

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

George McMahon, Bryan Scott, and
Barbara Douglass, Petitioners

and

Carl E. Olsen, Intervenor

vs.

The Iowa Board of Pharmacy,
Respondent

Docket No. CV 7415

Petitioners' Reply Brief

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I. REBUTTAL ARGUMENT

A. Statutory Misinterpretation

The *sine qua non* for listing of a substance in Schedule I of the Iowa Controlled Substances Act (Iowa Code Chapter 124), as opposed to being listed in any of the other schedules, is whether the substance “has no accepted medical use in treatment in the United States.”¹ Iowa Code Section 123.203. The Board of pharmacy does not apparently dispute this, for it makes no rebuttal of this assertion in its brief.

The statute is unambiguous:

“If the board finds that any substance does not meet **these criteria**, it **shall** recommend that the general assembly place the substance in a different schedule or remove it from the list of controlled substances as appropriate.”

Id. {*emphasis supplied*}. This language does not refer to the discretionary re-evaluation of a scheduled substance’s potential for abuse as permitted by Iowa Code Section 124.201, nor does it suggest the Board must follow a “road map” for assessing dangerousness before even looking at whether a substance has accepted medical use as the Board now argues in its brief. [*e.g.*, *Respondent’s Brief*, p.5]. The operative language only refers to “these criteria”—the two criteria immediately preceding the instruction, which are all contained within a section entitled “Substances listed in schedule I—criteria.” How much plainer can that be?

¹ Peitioner’s brief in chief explains why the additional phrasing of Section 124.203, “or lacks accepted safety for use in treatment under medical supervision” imposes one and the same requirement. {Petitioners’ Brief, p. 20}

Today, the Board places all reliance on an argument that was not part of its original decision, but which only first partially appears in its written ruling issued some 10 weeks later (whatever additional deliberations were involved are not part of the record). That argument now goes like this: “We are the agency that has responsibilities under the statute, and by virtue of those responsibilities, we have the ability to authoritatively construe the statute, and under our interpretation, which is entitled to substantial deference, we do not have to follow the explicit directions of the legislature contained in Iowa Code Section 124.203 until some party comes before us and proves that a substance should be rescheduled pursuant to the criteria for assessing potential for abuse contained in Section 124.201, because we have decided that is the statutory ‘road map.’” The Board’s newly announced “road map” seeks to drag the Petitioners’ through issues that are not part of this appeal and to close access to the road that leads to resolution of the dispositive issues in this case: “whether marijuana has accepted medical use in treatment in the United States.”

The problems with the Board’s argument are: 1) the Board is entitled to no deference, 2) deference is irrelevant where the instructions of a statute are clear and unambiguous, 3) the “road map” suggested by the Board cannot be supported by any reasonable construction of the statute, and 4) the proofs being demanded by the Board as a condition for its compliance with Iowa Code Section 124.203 are irrelevant in any case.

1. The Board is entitled to no deference.

Battles over deference to the statutory interpretations of scheduling authorities in regard to controlled substance regulation have already played out at the federal level in a way that sheds much doubt upon the Board's claim to interpretational freedom. In Iowa, all scheduling decisions are made by the legislature, the Board being its trusted advisor only. However, at the federal level, the Attorney General has direct authority to schedule substances after making specified findings. Yet, even with this added discretion to administer functions under the federal Controlled Substances Act, the U.S. Attorney General was held to lack power to create binding interpretations of its legal provisions. Gonzales v. Oregon, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006).

In *Gonzales*, the U.S. Supreme Court concluded that the Attorney General was not entitled to *Chevron* deference as an agency to whom the interpretation of an arguably vague statute had been entrusted, because, even though the Attorney General has substantial powers to affect scheduling of drugs and substances, the statute had not conferred on the Attorney General the authority to promulgate the rule he was interpreting.

Chevron deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.

Gonzales, 546 U.S. at 558. Thus when an agency claims power to authoritatively construe a statute it is important to inquire into the actual authority granted.

