

**In the Iowa District Court
in and for
Polk County Iowa**

George McMahon, and Barbara
Douglass, Petitioners

vs.

Docket No. CV7415

The Iowa Board of Pharmacy,
Respondent

vs. Carl Olsen, Intevenor

**Statement of Proceedings upon Appeal
to the Iowa Supreme Court**

COME NOW George McMahon and Barbara Douglass and respectfully submit a statement of these proceedings in compliance with Iowa Rule of Appellate Procedure 6.806, *to wit*:

1. Marijuana [or “*cannabis*” as petitioners prefer to call it] has been legally approved for medical use under the laws of 13 states¹ comprising no less than 25% of the United States population.² An additional 2.16% of the U.S. Population lives in a jurisdictions where medical

¹ Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington

use of marijuana has been approved, but where actual usage has been successfully enjoined by federal law.³

3. In Iowa, marijuana is listed as a “schedule I” substance under Iowa’s Controlled Substances Act. Iowa Code 124.204.4(m&u).

4. Schedule I is legislatively reserved for substances that in addition to having a high potential for abuse, have “no accepted medical use in treatment in the United States;” or lack “accepted safety for use in treatment under medical supervision.”

5. On May 12, 2008, Intervenor Carl Olsen filed a “Petition for Rule Making or Action with the Iowa Board of Pharmacy requesting the Board to recommend removal of marijuana from Schedule I of the Iowa Controlled Substances Act (Iowa Code Ch. 124) based on the argument that marijuana no longer met the Schedule one criteria of having no accepted medical use in treatment in the United States.

6. Mr. Olsen’s petition also included an exhibit consisting of the 1988 decision of federal Administrative Law Judge Francis L. Young, concluding that “Marijuana in its natural form, is one of the safest therapeutically active substances known to man.” which Olsen contended was responsive to issues regarding marijuana’s safety.⁴ Through apparent oversight the exhibit was not reproduced in the agency record which was later submitted to the Iowa District Court in Polk County for review.

³ Arizona and Washington, D.C.

⁴ Judge Young’s findings regarding marijuana’s safety and medical efficacy were overturned by the federal DEA administrator for lack of sufficient scientific evidence.

7. On June 24th, 2008, the above-named petitioners, McMahon and Douglass, together with Bryan Scott, filed their own petition with the Iowa Board of Pharmacy seeking removal of marijuana from Schedule I, and moved to intervene in Olsen's administrative proceeding.

8. Their petition, encaptioned "Petition and Motion for Intervention" requested the Iowa Board of Pharmacy to undertake its own review of marijuana's scheduling under its authority to discretionarily review the scheduling of substances and recommend changes under Iowa's Controlled Substances Act.

8. The petition by McMahon, Douglass and Scott, further argued that marijuana no longer met the requirements for listing in Schedule I of Iowa's Controlled Substances Act because it had been accepted for medical use in at least 12 states, and accordingly, requested that the Board of Pharmacy fulfill its mandatory responsibility under Iowa Code §124.203 to recommend rescheduling of a substance (in this case, marijuana) to the Iowa General Assembly when the criteria of schedule I are no longer met.

8. The Board initially ignored the Petitioners' request to conduct an independent discretionary review of whether marijuana should be rescheduled.

9. No hearings were ever scheduled or held on the petitions of Olsen or McMahon, *et al.*, nor were any notices provided to counsel.

10. On July 23, 2008, a staff member brought to the attention of counsel for McMahon, *et al.* that the Iowa Board of Pharmacy had placed discussion of Mr. Olson's petition on the agenda for its July 29th, 2008 board meeting—a date when counsel was out of the state.

11. On the 29th of July, 2008, Carl Olson and George McMahon were able to attend the Pharmacy Board meeting together with a paralegal from the ACLU of Iowa who had been assigned to monitor the meeting. It came to pass at the meeting that Mr. Olsen and Mr. McMahon⁵ were permitted to comment on their requests.

12. A transcript of the July 29th, 2008 meeting was prepared and submitted to the Iowa District Court as part of the record in this cause and speaks for itself.

13. At its July 29th, 2008 meeting the Pharmacy Board discussion centered on the Board's reluctance to take any action before there have been similar changes enacted at the federal level and ended with a voice vote denying "the petition." Counsel for the Board indicated that a written ruling would follow and that he would try to include some of the board's analysis in the decision.

14. On October 7, 2008 the Pharmacy Board issued its written decision denying Mr. Olsen's petition, and by implication, the petition filed by McMahon, Douglass and Scott.

15. The Board stated in its October 7, 2008 ruling that, "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."

16. Petitioner's McMahon and Douglass filed a Petition for Judicial Review of Agency action with the Polk County, Iowa District Court on October 17, 2008.

⁵ In the transcript of the Pharmacy Board meeting, Mr. McMahon is the speaker labeled "Unidentified Guest."

17. On October 21st, 2008, *pro se* litigant Carl Olsen filed a motion to intervene and join in the petition to join in judicial review.

18. On November 4, 2008 the Polk County District Court established a schedule for the conduct of proceedings which was subsequently amended at the request of the parties.

19. The parties each filed briefs in this matter.

20. On March 27th, 2009 the parties attended an unreported hearing before Iowa District Court Judge, Joel Novak. No evidence was taken and following colloquy and oral arguments the disputes were taken under consideration.

21. On April 21, 2009, the district court filed its ruling on petition for judicial review.

The court ruled that:

- a. the Pharmacy Board's "statement that it 'would also need to make a finding that marijuana lacks a high potential or abuse' before it could recommend to the legislature that marijuana be moved from Schedule I to Schedule II is based on an erroneous interpretation law."
- b. the Pharmacy Board could not be affirmed on the basis that the petitioners had made an inadequate record, when that was not the basis for its original decision.
- c. "the Petitioners were entitled to a written explanation of the reasons for the board's decision...."
- d. "Iowa Code section 124.203 clearly requires that the Board recommend removal of marijuana from Schedule I or reclassification under a different schedule, unless⁶ it is found that marijuana 'has no accepted medical use in treatment in the United States, or lacks accepted safety for use in treatment under medical supervision.'"

22. The district court remanded the case to the Board of Pharmacy "so that the Board may address Petitioners' Petition through proper application of the law.

⁶ By subsequent order the district court corrected a logical error in this sentence so that it reads as reproduced above.

23. The district court also directed the Board to determine whether the evidence presented by Petitioner is sufficient to support a finding that marijuana has accepted medical use in the Unite[d] States and does not lack accepted safety for use in treatment under medical supervision.

24. The Pharmacy Board met on June 1st, 2009 and voted to deny petitioners' request for a re-scheduling recommendation principally on grounds that it deemed the prior agency record to be inadequate to support such relief. {A transcript of the meeting was never introduced into the court record prior to appeal of this matter to the Iowa Supreme Court, but has since been prepared.}

25. On July 21st, 2009 the Pharmacy Board met again and adopted the "Supplemental Order" drafted by its counsel. On that date, counsel for McMahon and Douglass complained to counsel for the Board that the proposed supplemental order was not addressed to the petition filed by McMahon and Douglass. Counsel for the Board of Pharmacy then represented that the order would be considered to be applicable to the petition filed by McMahon and Douglass as well.

26. On August 18th, 2009 McMahon and Douglass filed a Petition for Further Review of Agency Action, which was later joined by Mr. Olsen. Both motions were resisted by the Board.

28. The parties met with the district court (Judge Novak) on October 9th and agreed that the district court could consider the merits of the requests for further review without further briefing or argument.

27. On October 30th, 2008 the district court issued its “Ruling on Petition for Further Judicial Review of Agency Action.”

28. McMahon and Douglass filed a Motion to Expand Ruling on November 10, 2009 which was joined by Mr. Olsen on the same date and later resisted by the Board.

29. On November 25, 2009 the district court expanded its ruling to cover the issues requested by the petitioners, but ruled unfavorably to the petitioners on each point.

30. Filings in this case are as they appear in the Combined General Docket as prepared by the Polk County District Court Clerk on December 1, 2009, with the exception of the district court’s “Ruling on Motion to Expand Ruling” which though timely entered had not been fully processed by the clerk by the time of the docket report.

31. Notices of Appeal were timely filed by Petitioners McMahon and Douglass, and by Petitioner Olsen on November 25, 2009.

—∞—

Respectfully Submitted:



Randall C. Wilson, Esq. PK 0007857

ACLU OF IOWA FOUNDATION

901 Insurance Exchange Bldg.

Des Moines, IA 50309-2316

Telephone: 515.243.4032

Facsimile: 515.243 8506

email: randall.wilson@aclu-ia.org

Counsel for Petitioners

Proof of Service

I certify on or before December 14th, 2009 I effected service of this filing upon the other parties to this action by placing a true copy of the same in the U.S. Mail addressed to each the parties or their attorney of record as follows:

Scott Galenbeck, Esq.
Assistant Iowa Attorney General
1305 E. Walnut Street
Des Moines IA 50319

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



Randall C. Wilson, Attorney for Petitioners