

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN,)	
)	
Petitioner,)	CASE NO. CV 8682
)	
vs.)	
)	
STATE OF IOWA,)	SUPPLEMENTAL
)	MEMORANDUM
)	IN OPPOSITION TO
Respondent.)	MOTION TO DISMISS

Pursuant to Iowa R. Civil P. 1.441(4), Carl Olsen (“Olsen” hereafter) moves to resist the new issue of res judicata which was brought to this court’s attention for the first time by the State of Iowa (“Respondent” hereafter) at the hearing on the Respondent’s Motion to Dismiss held in courtroom 307 of the Polk County Courthouse on Friday, September 23, 2011, at 9:00 a.m.

INTRODUCTION

Regarding the new issue presented on by the Respondent, 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 (“McMahon” hereafter), precludes a declaratory order in this case because of the legal doctrine of res judicata. At the hearing Respondent stated that this is a new argument found by the Respondent

while the Respondent was reviewing the record in McMahon in preparation for the hearing on September 23, 2011.

BACKGROUND

Olsen was the Intervenor in McMahon. Olsen was the original petitioner before the Iowa Board of Pharmacy (“Board” hereafter), and McMahon was the Intervenor in Olsen’s petition before the Board.

SCOPE OF JUDICIAL REVIEW IS LIMITED

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.

Considering the limited nature of a petition for judicial review, the issue that Olsen presented to the Iowa Supreme Court in McMahon v. Board of Pharmacy, No. 09-1789, must be construed as follows:

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 (a copy of the Iowa Supreme Court's order dismissing the appeal is attached to this memorandum as **Exhibit #1**). Judge

Novak' 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.

Respondent emphasizes 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 the legal question of 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.

REMEDY AT 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 Olsen 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 limited scope of judicial review under Iowa Code Chapter 17A simply applies to whether the question of law should have been answered by the Board of Pharmacy. The question presented to this court is not whether the agency should have answered that question of law, but whether the State of Iowa must now answer that legal question in this case. *Res judicata* does not apply in this situation.

JUDICIAL NOTICE

Olsen requests that this court take judicial notice pursuant to Iowa Rule of Evidence 5.201 that Olsen has been granted leave to raise this exact same question of law 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 a question of law (see attached court orders, **Exhibits #2 and #3**, from those two cases granting my motions to intervene in both cases). Americans for Safe Access v. Drug Enforcement Administration, No. 11-1265, U.S. Court of Appeals for the District of Columbia Circuit (Petition for Judicial Review); In re: Coalition to Reschedule Cannabis, No. 11-5121, U.S. Court of Appeals for the District of Columbia Circuit (Petition for Writ of Mandamus).

CONCLUSION

Because of the limited authority given to the Iowa District Court by the Iowa Administrative Procedures Act, Iowa Code Chapter 17A, Olsen respectfully moves this court to find that the issue of whether marijuana has “accepted medical use in treatment in the United States” as defined by several States’ laws accepting the medical use of marijuana is not precluded by res judicata in this case.

Respectfully submitted,

CARL OLSEN

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon each of the parties in the above entitled cause by enclosing the same in an envelope addressed to each such party at their respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelopes in a United

States Post Office depository in Des Moines, Iowa on the 26th day of September, 2011.

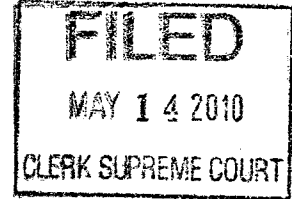
CARL OLSEN

Exhibit #1
IN THE SUPREME COURT OF IOWA

No. 09-1789

Polk County No. CVCV007415

O R D E R



**GEORGE MCMAHON and
BARBARA DOUGLASS,
Petitioners-Appellants,**

and

**CARL OLSEN,
Intervenor-Appellant,**

vs.

**THE IOWA BOARD OF
PHARMACY,
Respondent-Appellee.**

This matter comes before the court, Cady, Appel, and Baker, JJ., upon petitioners' motion to vacate judgment and remand to the district court with instructions. The intervenor has filed an objection to the motion to vacate judgment and a supplement to the objection. The respondent, the Iowa Board of Pharmacy, has filed a resistance to the motion to vacate judgment. The board's resistance includes a request to dismiss this appeal as moot. The intervenor has filed a resistance to the board's request. The petitioners have filed a reply to the board's request.

The petitioners and the intervenor are appealing from the district court's ruling denying them additional judicial review of the pharmacy board's denial of their requests to recommend marijuana's reclassification as a controlled substance under Iowa Code chapter 124. On February 17, 2010, while this appeal was pending, the pharmacy board recommended that the legislature reclassify the scheduling of marijuana as a controlled substance under Iowa Code chapter 124

Exhibit #1

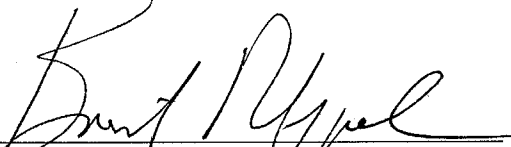
(2009). The board ultimately made the reclassification recommendation sought by the petitioners and the intervenor. This reclassification decision ended any justiciable existing controversy that an appellate decision on this case could affect. See *Grinnell College v. Osborn*, 751 N.W.2d 396, 398-399 (Iowa 2008) (need for existing controversy to justify an appeal). The appeal brought by the petitioners and the intervenor is moot.

This court agrees with the board that the proper disposition of a moot appeal before this court is dismissal. *Martin-Trigona v. Baxter*, 435 N.W.2d 744, 745-46 (Iowa 1989). Accordingly, it is ordered:

1. The petitioners' motion to vacate judgment is denied.
2. The respondent board's request to dismiss is granted. The appeal by petitioners and the intervenor is dismissed as moot.

Dated this 14th day of May, 2010.

THE SUPREME COURT OF IOWA



Brent R. Appel, Justice

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Clerk of District Court
Polk County Courthouse
L O C A L

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

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