The best case that the Board can cite for its claim to substantial deference in statutory interpretation is Houck v. Iowa Bd. Pharmacy Examiners, 752 N.W.2d 14 (Iowa 2008). Superficially, *Houck* would seem to favor the Pharmacy Board's claim to interpretive discretion in this case because the Board's claim to deference in that case was upheld. But *Houck* involved a different statute that was central to the Pharmacy Board's primary role of regulating pharmacy practice, and a correspondingly broader grant of statutory authority:

Iowa Code section 147.76 (2007) confers upon the board the authority to “**adopt all necessary and proper rules** to implement **and interpret** [chapter 155A].”... We have previously held similar language in other statutes constituted a clear vesting in the agency of the authority to interpret a statute.

Id., at 17.

The Pharmacy Board's role and grant of authority regarding the scheduling of substances is much different under Iowa's Controlled substances act. There the Board appears in an advisory capacity only and has not been given the authority to determine its own duties. Indeed, primary responsibility over the chapter is given to the Department of Public Safety; the Board cannot even claim this is “its chapter.” The grant of authority to the Board simply states:

“The Board shall administer the regulatory provisions of this chapter.”

Unlike *Houck*, there is no wording here authorizing the Board to adopt “necessary and proper rules” of implementation or to “interpret” the statute.

Perusal of Iowa Code Chapter 124 shows that the Pharmacy Board is actually on a very short leash. All of its scheduling decisions must be reviewed and approved by the legislature and throughout there are very specific criteria and triggers defining circumstances where the Board “shall” do this and “shall” do that. In essence, the role of the Board in Chapter 124 scheduling decisions is that of a professional fact finder. In this limited role the Board must do just as the statutes command and it is not free to interpret the process to its own advantage.

In Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330 (Iowa, 2008), the Iowa Supreme Court considered the issue of statutory deference with respect to the Worker’s Compensation Commissioner who according to settled law, works merely as a factfinder and has no statutorily vested discretion to interpret the statutes or case law. There the Court observed: “Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute. Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) (citations omitted).”

2. Deference is irrelevant where statutory commands are clear

Even if the Board of Pharmacy were entitled to deference over statutory interpretation as to any ambiguous provisions of Iowa's carefully crafted Controlled Substance Act, that deference does not come into play here because Iowa Code Section 124.203 is not in the least bit ambiguous concerning what the Board is required to do. "When the language of a statute is plain and its meaning clear, the rules of statutory construction do not permit us to search for meaning beyond the statute's express terms." Boehme v. Fareway Stores, Inc., ___ N.W.2d ___, 2009 WL 484962 (Iowa 2009); "Where language is clear and plain, there is no room for construction." Sherwin-Williams Co. v. Iowa Dept. of Revenue, 759 N.W.2d 4 (Iowa App. 2008) *citing* Welp v. Iowa Dep't of Revenue, 333 N.W.2d 481, 483 (Iowa 1983).

To be fair to the Board, ambiguity can arise when another statutory provision calls an unambiguous code section into question. Larson Mfg. Co., Inc. v. Thorson, ___ N.W.2d ___, 2009 WL 349578 (Iowa 2009).² That, however, is not the case in this instance. The Pharmacy Board would have Section 201 of the Iowa Controlled Substances Act somehow modify the straightforward commands of Section 203. That cannot be. Section 201 imposes a duty to engage in periodic **discretionary** review of the potential for substances to be abused. Section 203 describes a **mandatory** duty to report

² "Ambiguity may arise in two ways: (1) from the meaning of particular words; or (2) from the general scope and meaning of a statute when all its provisions are examined." *Id.* (citation omitted).

back to the legislature whenever either of the criteria for listing in Schedule I is not met. The Board cannot escape its mandatory duties simply by imagining that they are all somehow subsumed under a separate discretionary function.

