

BEFORE THE IOWA BOARD OF PHARMACY

Re:)	Case No. 2008-105
PETITION FROM CARL OLSEN)	
REQUESTING RESCHEDULING OF)	SUPPLEMENTAL
MARIJUANA)	ORDER

I. PROCEDURAL HISTORY

Carl Olsen petitioned the Iowa Board of Pharmacy (hereinafter, "Board"), seeking the rescheduling of marijuana, currently a schedule I controlled substance. *See* Iowa Code § 124.204(4)(m) (2009). Olsen was joined before the Board by intervenors George McMahon and Bryan Scott who appeared in support of Olsen's petition. In an order dated October 7, 2008, the Board denied Olsen's request, noting the absence of evidence in support of rescheduling.

McMahon and Scott then filed a petition for judicial review of the Board's Order. Barbara Douglass joined the District Court proceeding as a petitioner and Olsen joined as an intervenor. The District Court ruled that the Board had not addressed all of the questions presented by Olsen's petition, and remanded the case to the Board. The Court wrote: "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." The Court also stated: "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." (April 21, 2009 Ruling on Petition for Judicial Review, p. 4-5)

On remand, the Board must follow the District Court's directive and determine whether the evidence (including testimony and exhibits) presented to the Board in connection with Olsen's petition 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. The Board has reviewed all the evidence presented and makes the following findings of fact and conclusions of law.

II. FINDINGS

A. *Carl Olsen Not Credible*

There is no evidence that Olsen's interest in re-scheduling marijuana arises from a personal, medical need. In his July 29, 2008 comments to the Pharmacy Board, Olsen did not assert a personal need or preference for *medical* marijuana use, or describe any personal disease or disability.

Olsen has a long history of marijuana possession and use – which history has nothing to do with medical treatment. On January 19, 1978, Olsen was arrested in Jasper County after he was observed at about 2:00 a.m. traveling east on Interstate 80 at a slow rate of speed. Olsen's Cadillac Eldorado was repeatedly weaving on and off the highway shoulder, and across the centerline of the pavement. After being stopped by Newton police officers, Olsen consented to a search of his person, which revealed three marijuana cigarettes in his coat pocket and a bundle of several hundred dollars in his shirt pocket. Olsen was then arrested for possession of marijuana and his car searched. In the trunk of Olsen's automobile were plastic bags of marijuana and "a whole pile of

money." Although Olsen's jury conviction was reversed on appeal, the search was held to be lawful. *See, State v. Olsen*, 315 N.W.2d 1, 6 (Iowa 1982).

One of Olsen's defenses to the criminal charges is relevant to these proceedings. While acknowledging possession of marijuana at the time of his arrest, Olsen asserted he was a priest in the Ethiopian Zion Coptic Church and that a sacrament of the church is smoking marijuana all day, during all activities. Olsen claimed that Iowa laws prohibiting possession of marijuana interfered with the free exercise of his religion, in violation of his constitutional rights. The Iowa Supreme Court rejected Olsen's argument. *State v. Olsen*, 315 N.W.2d at 8.

A few months following his Jasper County arrest, on May 20, 1978 at 10:45 p.m., Olsen's driving again came to the attention of a law enforcement officer. After Olsen passed two cars in a no passing zone, a Muscatine County Deputy Sheriff stopped Olsen. While issuing Olsen a traffic violation citation, the deputy noticed a "large roach" in the ashtray of Olsen's automobile, and smelled a strong marijuana odor coming from Olsen and the interior of Olsen's car. Olsen was arrested for possession of marijuana. A search of Olsen revealed a quantity of hashish in his pocket.

The deputy had also noticed that the rear of the automobile appeared to be heavily loaded. A warrant was obtained and the trunk searched. In the trunk were 129 pounds of marijuana, in bales, wrapped in brown paper. A white paper bag hidden behind the spare tire contained \$10,915 in currency. A brief case held a further supply of marijuana.

Olsen was subsequently tried before a jury and convicted of possession of controlled substances, with intent to deliver. On appeal to the Iowa Supreme Court,

Olsen's conviction was reversed and his case remanded for a new trial – but the court held that the searches of Olsen and his car were lawful. *State v. Olsen*, 293 N.W.2d 216, 220 (Iowa 1980).

A few years later Olsen was convicted in the U.S. District Court, Maine, for possession of marijuana, with intent to deliver. *United States v. Olsen, et al.*, 738 F.2d 497 (1st Cir. 1984). Olsen's conviction arose from his criminal activities in the early hours (12:00 to 3:00 a.m.) of October 20, 1980, near Deer Island, Maine, when Olsen and approximately a dozen others were observed unloading, in rubber boats, approximately 40,000 pounds of marijuana from an ocean-going vessel, the JUBILEE, which was moored off-shore.

