

BEFORE THE IOWA BOARD OF PHARMACY

Re:) Case No. 2010-91
)
PETITION REQUESTING)
MEDICAL MARIJUANA) ORDER
RULEMAKING)
)

I. PROCEDURAL HISTORY

On July 20, 2010, a Petition for Rule Making (hereinafter, "petition") was received by the Iowa Board of Pharmacy ("Board"). Filed pursuant to the provisions of Iowa Code § 17A.7 (2009) and 657 Iowa Administrative Code ("IAC") chapter 26, the petition requests that the Board adopt rules relating to medical use of marijuana and proposes a new administrative rule chapter. The proposed chapter would include five sub-parts, dealing with consent to use marijuana, cultivation of marijuana, notification of local officials, affirmative defenses and notification of federal officials. Exhibits and a memorandum of legal authorities were submitted in support of the petition.

II. JURISDICTION

The Board has broad rulemaking authority relating to regulation of the practice of pharmacy. Iowa Code § 147.76 (2009); *Houck v. Board of Pharmacy*, 752 N.W.2d 14, 17 (Iowa 2008). *See also*, Iowa Code chapter 155A (2009). The Board's authority to engage in rulemaking relating to controlled substances is articulated in Iowa Code chapter 124, "Controlled Substances." Iowa Code § 124.301 (2009) provides:

The board may, subject to chapter 17A, promulgate rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this state."

Iowa Code § 124.204(4)(m) (2009) provides specific authority for rulemaking regarding the medicinal use of marijuana. That section categorizes marijuana as a schedule I (generally, prohibited) controlled substance "*except as otherwise provided by rules of the board for medicinal purposes.*" (emphasis added)¹ A fourth source of rulemaking authority is found in Iowa Code § 124.206(7)(a) (2009), which lists marijuana as a schedule II controlled substance (available by prescription) "*when used for medicinal purposes pursuant to rules of the board.*" (emphasis added)

Rules promulgated by the Board must, however, conform to the legislature's grant of authority. Courts will set aside rules which are beyond the authority delegated to the Board by a provision of law. Iowa Code § 17.19(10)(b) (2009); *Motor Club of Iowa v. Department of Transportation*, 251 N.W.2d 510, 517-518 (Iowa 1977) (agency's administrative rules were *ultra vires*; beyond statutory grant of authority).

III. DISCUSSION

A. *Specifics of Petition*

The petition proposes rules for the medical use of marijuana. The proposed rules may be summarized as follows:

1. Persons would be allowed the use of marijuana for "medical purposes."
2. Persons using marijuana for medical purposes would assume any risk associated with their use.
3. Doctors would not be liable for prescribing ("writing a written recommendation" for) marijuana for medical purposes.

¹ Iowa Code §124.101(3) (2009) provides that "the board" refers to the Board of Pharmacy.

4. Doctors would be allowed to place limitations on the use of marijuana by their patients.
5. Patients would be allowed to cultivate marijuana for their own medical use.
6. Caregivers would be allowed to cultivate marijuana for persons they are providing care to.
7. Counties would be allowed to require medical marijuana users to provide a copy of their prescription ("written recommendation") to the county.
8. Counties would maintain the confidentiality of medical marijuana information.
9. A marijuana user who was subject to criminal charges for possession or use of marijuana would be allowed – subsequent to being charged – to obtain a prescription ("written recommendation") for medical marijuana use, then move to dismiss the criminal charges.
10. The state would notify the federal government that marijuana has an accepted medical use in Iowa.

B. Areas Not Addressed by Petition

Numerous important subjects are not addressed by the administrative rules proposed in the petition. The following is not an exhaustive list of the proposal's deficiencies.

First and foremost, the proposed rules contain no definition of "medical purposes" and "medicinal purposes," as applied to the use of marijuana. No set of rules addressing medical use of marijuana is workable without such a definition – a rule stating specifically what the permitted medical uses of marijuana would be. The Board notes that any appropriate medical use for marijuana will need to be determined by

either the Iowa Board of Medicine or some other qualified medical body.

The proposal also fails to discuss production, processing, packaging and delivery of marijuana. The proposal contemplates a scenario where medical marijuana users (and their caretakers) grow their own marijuana, skipping the structure of regular visits to a medical professional to obtain a prescription, avoiding the limitations inherent in a prescribed dosage, eliminating prescriber direction as to both the number and frequency of prescription refills, and removing the necessity of purchasing marijuana from a pharmacy.² Under the petition's proposed rules, a caretaker might provide unlimited access to marijuana for an unlimited number of persons under his/her care, all without medical supervision following the issuance of the initial "written recommendation."

In short, the proposed rules lack a focus on *medical* use of marijuana. Instead, they seek to establish the broadest possible access to marijuana with the least involvement by medical professionals; a process whereby a patient, after one visit to a prescriber, might thereafter have unlimited access to marijuana without ongoing medical supervision. As such, the proposal fails to satisfy the Board's responsibility – when engaged in rulemaking – to formulate comprehensive rules which establish standards for *medical* use of marijuana.

C. Rules Are Beyond the Authority Delegated to the Board

Several of the petition's proposals concern subject matter beyond the authority delegated to the Board by the legislature. Iowa Code §§ 124.206(7)(a), 124.204(4)(m)

²The proposed rules suggest that a prescriber may limit their patient's use of marijuana, but it is unclear how patient marijuana use could be restricted where the patient grows marijuana for his/her own use rather than purchasing from a pharmacy a specific dose and quantity.

and 124.301 (2009) do not authorize the Board to:

1. Declare that persons using marijuana for medical purposes assume all risks associated with marijuana use.
2. Determine that prescribers are not liable for errors in diagnosis and treatment, when treatment includes medical marijuana.
3. Require medical marijuana users to provide a copy of their written recommendation to authorities in the county where they reside.
4. Create a defense to criminal charges of marijuana possession or use.
5. Require notification of the federal government that marijuana has an accepted medical use in Iowa.

Nor is there another Iowa Code provision – outside Iowa Code chapter 124 – which grants such rulemaking authority to by the Board. Simply stated, limitations on liability and creation of criminal defenses are matters for the legislature, not the Board. If the Board were to adopt the rules proposed in the petition, many of the rules would be *ultra vires* – i.e., beyond the Board's authority.

IV. CONCLUSION

Two significant flaws in the petition's proposed rules prevent their adoption by the Board. On one hand, the rules are not comprehensive enough because they lack (1) provisions for safe delivery of medical marijuana and (2) measures to assure marijuana use is limited to medical treatment. Most significantly, the proposed rules abandon the established practice in Iowa of a prescriber, a patient and a pharmacist working together to assure safe medical treatment through the use of prescription medications. On the

other hand, the proposal incorporates subject matter that the Board is not authorized by statute to address. For example, there is nothing in the Iowa Code that authorizes the Board to create a defense to criminal charges.

V. ORDER

Because the petition is both incomplete and overbroad, it is denied.

IT IS SO ORDERED this _____ day of September 2010.

VERNON H. BENJAMIN, Chairperson
Iowa Board of Pharmacy

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