3. The Board has not suggested a reasonable construction of the statute

Potentially conflicting statutory provisions should not be read in such a way that one section is allowed to neutralize or impede another. When interpreting potentially conflicting provisions, courts strive to give full effect to each provision, and if only one interpretation permits such a result, that interpretation will be followed. *E.g.*, Neessen v. Armstrong, 213 Iowa 378, 239 N.W. 56 (1931) {"This construction permits both sections to stand and gives both full force and effect..."}; In re Doe Petition, 310 Wis.2d 342, 750 N.W.2d 873 (2008) {"[W]e should choose this construction, which avoids statutory conflict and gives both statutes full force and effect."}; State v. Robinson, 33 Kan.App.2d 773, 109 P.3d 185 (2005) {"This interpretation of the statute gives full and harmonious effect to both subsections (a) and (b)."} Vezina v. Best Western Inn Maplewood, 627 N.W.2d 324 (Minn.,200) {"Respondents' proposed interpretation of the statute gives full effect to both sentences of section 176.101, subdivision 4, and is most consistent with the plain language of the statute."}; In re Ensign's Estate, 181 Iowa 1081, 165 N.W. 319 (1917) {Construing potentially conflicting statutes to give full effect to the plain meaning

and intent of each.} *Cf.*, Farrens v. Mutual Ben. Dept., 213 Iowa 608, 239 N.W. 544 (1931) {same principles employed in interpreting contract}.

Here, the only harmonious interpretation is to allow the two sections to stand on their own. The Board is not precluded from engaging in the eight criteria analysis required by Iowa Code Section 124.201 when ascertaining whether a substance in schedule I has a “high potential for abuse,” but such an analysis need not impede or preclude an analysis of whether a substance has “accepted medical use in treatment in the United States.” In this manner, the discretion exercised by the Board to review previously scheduled substances will never really impede its reporting duty under Iowa Code §124.203.”

Neither the final decision of the Board, nor its “road map” to decision making permits Iowa Code Section 124.203 to be given its “full effect. The Board said:

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 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.”**

[Decision, Record, Tab E, p.2 {*emphasis supplied*}]. This statement shows the absolutely stunning depth of the Board’s lack of understanding of the regulatory scheme it supposedly “administers.”

First of all, contrary to the Board's decision, marijuana could not be placed in schedule II if the Board had made a finding that it "lacks a high potential for abuse." Schedule II, like Schedule I is reserved for drugs and substances that indeed, have "a high potential for abuse." Iowa Code Sections 124.205 and 123.203. If the Board doesn't understand even the conceptual distinctions between schedules, what else doesn't it understand about this scheduling law?

Secondly, the Board's conclusion that the it would have to find that both criteria in Iowa Code Section 124.203 are not be met, before it is required to recommend to the legislature that marijuana be moved, appears to be an outgrowth of the very same fundamental misperception of a clearly stated law. No reasonable interpretation of Section 124.203 would accept the Board's conclusion that "**these** criteria" are met so long as at least one of them is. The logical import of such an interpretation is that substances that are in Schedule II could just as well be placed in Schedule I (because they have a "high potential for abuse"). The penalties and uses to which substances may be put vary with the schedules; these are important distinctions; and yet the Board treats them as arbitrarily indistinct classifications. This is totally irrational and in complete contravention of the express wording of the statutes just cited.

4. The proofs being demanded by the Board are irrelevant

The Board faults the petitioners for not submitting evidence of marijuana's lack of a "high potential" for abuse. Intervenor, Carl Olsen, will, perhaps, assert that he actually did submit such evidence based on filings he made in the proceedings below. However, those proofs and filings were never made part of the record for appeal to this court — they were and continue to be irrelevant to the issues now being litigated to this Court.

The inquiry driven by Iowa Code Section 124.201 is whether a drug or substance has a high potential for abuse and that fact completely misses the mark. The Petitioner's argument is not that marijuana does not have a "high potential for abuse," rather, it is that marijuana has acceptance for "use in medical treatment in the United States." On that fact, and that fact alone, marijuana no longer meets the criteria for inclusion in schedule I.