Facing federal criminal charges, Olsen again asserted that his possession of marijuana was a protected religious activity. Indeed, Olsen argued on equal protection grounds that unloading 40,000 pounds of marijuana from an ocean going vessel should be treated in the same fashion as the ceremonial use of peyote by Native Americans. Unsurprisingly, the United States Court of Appeals for the First Circuit rejected Olsen's argument and affirmed his conviction.

Olsen's history of personal, non-medical marijuana use and illegal marijuana trafficking is established by published court decisions cited above. The Board also takes notice of Olsen's broad, ongoing advocacy of non-medical marijuana use on internet web sites.¹ Nowhere has Olsen suggested he wishes to use marijuana to treat a personal medical condition. Nevertheless, Olsen appeared before the Board as a proponent of legalization of marijuana for medical purposes.

¹ See, <http://www.ethiopianzioncopticchurch.org/>, a website devoted to Ethiopian Zion Coptic Church matters.

Because of his criminal history of drug trafficking, his admissions of non-medical marijuana use, his assertion that his non-medical marijuana use is a religious activity and his advocacy of non-medical marijuana use, the Board does not regard Olsen as a sincere, credible advocate for *medical* marijuana use. Olsen appears out of touch with the complex medical, social and political issues relating to medical marijuana use – and that lack of awareness was expressed in Olsen's failure to provide evidence responsive to the statutory criteria for controlled substance rescheduling. Indeed, it is likely that Olsen is simply an advocate for broad legalization of marijuana, not for legalization of marijuana for medical use. Thus, the Board rejects Olsen's testimony for lack of credibility. Olsen is, after all, the same person who argued in federal court that unloading 40,000 pounds of marijuana from an ocean going vessel is equivalent to ceremonial use of peyote by Native Americans.

B. Other Olsen Evidence Not Sufficient Basis for Findings

Iowa Code § 124.201(1) sets out eight criteria to be considered by the Board before recommending to the Iowa legislature a change in the controlled substance schedules. Additional criteria are found in Iowa Code §§ 124.201(2) and 124.203 (2009). Preliminarily, the Board was required to consider each of the following in response to Olsen's petition:

1. Marijuana's actual or relative potential for abuse,
2. Marijuana's pharmacological effect,
3. Current scientific knowledge regarding marijuana,
4. The history and current pattern of abuse of marijuana,
5. The scope, duration, and significance of abuse of marijuana,
6. The risk to the public health from moving marijuana to a different controlled substance schedule,

7. The potential of marijuana to produce psychic or physiological dependence liability, and
8. Whether marijuana is an immediate precursor of a substance on some other controlled substance schedule.

There can be no doubt that Olsen knew of these statutory requirements because he referred to "8 factors to be considered by the Iowa Board of Pharmacy" in his May 12, 2008 Petition for Rulemaking or Action. *See*, Petition, p. 3. Nevertheless, his submittal to the Board consisted of (1) brief hearing testimony, (2) a 1988 decision by an administrative law judge, and (3) citation to the laws of 12 states which, in Olsen's view, "allow medical marijuana use, possession and cultivation." Petition, p. 2.

Olsen presented no *expert* evidence of any kind – no testimony or other current direct evidence from medical or pharmaceutical specialists, no testimony from scientists or criminologists, no studies of medical marijuana use or its impact on individual marijuana users and society in general, no journal articles, no evidence that the states which have legalized medical marijuana use are experiencing legitimate utilization of the drug, and no research on the potential for abuse of or addiction to marijuana. Needless to say, the Board would welcome the assistance of pharmacists, scientists, doctors, law enforcement authorities, social service and addiction treatment providers, and others who have professional insight relating to marijuana use and abuse, including the medical use and abuse of marijuana.

The Board finds the evidence presented by Olsen to be woefully lacking as a basis for making controlled substance schedule recommendations. Olsen, after referring to the statutory criteria found in Iowa Code, failed to address it. While Olsen is free to ignore the *science* of marijuana and medical marijuana use, the Board is not. *See* Iowa

Code §§ 124.201(1)(b) and 124.201(1)(c) (2009) (Board must consider "scientific evidence" and review "current scientific knowledge").

Olsen appears to consider a 1988 recommended ruling of administrative law judge Francis L. Young to be dispositive of factual and legal issues raised by Olsen's petition. The Board rejects, wholly and unequivocally, the 1988 ruling as probative evidence. The ruling², though carefully written and thoughtful – is, at best, hearsay testimony by a witness (undoubtedly a lawyer; probably not a doctor or scientist) who heard testimony and received other evidence in a 1987 administrative proceeding. The judge synthesized the evidence he heard into a written decision – now more than 20 years old, and based on evidence which is older still – which quite apparently was not adopted by the Drug Enforcement Administration.

The dated, summarized source material for Judge Young's ruling cannot serve as support for a Board's recommendation in 2009 – either pro or con – regarding scheduling of marijuana. The Board's statutory duty requires that the Board assess contemporary, highly informed, direct evidence from professional sources before recommending changes to the controlled substance schedules. Such evidence was not provided by Olsen.

Finally, the Board is not persuaded by Olsen's suggestion that, because twelve states have legalized some marijuana use, a medical use for marijuana is established. The flaw in Olsen's argument is twofold. First, if twelve states have legalized some marijuana use, thirty-eight states have not. Legislation in twelve states does not

² The "Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge" was issued September 6, 1988 in the following case: In the Matter of Marijuana Rescheduling Petition, Drug Enforcement Administration docket number 86-22.

constitute proof that medical marijuana use is accepted in the United States, which is comprised of fifty states, not twelve. Secondly, the fact that the legislatures of about one fourth of the states have adopted medical marijuana legislation does not respond to the criteria found in Iowa Code §§ 124.201 and 124.203 (2009). The Board is persuaded that the Iowa Code requires the Board to do more than conduct a popularity contest.

In summary, Olsen did not present any evidence upon which this Board can make any finding relevant to (1) the statutory criteria found in Iowa Code § 124.201 (2009) or (2) whether marijuana has accepted medical use in treatment in the United States and does not lack accepted safety for use in treatment under medical supervision (*See* Iowa Code § 124.203 (2009)).

C. Findings Based On Testimony of George McMahon

The testimony of George McMahon (who did not identify himself or his ailment to the Board) at the July 29, 2008 Board meeting was credible. Based on that testimony, the Board finds that McMahon is a long-term marijuana user and participant in a federal program which supplies marijuana to McMahon and two other individuals in Iowa. Marijuana use has been helpful to McMahon in the treatment of his unspecified medical condition. No other finding can be drawn from the evidence McMahon presented.

III. CONCLUSIONS OF LAW

A. *Applicable Law*

Marijuana is a schedule I controlled substance (*See Iowa Code § 124.204(4)(m) (2009)*).³ Any possession or use in Iowa is currently illegal, with the exception of possession and use by George McMahon and others who are involved in a federal program. Thus, Olsen's request for movement of marijuana to any controlled substance schedule other than schedule I is the equivalent of seeking "legalization" of marijuana.

Iowa Code § 124.201(1) (2009) provides that the Board is the administrator of Iowa Code chapter 124. As the administrator, the Board has a duty to periodically recommend to the legislature changes in the controlled substance schedules. The Board views its statutory responsibility with great seriousness both because of the specificity of Iowa Code chapter 124 and because marijuana use, and the use of drugs generally, is a sensitive medical, social and political issue. As explained above, any Board recommendation for changes to the controlled substances schedules will be preceded by a thoughtful review and analysis of the most helpful and current scientific information available to the Board, in accord with the Board's statutory duties.

There are three relevant sections within Iowa Code chapter 124 (2009) that structure the Board's administration of the controlled substance schedules. Iowa Code § 124.201(1) directs that annually, within thirty days after the convening of each regular session of the general assembly, the Board shall "recommend any deletions from, or *revisions in the schedules of substances*, enumerated in section 124.204 [schedule I], 124.206 [schedule II], 124.208 [schedule III], 124.210 [schedule IV] or 124.212

³ By administrative rule, the Board could make marijuana a schedule II controlled substance, available for medicinal

[schedule V] which it deems necessary or advisable." (emphasis added) Most relevant to Olsen's petition is the following language from Iowa Code § 124.201(1):

In making a recommendation to the general assembly regarding a substance, the board shall consider the following:

- a. The actual or relative potential for abuse;
- b. The scientific evidence of its pharmacological effect, if known;
- c. State of current scientific knowledge regarding the substance;
- d. The history and current pattern of abuse;
- e. The scope, duration, and significance of abuse;
- f. The risk to the public health;
- g. The potential of the substance to produce psychic or physiological dependence liability; and
- h. Whether the substance is an immediate precursor of a substance already controlled under this division. (emphasis added)

Additional guidance to the Board is provided by the immediately following Iowa Code provision. Iowa Code § 124.201(2) (2009) provides:

After considering the above factors, the board shall make a recommendation to the general assembly, specifying the change which should be made in existing schedules, if it finds that the potential for abuse or lack thereof of the substance is not properly reflected by the existing schedules. (emphasis added)

Finally, Iowa Code § 124.203 (2009) 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.

If the board finds that any substance included in schedule I 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.

The above statutory provisions must be read together. The legislature's intent is gleaned from the statute as a whole, not from a single part. *Goergen v. State Tax*

purposes. Iowa Code §§ 124.204(4)(m) and 124.206(7)(a) (2009). The Board has not adopted such a rule.

Commission, 165 N.W. 2d 782, 786 (Iowa 1969). Interpretations which render any part of Iowa Code chapter 124 irrelevant or redundant must be avoided. *T & K Roofing v. Iowa Department of Education*, 593 N.W.2d a59, 162 (Iowa 1999). Thus, no recommendation for a revision of schedule I can be forwarded to the general assembly until the Board has considered each of eight factors listed in Iowa Code § 124.201(1) and each of two factors listed in § 124.201(2) and each of three factors listed in § 124.203 (2009).

As explained above, the evidence presented by Olsen supported no findings by this Board. George McMahon's testimony allowed findings that he is a long-term marijuana user and participant in a federal program which supplies marijuana to McMahon and two other individuals in Iowa. Marijuana use has been helpful to McMahon in the treatment of his unspecified medical condition.

These findings are not helpful in consideration of the statutory factors found in Iowa Code chapter 124 (2009). And, as noted above, the Board cannot forward recommendations regarding controlled substance scheduling to the legislature without due consideration of statutory factors. Olsen's petition must be denied because there is no evidence in the administrative record which would permit the Board to determine any of the following:

1. Marijuana's actual or relative potential for abuse,
2. Marijuana's pharmacological effect,
3. Current scientific knowledge regarding marijuana,
4. The history and current pattern of abuse of marijuana,
5. The scope, duration, and significance of abuse of marijuana,
6. The risk to the public health from moving marijuana to a different controlled substance schedule,
7. The potential of marijuana to produce psychic or physiological dependence liability, and

8. Whether marijuana is an immediate precursor of a substance on some other controlled substance schedule.

Similarly, there is no evidence in the administrative record which would permit the Board to determine:

9. Whether marijuana's potential for abuse is properly reflected in its inclusion in schedule I, and
10. Whether marijuana's lack of potential for abuse is properly reflected in its inclusion in schedule I.

Likewise, there is no evidence in the administrative record which would permit the Board to make a finding either that:

11. Marijuana does not have a high potential for abuse; or
12. Marijuana has an accepted medical use in treatment in the United States and
13. Marijuana does not lack accepted safety for use in treatment under medical supervision.

Even if the Board were to ignore the provisions of Iowa Code § 124.201, and focus exclusively on Iowa Code § 124.203 – as the District Court appeared to do – there would be no evidence in the administrative record to support a finding by the Board that marijuana does not have a high potential for abuse *or* that marijuana has an accepted medical use in treatment in the United States *or* that marijuana does not lack accepted safety for use in treatment under medical supervision. The record is simply too sparse for the Board to make any finding relating to the statutory criteria for decision making.


More specifically, the Board rejects Olsen's notion that evidence of the adoption of legislation authorizing medical marijuana use in twelve states establishes that marijuana has an accepted medical use in treatment in the United States and does not lack accepted safety for use in treatment under medical supervision. The Board concludes that its statutory responsibility requires more than merely surveying

enactments in other states and recommending to the General Assembly that Iowa conform to the latest legislative trend. The Board will make recommendations relating to marijuana scheduling only upon a fully developed administrative record, complete with expert scientific evidence which fully addresses statutory criteria.

IV. ORDER

Carl Olsen's petition requesting that the Board recommend to the legislature the rescheduling of marijuana is denied. Olsen's petition is unsupported by any evidence responsive to Iowa Code chapter 124 (2009) criteria. Among other things, Olsen's petition is not supported by evidence sufficient for this Board to find that marijuana has accepted medical use in treatment in the United States and does not lack accepted safety for use in treatment under medical supervision.

IT IS SO ORDERED this 21st day of July 2009.


VERNON BENJAMIN, Chairperson
Iowa Board of Pharmacy

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