Decision Not to Recommend the Wholesale Rescheduling of Marijuana was Not in Conflict With Prior Precedent.

Iowa Code section 17A.19(10)(*h*) prohibits an agency from taking action inconsistent with the agency's prior practice or precedents, unless that inconsistency is justified by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency. While the Board's 2015 decision to recommend the rescheduling of cannabidiol but not marijuana generally is unique, it is not contrary to prior precedent.

In asserting that the Board's 2015 decision conflicts with prior precedent, Mr. Olsen focuses solely on one decision—the Board's 2010 decision to recommend the rescheduling of marijuana. Mr. Olsen ignores the Board's precedent prior to 2010 and the Board's precedent following 2010. In every year except 2010, the Board has refused to recommend the wholesale reclassification of marijuana. If any decision conflicts with prior precedent, therefore, it is the Board's 2010 decision and not the 2015 decision which is challenged in this case.

Mr. Olsen failed to inform this court that the Board refused to recommend the rescheduling of marijuana in 2013 and 2014. Mr. Olsen challenged both of those decisions, which were upheld on appeal to the district court. *See Olsen v. Iowa Bd. of Pharmacy*, CVCV045505 (Iowa Dist. Ct. 2014); *Olsen v. Iowa Bd. of Pharmacy*, CVCV047867 (Iowa Dist. Ct. 2014). As noted previously, the 2014 decision is currently pending before the Iowa Court of Appeals.

Moreover, the Board adequately justified its 2015 decision not to recommend a general rescheduling, but to recommend the rescheduling of cannabidiol. The Board noted that

subsequent to its 2014 recommendations, the Iowa General Assembly passed the Medical Cannabidiol Act. The Board interpreted this act as "an affirmative recognition by the Iowa General Assembly that there is some medical use for marijuana" or a marijuana derivative. (Order Denying Petition at 3). This intervening action by the legislature is a credible justification for the Board's minor deviation from its 2013 and 2014 precedent.

Assuming that the Board did fail to follow precedent when it denied Mr. Olsen's Petition, that failure is justified by the change in the Board's composition since 2010. Members of the Board are appointed by the Governor, subject to confirmation by the Senate. Iowa Code § 147.19. Members are appointed to serve three-year terms. *Id.* Members may serve up to nine years total on the Board. *Id.* The composition of the Board, therefore, by legislative design does not remain static over time. Requiring later incarnations of the Board to abide in lockstep to prior decisions of the Board thwarts the legislative intent expressed in chapter 147. New members bring different experiences, worldviews, and opinions to their roles on the Board. Reasonable people can reasonably come to different conclusions. Mr. Olsen has cited no authority which would prohibit the 2015 incarnation of the Board from reaching a different conclusion from the 2010 Board—even based on the same evidence.

III. The Board's Decision Not to Recommend the Wholesale Rescheduling of Marijuana was Not So Illogical as to Render it Wholly Irrational.

Mr. Olsen next claims that the Board's refusal to recommend the wholesale rescheduling of marijuana must be reversed because it was the "product of reasoning that is so illogical as to render it wholly irrational" under Iowa Code section 17A.19(10)(*i*). In support of that contention, Mr. Olsen paradoxically cites the Board's recommendation to reschedule hydrocodone in conformance with federal law. (Petitioner's Brief at 9). First, Mr. Olsen cites no

record support for the factual allegation asserted. Second, the Board's decision to recommend the rescheduling of hydrocodone to conform with federal scheduling, actually supports the Board's decision not to recommend the rescheduling of marijuana contrary to federal law.

IV. The Board's Decision Not to Recommend the Wholesale Rescheduling of Marijuana is Not the Product of Decision-Making Process in Which the Agency Did Not Consider Relevant and Important Matters.

Finally, Mr. Olsen asserts that the Board's decision not to recommend the general rescheduling of marijuana violated Iowa Code section 17A.19(10)(*j*) because it was the "product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action." In support therefore, Mr. Olsen cites some stray comments from individual board members about the scheduling of opium.

First, Mr. Olsen appears to be citing to a transcript of the Board's open session deliberations, but he makes no citation to the record. The State is unaware of any official transcript of its open session deliberations. Second, these comments from various Board members are not germane to the case at hand. Nor can these comments be attributable to the Board. The Boards acts through its written decision. *See Belle of Sioux City, L.P., v. Iowa Rac. & Gaming Comm'n*, No. 14-1158, 2016 WL 1129935 *8 (Iowa Ct. App. March 23, 2016). This case is about the scheduling of marijuana, not the scheduling of other substances. The decision at issue makes no mention of the scheduling of opium. Finally, even assuming these comments were somehow germane, as Mr. Olsen sets forth he apprised the Board members of their mistake prior to the vote. As a result, any mistake by the Board members was harmless error.

CONCLUSION

For the reasons set forth above, the decision of the Iowa Board of Pharmacy denying Mr. Olsen's Petition for Agency Action to Reschedule Marijuana should be affirmed. Should the court reverse the Board's order, however, the proper remedy would be to remand the petition for further reconsideration in light of the Court's decision. *See Johnston v. Iowa Real Estate Comm'n*, 344 N.W.2d 236, 240 (Iowa 1984) (concluding that on judicial review the court has no original authority to declare the parties' rights, so remand is the proper remedy unless another remedy is required as a matter of law).

Respectfully submitted,

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