Should the Board of Pharmacy decide to inform the legislature that marijuana no longer meets criteria for listing in schedule I, it is still able to conduct the review provided under Section 201 and it may even conclude that marijuana should be placed in schedule II if it finds that marijuana still has a high potential for abuse. The only relief that the Petitioners have asked for, however, is that the Board of Pharmacy make the recommendation required by Section 203 to remove marijuana from Schedule I and that it be "placed in a different schedule" or "remove[d]... from the list of controlled

substance, as appropriate.” It is the Pharmacy Board’s job, not the Petitioners, to determine what other schedule (if any) might be appropriate to this recommendation.

In many respects this action resembles that of a mandamus proceeding.

Petitioners are not seeking to legally compel the Board to exercise its discretionary functions in any particular way. Rather they seek an order requiring the Board to follow the statute and perform its required functions under Iowa Code Section 124.203. The Board cannot escape its statutorily defined duties by arbitrarily imposing irrelevant burden of proof obligations upon the Petitioners.

B. Matter of Law v. Proof of Fact

The Board has never ruled on Petitioners and Intervenor’s assertion that medical marijuana legislation in at least 13 other states establishes, as a matter of law, that marijuana has “accepted medical use in treatment in the United States.” As obvious as this would seem, the Board questions how this court may make a “factual finding” to that effect in the absence of a decision below. Now here is an interesting proposition: An agency may avoid district court review of its failure to carry through with statutorily imposed responsibilities by simply refusing to make findings that would require it to act.

As a practical matter, the Court will have to make at least some preliminary assessment of the validity of the Petitioners’ assertion if it is to rule on whether the Board’s refusal to act was justified. In the record below and on appeal, the Board does not controvert that marijuana’s medical usefulness within the United States can be shown

to exist as a “matter of law.” The record on this point is uncontroverted by any other evidence below. On appeal to this Court the Board does not challenge Petitioner’s arguments why marijuana must “as a matter of law” be deemed to have “accepted medical use in practice in the United States. “Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.” McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa, 1980) quoting Iowa R.App.P. 14(a)(3)

In light of the uncontroverted record below, and waiver of any argument on this point above, there is no value in remanding this for further consideration based on the record. This Court can just as easily rule on matters of law as an agency, and a remand would serve no useful purpose in enlightening the Court. {Especially so, since the agency in this case cannot legitimately claim deference to its interpretations of the law and has demonstrated a significant lack of understanding of the statute it is administering.} See, Armstrong v. State of Iowa Bldgs. and Grounds, 382 N.W.2d 161,*165 (Iowa 1986):

A remand is for the purpose of allowing the agency to re-evaluate the evidence. **However, a remand for agency fact-finding is unnecessary when the facts are established as a matter of law.** The reviewing court can determine the facts as a matter of law when the relevant evidence is both uncontradicted and reasonable minds could not draw different inferences from the evidence. McSpadden, 288 N.W.2d at 186.

The criteria set forth in *Armstrong* and *McSpadden* are fully met here. This Court should avoid the unnecessary, unhelpful, and time-consuming step of remanding this case

because the evidence below is both uncontradicted and legally conclusive. At least 13 states in our Union have legitimized the use of marijuana in medical treatment. Courts know what everyone else knows. Thousands of people across the nation now use marijuana therapeutically under medical supervision every day. This Court should find that marijuana has medical use in treatment in the United States” as a matter of law— both in order to decide this case, and as a matter of judicial economy in averting further useless, proceedings. There is nothing to be served by remand. An order should issue requiring the Board of Pharmacy to advise the Iowa General Assembly that marijuana no longer meets the criteria for listing in Schedule I of Iowa’s Controlled Substances Act and to make such other recommendations as the statute calls for.

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