

IOWA BOARD OF PHARMACY

MEETING OF JULY 29, 2008

Transcript of Request Item # 4, "Petition for Rule Making or Action - Rescheduling of Marijuana Pursuant to Iowa Code 124.201 and 657 I.A.C. Chapter 26 - Carl Olsen, Des Moines"

Board Members Present:

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| Leman E. Olson, Chairperson | Pharmacist Member |
| Vernon H. Benjamin, Vice Chair | Pharmacist Member |
| Edward L. Maier | Pharmacist Member |
| DeeAnn Wedemeyer-Oleson | Pharmacist Member |
| Susan M. Frey | Pharmacist Member |
| Annabelle Diehl | Public Member |

Staff Members Present:

Lloyd Jessen, Executive Director
Terry Witkowski, Executive Officer
Becky Hall, Secretary
Scott Galenbeck, Assistant Attorney General
Bernie Berntsen, Compliance Officer
Jim Wolfe, Compliance Officer
Roger Zobel, Compliance Officer
Dennis Dobesh, Compliance Officer
Jennifer Tiffany, Compliance Officer
Jean Rhodes, Compliance Officer

Others Present:

Carl Olsen, Petitioner
Guest
Marty Ryan, ACLU-IA

1 LEMAN OLSON: Next is the petition for rule making or action regarding marijuana.
2 You have the information. Thoughts on this? Do we have somebody here...?

3 CARL OLSEN: Yes, I'm Carl Olsen.

4 LEMAN OLSON: Okay. Would you like to speak briefly on behalf of your request?

5 CARL OLSEN: Sure. The definition of Schedule I says no accepted medical use in
6 treatment in the United States and 12 states have enacted legislation that says it does have
7 medical use. So it no longer fits the definition and I filed both state and federal petitions and, I
8 don't know if you would be willing to accept that, but that's a copy of the letter from the DEA.

9 LLOYD JESSEN: In the case of, the DEA has accepted his petition and they'll be
10 considering it then?

11 CARL OLSEN: Correct.

12 LLOYD JESSEN: Right.

13 CARL OLSEN: It will be in the same state as it is here. And I based the argument on a
14 Supreme Court decision, Gonzales v. Oregon, 546 U.S. 243 (2006). This says the states, not the
15 federal government, determine acceptable medical practice. So this Board would have the
16 ability to determine acceptable medical practice in Iowa but not in the other states.

17 LEMAN OLSON: So the request is really to, that this Board recommends moving it
18 from Schedule I to Schedule II?

19 CARL OLSEN: Or any appropriate Schedule or off the Schedules.

20 SCOTT GALENBECK: (Side conversation suggesting Lloyd ask if the intervenor wishes
21 to speak.)

22 LLOYD JESSEN: Marty did you have some comments for the Board.

23 MARTY RYAN: No, I didn't.

24 LLOYD JESSEN: Okay.

1 MARTY RYAN: I was just taking notes. Thanks for offering.

2 LLOYD JESSEN: Yes. Anyone else in the room want to speak on this issue?

3 UNIDENTIFIED GUEST: I approached this Board 18 years ago with this question and
4 the immediate response was acceptance. I'm in the Federal program and they had to make it
5 work with Iowa. Carl's been helping me for 18 years. It just came to this point where we can
6 say, okay now we understand what we have to do and it starts with you guys. But 18 years ago
7 you were all pretty open to the idea that it is medicine, so, that's about as much as I need to say.
8 It has worked for 18 years, guys. Thank you.

9 LEMAN OLSON: As you know, we do have Marinol, which is a prescription item and it
10 is not a Schedule I. Does anybody feel that we are well-enough informed to make a
11 recommendation?

12 VERNON BENJAMIN: In a typical process is we change classifications of drugs after
13 DEA has changed them and then we adjust our rules to adapt to whatever class they've
14 reclassified drugs as and get these applied to both the federal and state level, I think. It seems if
15 the federal level would make the changes, we would probably follow suit.

16 LEMAN OLSON: Do we have any indication on how long it will take for DEA to act on
17 this?

18 CARL OLSEN: Couple decades. <laughter> If any indication, the last petition took 22
19 years and was resolved in the U.S. Court of Appeals in '94. It was not reviewed by the U.S.
20 Supreme Court. But that was before 12 states enacted legislation and that was before the
21 Supreme Court said that the states, not the federal government, <coughing> acceptable medical
22 practice.

23 LEMAN OLSON: Scott, your thoughts?

1 SCOTT GALENBECK: Yes, I probably disagree with Mr. Olsen as to the status of the
2 law that is relevant to this. There is, on page 107 of your disc, I reviewed a case called Gonzales
3 v. Raich, which is a 2005 case from the United States Supreme Court that has not been overruled
4 by any other decision and I was fascinated by the case when it originally came out in 2005, and I
5 am still fascinated by the case. But the bottom line of the case is that the states can enact
6 whatever they want to, and Mr. Olsen is correct, that the state of Iowa, in theory at least, sets its
7 own schedules for controlled substances and so forth. But the bottom line is, to use your word,
8 Lemman, the federal government trumps the state law. That is what Gonzales v. Raich is all
9 about. California had passed what became known in California as the "Compassionate Medical
10 Use Act," I think—I can't see the name in my notes here—but that permitted home-grown
11 marijuana, as long as it wasn't being sent outside the state, wasn't being used outside the state,
12 it was perfectly legal under California law. However, the DEA agents, this was back in 2002,
13 DEA agents came to the residence of a California person and destroyed her marijuana plants
14 and that led to some lengthy litigation, all the way to the U.S. Supreme Court, and the Supreme
15 Court determined that the DEA and the federal law did trump federal, did trump, excuse me,
16 state legislation, relating to the use of marijuana and that means that people in these fourteen
17 states, or however many have adopted legislation permitting marijuana harvesting and use,
18 those persons in those states are still subject to federal law, including federal criminal law if
19 they choose to grow and use marijuana. So the main point of my memo is that if the state of
20 Iowa, if this Board were to adopt something that permitted marijuana use, that would not create
21 a safe harbor for anybody who actually chose to follow what is known as state law, and you
22 know, I would ask, or suggest, that the Board consider very carefully setting people up like that
23 because it is a very difficult situation. You can, the state of Iowa can adopt something, is what
24 I'm saying, that legalizes marijuana use but the federal government trumps that and that means

