

September 24, 2011

Judge Brad McCall
Iowa District Court
Polk County Courthouse
5th & Mulberry
Des Moines, Iowa 50309

Re: Carl Olsen v. State of Iowa, No. CV 8682

Dear Judge McCall,

Regarding the new issue presented yesterday by Mr. Galenbeck, this letter is in response to that issue, i.e., specifically whether Judge Novak's prior ruling in McMahon v. Board of Pharmacy, No. CV 7415, precludes a declaratory order in this case because of the legal doctrine of res judicata. Mr. Galenbeck said yesterday that this is a new argument he found just prior to yesterday's hearing when he was reviewing the record in McMahon v. Board of Pharmacy in preparation for yesterday's hearing. Accordingly, I would like the opportunity to respond to this new issue in more detail.

For the historical background of McMahon v. Board of Pharmacy you should know that I took a risk by making a legal argument to the Iowa Board of Pharmacy. That risk has now become apparent as the State of Iowa argues that res judicata should prevent me from making what appears to be the same legal argument in this case.

If you would like me to write a legal brief on this issue, I'd be glad to. I'm not an attorney, but I do have an AS Legal Assistant degree from DMACC. Most of what I'm going to say in this letter comes from reading federal court cases, but the same principles apply here.

In a proceeding for judicial review under Iowa Code Chapter 17A, an Iowa District Court judge sits as an appellate court rather than a trial court. In judicial review, the record is limited to the information presented to the administrative agency and the court simply reviews what happened below to see if any errors were made by the agency. In a trial, particularly a non-jury trial, the court sits as trier of fact. That distinction is critical here. See SEC v. Chenery Corp., 332 U.S. 194 (1947):

That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id., at page 196.

Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 224.

Id., at page 207.

The issue that was before the Iowa Supreme Court in McMahon v. Board of Pharmacy, No. 09-1789, was:

Does the fact that several States in the United States have accepted the medical use of marijuana require the Iowa Board of Pharmacy to recommend that marijuana be removed from schedule I in Iowa?

In the limited context of a petition for judicial review, this is the only question of law that Judge Novak could have lawfully considered. To interpret Judge Novak's ruling any other way would be legal error. While that appeal was pending in the Iowa Supreme Court, the Board of Pharmacy made a unanimous ruling that marijuana is medicine based on science, not law. The Iowa Supreme Court dismissed the appeal as moot because the Iowa Board of Pharmacy made the recommendation that Olsen asked it to make. Judge Novak's ruling simply means the Board of Pharmacy was under no legal obligation to make a ruling on a question of law which it chose not to address.

Yesterday, the State attorney also emphasized that the Board of Pharmacy treated the question of marijuana's medical efficacy as one of science (fact), not law. Judge Novak simply affirmed that the Board of Pharmacy was under no legal obligation to consider whether Iowa can classify a substance that has accepted medical use in 16 States in the United States as a substance with "no accepted medical use in treatment in the United States." The limited scope of judicial

review did not allow Judge Novak to rule beyond the scope of the narrow question of whether the Board of Pharmacy made a legal error by choosing not to answer a question of law.

The fact that the Board of Pharmacy chose not to answer a question of law coupled with the fact that Judge Novak upheld their right not to answer it, does not, however, leave me without any remedy at law. See Leedom v. Kyne, 358 U.S. 184 (1958):

In *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548, it was contended that, because no remedy had been expressly given for redress of the congressionally created right in suit, the Act conferred “merely an abstract right which was not intended to be enforced by legal proceedings.” *Id.*, at 558. This Court rejected that contention. It said: “While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. . . . If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose The definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.” *Id.*, at 568, 569. And compare *Virginian R. Co. v. System Federation*, 300 U.S. 515.

Id., at page 189.

The risk I took in presenting this legal question to the Board of Pharmacy was that I’d be facing this issue of res judicata now. Why did I ask an administrative agency to rule on a question of law when I knew there was a good chance the agency would refuse to answer it? The reason I took that risk is because I did not think the board would listen to me if I asked them to look at the science. I knew this legal question would make them pay closer attention. As you can plainly see, they did take a serious look at the science. It looks to me like my gamble paid off and I got what I wanted, a thorough review of the scientific evidence, even though I had to resort to an unconventional method of doing it.

So, to conclude, I'm asking you to find that the limited scope of judicial review under Iowa Code Chapter 17A simply applies to whether the legal question could have been answered by the Board of Pharmacy, and not whether the legal question must now be answered by the State of Iowa in this case. Res judicata does not apply in this situation. Again, I'd be happy to do more legal research on this question and try to come up with some Iowa case law to support it, if you would find it useful. Just let me know.

I would also like you to take judicial notice pursuant to Iowa Rule of Evidence 5.201 that I have been granted permission to raise this exact same issue in two federal cases involving the federal classification of marijuana. Unlike the Board of Pharmacy, the DEA does have the statutory authority, and the legal obligation, to consider questions of law. I am attaching the court orders from those two cases granting my motions to intervene in them. Americans for Safe Access v. Drug Enforcement Administration, No. 11-1265, U.S. Court of Appeals for the District of Columbia Circuit; In re: Coalition to Reschedule Cannabis, No. 11-5121, U.S. Court of Appeals for the District of Columbia Circuit.

Thank you!

Carl Olsen
130 E. Aurora Ave.
Des Moines, IA 50313-3654
515-288-5798 home phone
515-343-9933 cell phone
carl-olsen@mchsi.com

cc: Clerk of Court
Scott Galenbeck
Bob Manke
Ladd Huffman
Alan Koslow
George McMahan

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5121

September Term 2010

Filed On: July 12, 2011

In re: Coalition to Reschedule Cannabis,

Petitioner

ORDER

Upon consideration of the motions of Carl Eric Olsen for leave to intervene and for leave to file electronically, it is

ORDERED that the motions be granted. Intervenor's response to the petition is due July 25, 2011. Intervenor is permitted to participate as an ECF filer in the court's Case Management/Electronic Case files (CM/ECF) system, solely for the purposes of this case and so long as he is not represented in this case by an attorney. See Administrative Order Regarding Electronic Case Filing, ECF-2(B) (D.C. Cir. May 15, 2009). This permission is granted subject to the terms of the Administrative Order and D.C. Circuit Rule 25.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1265

September Term 2010

DEA-76FR40552

Filed On: September 1, 2011

Americans for Safe Access, et al.,

Petitioners

v.

Drug Enforcement Administration,

Respondent

ORDER

Upon consideration of the unopposed motion of Carl Olsen for leave to intervene, and the lodged unopposed motion for leave to file electronically, it is

ORDERED that the motion for leave to intervene be granted. The Clerk is directed to file the lodged motion for leave to file electronically. It is

FURTHER ORDERED that the motion for leave to file electronically be granted. Intervenor is permitted to participate as an ECF filer in the court's Case Management/Electronic Case files (CM/ECF) system, solely for the purposes of this case and so long as he is not represented in this case by an attorney. See Administrative Order Regarding Electronic Case Filing, ECF-2(B) (D.C. Cir. May 15, 2009). This permission is granted subject to the terms of the Administrative Order and D.C. Circuit Rule 25.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk