

Carl Olsen
130 E. Aurora Avenue
Des Moines, IA 50313-3654

May 17, 2010

Governor Chet Culver
State Capitol, 1007 E. Grand Avenue
Des Moines, IA 50319

Dear Governor Culver:

Thank you for your recent letter regarding the medical use of marijuana. You mentioned that state laws may be preempted by federal law, but the only court cases that have been decided on this issue say exactly the opposite. The leading case is ***Gonzales v. Oregon***, 546 U.S. 243 (2006), which I quoted in my letter of March 12, 2010. Federal Regulations, which are how drugs are classified and regulated by the U.S. Department of Justice, cannot be used to preempt state laws. The U.S. Supreme Court says so and President Obama says so. I sent you a copy of President Obama's executive memo of May 20, 2009, explicitly forbidding federal agencies from preempting state law. The title of that memo is **Memorandum on Preemption**. It just doesn't get much plainer than that. The Executive Branch and the Judicial Branch agree, federal regulations cannot be used to preempt state laws. If this is not enough to convince you, I have a couple California cases you need to read.

The first case you need to read is ***City of Garden Grove v. Superior Court***, 157 Cal. App. 4th 355, 385, 68 Cal. Rptr. 3d 656, 676-677 (Cal. App. 4th Dist., 2007), ***cert. denied***, ___ U.S. ___, 129 S. Ct. 623, 172 L. Ed. 2d 607 (2008) ("So, what we are left with is a state statutory scheme that limits state prosecution for medical marijuana possession but does not limit enforcement of the federal drug laws. This scenario simply does not implicate federal supremacy concerns").

The second case you need to read is ***County of San Diego v. San Diego NORML***, 165 Cal. App. 4th 798, 827, 81 Cal. Rptr. 3d 461, 483, (Cal. App. 4th Dist., 2008), ***cert denied***, ___ U.S. ___, 129 S. Ct. 2380, 173 L. Ed. 2d 1293 (2009) ("Congress

does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws”).

All of these authorities confirm without any doubt that federal drug law does not preempt state medical marijuana laws. In fact, the federal drug law includes a process for amending the classification of any controlled substance and ***Gonzales v. Oregon*** makes it perfectly clear the U.S. Department of Justice is required to grant such a request from any state that makes one. Not only does federal law not preempt state medical marijuana laws, federal law requires the U.S. Department of Justice to reclassify marijuana as medicine whenever a state notifies the Drug Enforcement Administration using the process set out by Congress in 21 U.S.C. § 811.

So, again, please let me know when you would like to meet with me to discuss this and any other issues I can help you understand to make the transition to medical use of marijuana here in the state of Iowa as smooth as possible.

I look forward to hearing from you again soon.

Thank you!

Sincerely,

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CHESTER J. CULVER
GOVERNOR

OFFICE OF THE GOVERNOR

PATTY JUDGE
LT. GOVERNOR

May 13, 2010

Carl Eric Olsen
130 E Aurora
Des Moines, IA 50313

Dear Carl:

Thank you for your recent correspondence regarding the usage of marijuana for medical purposes. We appreciate you taking the time to contact us.

Currently, the use of marijuana for medical purposes has been legalized in a handful of states. However, there are instances where these laws have been subjected to challenge. Such state laws may be preempted by federal laws regarding marijuana.

Marijuana is currently an illegal substance under Iowa law. In the past, our administration has opposed any efforts to change the relevant sections of the *Iowa Code* regarding marijuana use.

As you may know, the General Assembly recently established an interim legislative study task force to look at the implications of legalized medical marijuana in Iowa.

We encourage you to contact your state legislators regarding this issue. Their contact information can be found at: www.legis.state.ia.us/.

Thank you again for contacting our office. Please do not hesitate to contact us in the future with your thoughts. We appreciate your input.

Sincerely,

Handwritten signature of Chester J. Culver in black ink.

Chester J. Culver
Governor of Iowa

Handwritten signature of Patty Judge in black ink.

Patty Judge
Lt. Governor



IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

<p>GEORGE McMAHON, BRYAN SCOTT and BARBARA DOUGLASS,</p> <p>Petitioners,</p> <p>CARL OLSEN,</p> <p>Intervenor,</p> <p>v.</p> <p>IOWA BOARD OF PHARMACY,</p> <p>Respondent.</p>	<p>Case No. CV7415</p> <p>RULING ON PETITION FOR JUDICIAL REVIEW</p> <p>FILED POLK COUNTY IOWA 2009 APR 21 PM 4:14 CLERK DISTRICT COURT</p>
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Introduction

The above-captioned matter came before the Court for hearing on March 27, 2009. Petitioners were represented by attorney Randall Wilson. Intervenor, Carl Olsen, was present on behalf of himself. Respondent was represented by attorney Scott Galenbeck. Following oral argument and upon review of the court file and applicable law, the Court enters the following:

Statement of the Case

Petitioners filed a petition with the Iowa Board of Pharmacy on June 24, 2008, seeking removal of marijuana from Schedule I of Iowa’s Controlled Substances Act. Petitioners argued that Iowa Code section 124.203 requires the Iowa Board of Pharmacy (hereinafter the “Board”) to recommend to the legislature that marijuana be rescheduled because it no longer meets the legislative criteria established for the listing of Schedule I substances. The Board issued a final decision denying Petitioners’ request on October 7, 2008. Petitioners have now appealed the Board’s decision in this action for judicial review, and argue that the Board’s decision is based upon an erroneous interpretation of law.

Standard of Review

On judicial review of agency action, the district court functions in an appellate capacity to apply the standards of Iowa Code section 17A.19. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). The Court shall reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. IOWA CODE § 17A.19(10)(c). The Court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. IOWA CODE § 17A.19(11)(b). Appropriate deference is given to an agency's interpretation of law when the contrary is true, although "the meaning of any statute is always a matter of law to be determined by the court." *Birchansky Real Estate, L.C. v. Iowa Dept of Public Health*, 737 N.W.2d 134, 138 (Iowa 2007); IOWA CODE § 17A.19(11)(c). The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).

Analysis

Marijuana is identified in the Iowa Controlled Substances Act as a Schedule I controlled substance. *See* IOWA CODE § 124.204 (2009). Section 124.203 of the Iowa Code sets forth the criteria for classifying controlled substances under Schedule I. Section 124.203 provides:

The board shall recommend to the general assembly that it place in schedule I any substance not already included therein if the board finds that the substance:

1. Has high potential for abuse, and
2. Has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.

IOWA CODE § 124.203. This section further provides that the Board “shall recommend” that the general assembly place a listed Schedule I substance in a different schedule or remove it if it does not meet the previously mentioned criteria. *Id.*

Petitioners argued before the Board that marijuana no longer meets the criteria for classification as a Schedule I controlled substance because marijuana now has accepted medical use in treatment in the United States. In support of their argument, Petitioners cited to the laws of other states that have now authorized the use of marijuana for medicinal purposes. The Board addressed Petitioners’ argument and request for reclassification in its final order by explaining:

While neither accepting or rejecting Olsen’s assertion that the medicinal value of marijuana is established by legislation adopted in other states, the Board notes that before recommending to the Iowa legislature that marijuana be moved from schedule I to schedule II, the Board would also need to make a finding that marijuana lacks a high potential for abuse. *See* Iowa Code 124.203 (2007). There exists no basis for such a finding in the record before the Board, as Olsen’s submission offers no evidence or information on marijuana’s potential for abuse. Absent such evidence or information, Olsen’s request must be denied.

(Order, p. 2).

Section 124.203 of the Iowa Code requires that any controlled substance have (1) a high potential for abuse, *and* (2) no accepted medical use in treatment in the United States before it may be classified under Schedule I. Because the Code imposes both criteria as a prerequisite to Schedule I classification, the failure to meet either would require recommendation to the legislature for removal or rescheduling. *See id.* As such, the Board’s statement that it “would also need to make a finding that marijuana lacks a high potential for abuse” before it could recommend to the legislature that marijuana be moved from Schedule I to Schedule II is based upon an erroneous interpretation of law.¹

¹¹ Pursuant to Iowa Code section 124.205, Schedule II substances must be found to have “currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions,” in order to be classified as such. *See* IOWA CODE § 124.205. Controlled substances must also be found to have a “high

The Board now argues in this action for judicial review that its decision should be affirmed by this Court because Petitioners failed to make an adequate record before the agency. The Board asserts that Petitioners failed to present evidence addressing all of the factors delineated in Iowa Code section 124.201. However, this is not the Board's stated reason for its decision in its written order. The Court may not rely on the Board's post hoc rationalizations for purposes of affirming the agency action at issue. Petitioners were entitled to a written explanation of the reasons for the Board's decision regardless of whether the agency action at issue was taken in response to a request for the adoption of agency rules, taken in response to a request for a declaratory order, or taken in a contested case proceeding. *See* IOWA CODE §§ 17A.7(1), 17A(4)(d), 17A.16; *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981). The Court acknowledges that the factors set forth in Iowa Code section 124.201 are relevant in the Board's determination of whether the statutory criteria for Schedule I classification are satisfied.² However, Iowa Code section 124.203 clearly requires that the Board recommend removal of marijuana from Schedule I or reclassification under a different schedule if it is found that marijuana "[h]as no accepted medical use in treatment in the United States, or lacks accepted safety for use in treatment under medical supervision." If the Board believes that the evidence presented by Petitioners was insufficient to support such a finding, it should have so stated in its order. Remand of the Board's decision is required so that Board may address Petitioners'

potential for abuse" before they may be classified under Schedule II. *Id.* As such, one of the main characteristics that distinguishes Schedule II substances from those listed in Schedule I is accepted medical use in treatment in the United States. It is therefore erroneous to state that a substance classified under Schedule I cannot be reclassified as a Schedule II substance if the substance is found to present a high potential for abuse. Both Schedule I and Schedule II controlled substances share the same characteristic of having a high potential for abuse. A finding of accepted medical use for treatment in the United States alone would be sufficient to warrant recommendation for reclassification or removal pursuant to the language of Iowa Code section 124.203.