1 that those people who might think that they were acting in, were existing in a safe harbor, really
2 are not acting in a safe harbor and would be subject to federal criminal penalties. It's a very
3 difficult situation; the Gonzales v. Raich decision has not been reversed. That's where the law
4 stands today. It, you know, makes it, it is true that various states are enacting these laws, but I
5 kind of think that's an illusory situation; it does not grant somebody an absolute right to use
6 marijuana.

7 CARL OLSEN: In Raich they did not attack federal scheduling as being incorrect and it
8 was decided the federal government has Commerce Clause jurisdiction, the Supremacy Clause
9 trumps state law. But in Gonzales v. Oregon, decided the next year, the federal government
10 said there is no federal definition of accepted medical use, it is whatever the state's say it is, and
11 that means that the DEA has been in violation of federal law for 12 years for not moving it out
12 of Schedule I and that is a different argument than what was made in Raich and is not contrary
13 to the ruling in Raich at all.

14 SCOTT GALENBECK: Yea, you know, I admit there is a different argument made, so I
15 say take it to the FDA and present it to them and see what happens, or go to a court to see if you
16 can get...Gonzales v. Raich...

17 CARL OLSEN: ...setting up these people in these states that have legalized it without
18 making an attack on the federal government is setting these people up to be federally
19 prosecuted which is exactly what is happening. But that doesn't relieve this Board of making a
20 determination on this.

21 LEMAN OLSON: As I was trying to figure this out, and Scott has helped me
22 understand a little better, but my question is what would we accomplish by doing this? And I
23 think it is just one little step in the larger movement to eventually make changes.

24 CARL OLSEN: Yes, I would agree.

1 UNIDENTIFIED GUEST: I am ... there is at least two other patients in Iowa who were
2 through the health field accepted into the federal program. One was supplying, one was not.
3 My doctor now has been my doctor for 18 years. He's close to retirement. What's going to
4 happen to me when he retires? Am I just going to die because I can't get the medicine that the
5 federal government agrees keeps me alive? I should take that back. Of course the medicine
6 deals with the symptoms but what's dealing with that like? And there are many others like me
7 who are doing what you suggest—going along the river or growing it in the basement. We
8 would like to put that into some kind of medical knowledge and distributorship. I want you
9 guys to know what the heck I'm taking and I want you to know and most of the very ill people I
10 know who are using marijuana as a conjunctive treatment also want you to know. They want
11 you to know when they take less morphine or less whatever the medication might be at the
12 moment than they were taking the day before and that they have less symptoms and more
13 quality to their life. That's the reason I'm here and these two patients right now that have just
14 recently been through lots of doctors, well one of the patients ... through lots of their doctors
15 are no longer able to get this medicine.

16 CARL OLSEN: Barbara can't find another doctor because they are intimidated by the
17 whole entire... She has a federal license to use marijuana but can't find a doctor willing to
18 participate.

19 UNIDENTIFIED GUEST: Even with your rule change, our only supply would be the
20 federal government, so there is still, you're not agreeing to supply marijuana in the store fronts,
21 which you can't do until this things gets on the Schedule II or III, still ... pharmacy That
22 right now...

23 CARL OLSEN: We are not asking for Schedule II though.

24 UNIDENTIFIED GUEST: I know, I'm just saying that to be on lower than Schedule I....

1 LEMAN OLSON: Great. I think Scott is telling us that while this might be a time to step
2 in the effort that Mr. Olson is pursuing, we may be giving false hope to the patients that would
3 be hopeful. Is this Board ready to make a decision on this request, on this petition?

4 VERNON BENJAMIN: In my opinion, we don't have to put the cart before the horse;
5 we need to find out what they are going to do. If they reclassified on their level, I think we
6 would do on our end as well.

7 SUSAN FREY: I would agree with that. I would hate to put out information that
8 someone would assume that because we did reclassify it, that it was within their purview to use
9 it for their own use and put them in jeopardy for federal prosecution. I don't think that is what
10 the Board – we are there to protect our patients and our citizens, so I would not be able to vote
11 for this petition.

12 LEMAN OLSON: Somebody care to make a motion in regard to this petition?

13 SUSAN FREY: I would move we deny the petition.

14 EDWARD MAIER: Second.

15 LEMAN OLSON: There is a motion and a second. All in favor please say Aye. (Ayes.)
16 Opposed? (None.) Okay, thank you.

17 CARL OLSEN: Will I get any kind of legal reasoning or will I just get a letter saying
18 denied? How does that work?

19 SCOTT GALENBECK: Well the Board will need to issue a written response to your
20 petition for rule making...

21 CARL OLSEN: Okay.

22 SCOTT GALENBECK: ...actually I think heard the Board's analysis, but we will try to
23 incorporate some of that in the Board's...

24 CARL OLSEN: Yes. Thank you.