IN THE IOWA SUPREME COURT

No. 16-1381

CARL OLSEN,

Petitioner-Appellant,

vs.

IOWA BOARD OF PHARMACY,

Respondent-Appellee.

APPEAL FROM THE
IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE BRAD MCCALL, JUDGE

RESPONDENT-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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Iowa Code § 124.201(1)(*a*)-(*h*)

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(*a*), this case should be transferred to the Court of Appeals. Resolution of the issue presented rests exclusively on the applicability of existing legal principles.

STATEMENT OF THE CASE

The Petitioner, Carl Olsen, appeals the district court's dismissal of his petition for judicial review of the Iowa Board of Pharmacy's denial of Petitioner's request to recommend the removal of marijuana from Schedule I of the Iowa Controlled Substances Act.

FACTUAL AND PROCEDURAL HISTORY

On July 7, 2014, 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; App. at 27-31). 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 committee meeting. *Id.*

On November 19, 2014, the full 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 substance, meaning that it has no accepted 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 programs. *Id.* Given the instability of federal law and its enforcement, the Board concluded it was not appropriate to recommend the state rescheduling of marijuana to conflict with federal law. *Id.*

Additionally, while the Board noted the possible medicinal use of marijuana, it expressed concern "about the ability of any program to establish the standardization of

dosage and potency necessary to ensure patient safety and effective treatment." *Id.* at 4. However, the Board determined that given the passage of the Medical Cannabidiol Act, the Board would recommend the rescheduling of cannabidiol [hereinafter CBD]. *Id.* at 3. Similarly, the Board recommended the removal of CBD and other marijuana derivatives from the broad definition of marijuana contained in Iowa Code section 124.101(19). The Board's decision was memorialized in writing.

Mr. Olsen sought reconsideration of the Board's decision, which was denied without written decision at the Board's March 2015 meeting. Mr. Olsen filed a timely Petition for Judicial Review. (Petition for Judicial Review; App. at 73-91). During the pendency of the judicial review action, the Iowa Court of Appeals rendered a decision in *Olsen v. Iowa Board of Pharmacy*, No. 14-2164, 2016 WL 2745845 (Iowa Ct. App. May 11, 2016), which concerned Petitioner's challenge to the Board's 2014 decision on the rescheduling of marijuana. Based upon this decision and the relevant provisions of the Iowa Controlled Substance Act, the Honorable Brad Harris

determined that the Board's decision not to recommend the removal of marijuana from Schedule I was not irrational, illogical, or wholly unjustifiable. (Ruling at 7; App. at 157). In reaching its decision, the district court determined that the "Board clearly understands its legislative direction to make recommendations as to scheduling changes to the legislature." *Id.* at 6. The Board simply reached a different recommendation than that advocated by Mr. Olsen.

Mr. Olsen filed a timely Notice of Appeal.

ARGUMENT

I. The Board's Decision Not to Recommend the Removal of Marijuana from Schedule I of the Iowa Controlled Substances Act Was Not Irrational, Illogical, or Wholly Unjustifiable.

A. Error Preservation, Scope of Review, & Standard of Review. The Board concedes Mr. Olsen preserved error. (Ruling; App. at 151-58).

The parties, however, disagree as to the scope of this Court's review. In his brief, Mr. Olsen purports to be challenging four, separate Board actions. (Appellant's Brief at 1). The first of those actions is the Board's January 5, 2015 written decision not to recommend the removal of marijuana from Schedule I. There is no question that this action is properly before the Court. The second action challenged by Mr. Olsen is the Board's denial of his Motion for Reconsideration on March 9, 2015. That action is derivative of the January action and does not constitute a separate final action subject to judicial review.

The last two actions concern the Board's 2016 proposed legislation. Review of these actions is not properly before the

Court as the district court made no reference to these actions in its decision.[1] (Ruling; App. at 151-58).

The standard of review is governed by the Iowa Administrative Procedure Act. Indisputably, the sole issue in this case turns on the proper interpretation of Iowa's Controlled Substances Act. Or more specifically, the proper interpretation of the Board's duty to make annual recommendations to the General Assembly on the scheduling of controlled substances. 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*).

As Mr. Olsen acknowledges, the Board's interpretation of its annual duty is entitled to deference. (Appellant's Brief at 13). *See also Olsen*, No. 14-2164, 2016 WL 2745845 at *2

[1] In any event, as asserted below, Mr. Olsen is not aggrieved or adversely affected by the Board's proposed legislation. More significantly, even assuming there is a requirement that the Board recommend the rescheduling of marijuana or its removal from Schedule I, there is no requirement that the Board prefile legislation to that effect. The Board's failure, therefore, to include the rescheduling of CBD in its annual clean-up bill was not in error.

(holding that deference should be afforded to the Board's interpretation of its annual duty to make recommendations under the Controlled Substances Act). Because the Board's interpretation is entitled to deference, this Court may only grant relief if the agency's action is based upon an interpretation of law that is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*l*).

B. Argument.

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[2] to the General Assembly on the proper scheduling of controlled substances. Iowa Code section 124.203 directs the Board to recommend the removal of a controlled substance from Schedule I classification if the Board determines the substance no longer meets the Schedule I classification, "as appropriate." 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

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[2] At various points in his brief, Mr. Olsen misconstrues this statutory obligation as a duty to "initiate the reclassification" of controlled substances. This is incorrect. The Controlled Substances Act does not require the Board to propose legislation. In fact, the Act is silent as to the method of the Board's recommendation to the General Assembly. Publically considering, debating, and rendering a decision on the rescheduling of marijuana is certainly sufficient.

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 further 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.

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.").

As the district court found, it is not illogical, irrational, or wholly unjustifiable for the Board to decline to recommend the removal of marijuana from Schedule I even if the Board

determines that marijuana has an accepted medical use.[3] Marijuana is a naturally growing plant. As such it is fundamentally different than a synthetic drug. Synthetic drugs standardize dosage and potency. In other words, the medication a patient takes Monday is the same medication the patient takes Tuesday. The active ingredients are the same. The effect on the patient is the same. Treatment is the same. Such standardization and consistency is nearly impossible with a natural product like marijuana. In refusing to grant the Petition, the Board expressed fundamental concerns that any wholesale medical marijuana program could be enforced with the necessary medical efficacy. (Order Denying Petition at 3; App. at 29). *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

[3] Mr. Olsen repeatedly contends that the Board recognized that marijuana has an accepted medical use. This is inconsistent with the Board's 2015 decision. The Board explicitly found that *some* marijuana derivatives, such as CBD, have an accepted medical use. (Order Denying Petition at 3; App. at 29).

matter—to make critical decisions regarding the medical effectiveness of marijuana use. . . .").

Nor is it irrational, illogical, or wholly unjustifiable for the Board to decline recommending the removal of marijuana from Schedule I because it would put Iowa out-of-step with federal scheduling. As the Board noted, the current federal administration has allowed states to experiment with medical and recreational marijuana programs. (Order Denying Petition at 3; App. at 29). This largess, however, has been a matter of policy and not law. As a result, it is subject to change—at any time. Continuity of care for Iowa patients will be destroyed if a wholesale medical marijuana program is initiated and later disbanded.

Nor it is not irrational, illogical, or wholly unjustifiable for the 2015 Board to reach a different recommendation on the proper scheduling of marijuana than prior incarnations. 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. Mr. Olsen has cited no authority that would prevent the 2015 Board from reaching a different conclusion on the advisability of recommending the removal of marijuana from Schedule I. In fact, under Mr. Olsen's interpretation, the 2010 Board acted unlawfully by making a recommendation on marijuana different than all of the prior incarnations of the Board.

Finally, it is not irrational, illogical, or wholly unjustifiable for the Iowa Board of Pharmacy to decline to recommend the removal of marijuana from Schedule I simply because other states have done so. Mr. Olsen argues that federalism and his constrained interpretation of statute obligates the Board to recommend rescheduling of marijuana if any state has recognized its potential medical use. Such an

interpretation wholly destroys the purpose of the Board and illogically delegates rescheduling of controlled substances in Iowa to scheduling authorities throughout the country.

When considering a reclassification recommendation, the Board must consider *eight* different factors, including the state of current scientific knowledge regarding the substance, the history and current pattern of abuse, and the risk to the public health. Iowa Code § 124.201(1)(*a*)-(*h*). The current status of the controlled substance in other states is not listed among the factors to be considered by the Board. At no point in the factoring process is the Board required to defer to the determinations of any other state, as Mr. Olsen claims. After weighing the factors, the Board is only obligated to make a rescheduling recommendation when the Board "deems it necessary or advisable." *Id.*

Requiring the Board to follow the scheduling decisions of other states would lead to peculiar results. For example, if Wyoming decided tomorrow that heroin is an acceptable treatment for diabetics, under Mr. Olsen's interpretation, the Board would have to recommend rescheduling to allow such

treatment in Iowa even if the Board strongly disagreed. Such a result would be absurd. It is also impossible to validate the scheduling decisions of all other states. While Mr. Olsen is certainly correct that many states recognize a medicinal use for marijuana, an equal number of states do not. The scheduling of controlled substances in Iowa is an issue for Iowa authorities under chapter 124.

CONCLUSION

For the reasons expressed above, the Board respectfully requests that the decision of the district court be affirmed.

REQUEST FOR ORAL ARGUMENT

Respondent respectfully requests to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because this brief contains 2,347 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Bookman Old Style font.

/s/ Meghan Gavin Date: December 6, 2016

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