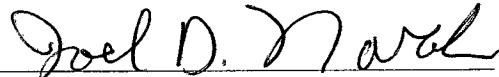
² Iowa Code section 124.201 requires that the Board consider these factors before making a rescheduling recommendation to the legislature. The Board is apparently of the position that these factors must also be considered before recommending rescheduling or removal pursuant to the terms of Iowa Code section 124.203.

Petition through proper application of the law. The Board must determine whether the evidence presented by Petitioner is sufficient to support a finding that marijuana has accepted medical use in the United States and does not lack accepted safety for use in treatment under medical supervision.

ORDER

IT IS THE ORDER OF THE COURT that the Ruling on Appeal of the Iowa Board of Pharmacy is hereby **REMANDED**.

SO ORDERED this 21 day of April, 2009.



JOEL D. NOVAK, District Judge
Fifth Judicial District of Iowa

Original Filed.

Copies mailed to:

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Carl Olsen
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March 12, 2010

Governor Chet Culver
State Capitol, 1007 E. Grand Avenue
Des Moines, IA 50319

Dear Governor Culver,

As you may know, the Iowa Board of Pharmacy recently recommended that the state of Iowa reclassify marijuana as a medicine.¹ The recommendation came as the result of a petition I filed with the Iowa Board of Pharmacy in May of 2008. My petition was based on the language in the state and federal controlled substances acts “accepted medical use in treatment in the United States” and the fact that 14 states have now accepted the medical use of marijuana. I based my opinion that the states matter on the ruling from the United States Supreme Court in ***Gonzales v. Oregon***, 546 U.S. 243 (2006):

The question in ***Gonzales v. Oregon***, is found at page 257:

Who decides whether a particular activity is in “the course of professional practice” or done for a “legitimate purpose”?

The answer in ***Gonzales v. Oregon***, is found at page 258:

The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instructs us that he is not authorized to make a rule declaring illegitimate a medical standard of care and treatment of patients that is specifically authorized by state law.

Simply put, this means the U.S. Drug Enforcement Administration cannot maintain marijuana in its current federal classification because marijuana now has accepted medical use in treatment in the United States. The answer to the question of who decides accepted medical use is “STATE LAW”.

On October 19, 2009, the Obama Administration issued a memorandum to federal prosecutors instructing them not to prosecute persons in compliance with state medical marijuana law.²

<http://www.justice.gov/opa/documents/medical-marijuana.pdf>

¹ See attached Minutes from the February 17, 2010, meeting of the Iowa Board of Pharmacy.

² See attached response from the U.S. Department of Justice Office of Information Policy dated January 25, 2010.

The October 19 memorandum is consistent with the Obama Administration's May 20, 2009, memorandum condemning federal preemption of state law. Memorandum of May 20, 2009, Federal Register, Vol. 74, No. 98, Friday, May 22, 2009, at page 24693 (referring to Executive Order 13132, of August 4, 1999 ("Federalism"), Federal Register, Vol. 64, No. 153, Tuesday, August 10, 1999, at page 43255).

http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/

<http://www.gpoaccess.gov/presdocs/2009/DCPD-200900384.pdf>

Because classification of controlled substances is a regulatory function of the U.S. Drug Enforcement Administration, those regulations must be interpreted by the U.S. Drug Enforcement Administration to be consistent with state law.

State laws must be accepted on their face value as required by the "Full Faith and Credit Clause" of the United States Constitution, Article IV, Section 1.

Accepted medical use in treatment in the United States does not mean approval by the U.S. Food and Drug Administration. ***Grinspoon v. Drug Enforcement Administration***, 828 F.2d 881, 886 (1st Cir. 1987):

Congress did not intend "accepted medical use in treatment in the United States" to require a finding of recognized medical use in every state or, as the Administrator contends, approval for interstate marketing of the substance.

I would like to meet with you to discuss the obstruction of state law by the U.S. Drug Enforcement Administration while Iowa is currently considering how to implement a state medical marijuana law. Please schedule a meeting at your office with you or an appropriate staff member at your earliest convenience.

Thank you!

Sincerely,

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