

Carl Olsen
130 E. Aurora Avenue
Des Moines, IA 50313-3654
515-288-5798

December 23, 2009

Scott M. Galenbeck
Assistant Attorney General
Administrative Law Division
Hoover Building, 2nd Floor
1305 E. Walnut Street
Des Moines, IA 50319

Dear Mr. Galenbeck,

The enclosed answer I received from the Iowa Board of Pharmacy on November 23 (regarding my religious use of cannabis) completely disregards the Constitution of the State of Iowa and the Constitution of the United States. Lloyd Jessen, the Executive Director of the Iowa Board of Pharmacy tells me that you drafted the response, so I'm addressing this letter to you.

The Iowa Bill of Rights is higher than the Iowa Uniform Controlled Substances Act, and guarantees me the following:

Rights of persons. SECTION 1. All men and women are, by nature, free and *equal*, and have certain inalienable rights - among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Religion. SEC. 3. *The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Religious test - witnesses. SEC. 4. *No religious test shall be required* as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.

Laws uniform. SEC. 6. All laws of a general nature shall have a uniform operation; *the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.*

The corresponding sections from the Constitution of the United States are similar: Article I (establishment of religion prohibited and free exercise of religion guaranteed), Article V (due process guaranteed), and Article XIV (equal protection guaranteed).

Your interpretation of the law (“Peyote use has been subjected to the scrutiny of the legislature and found deserving of a statutory exemption”) is unconstitutional. You are telling me that my only recourse is to go directly to the Iowa Legislature. The United States Court of Appeals for the District of Columbia rejected the same argument in *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989):

The DEA's contention that Congress directed the Administrator automatically to turn away all churches save one opens a grave constitutional question. A statutory exemption authorized for one church alone, and for which no other church may qualify, presents a “denominational preference” not easily reconciled with the establishment clause.

Id. at 1461. “Furthermore, we recognize that even if the DEA were not empowered or obliged to act, Olsen would be entitled to a judicial

audience. Ultimately, the courts cannot escape the obligation to address his plea that the exemption he seeks is mandated by the first amendment's religion clauses." *Id.*

If the Iowa Legislature had created an exemption for the use of a controlled substance by one religion without creating any process for any other religions to apply, that would be a violation of due process. The word you are using ("deserving") is the same as "good cause" as articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990):

As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen v. Roy*, supra, at 708 (opinion of Burger, C. J., joined by Powell and Rehnquist, JJ.). See also *Sherbert*, supra, at 401, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen v. Roy*, supra, at 708.

Id. at 884.

Here is the statutory exemption the state of Iowa has in place, Iowa Code § 124.204(8):

Nothing in this chapter shall apply to peyote when used in bona fide religious ceremonies of the Native American Church

Here is the finding of the Iowa Supreme Court in *State v. Olsen*, No. 171/69079 (July 18, 1984):

Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at his trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it.

I don't see any religious test applied in that statutory language that I have failed to pass.

The Iowa Legislature has clear articulated the duties of the Iowa Board of Pharmacy, Iowa Code 124.201(1):

The board shall administer the regulatory provisions of this chapter. Annually, within thirty days after the convening of each regular session of the general assembly, the board shall recommend to the general assembly any deletions from, or revisions in the schedules of substances, enumerated in sections 124.204, 124.206, 124.208, 124.210 or 124.212, which it deems necessary or advisable.

Any addition or deletion to Iowa Code §§ 124.204, 124.206, 124.208, 124.210, or 124.212, requires a recommendation from the Iowa Board of Pharmacy. Forcing an applicant to go directly to the Iowa Legislature without first having the application evaluated by the Iowa Board of Pharmacy deprives an applicant of the opportunity to prove the exemption serves the compelling governmental interest in upholding the Constitution's Bill of Rights and is not a threat to public health and safety.

I am enclosing a letter from the Oregon Board of Pharmacy showing how the issue of public health and safety was applied to an application for a religious exemption to the Oregon Controlled Substances Act for the use of Santo Daime tea. The Iowa Board of Pharmacy is similarly required to make the findings required by Iowa Code § 124.201

regarding the religious use of cannabis and then make a recommendation to the Iowa Legislature.

The Iowa Board of Pharmacy is uniquely situated at this time to evaluate a religious exemption for the sacramental use of cannabis, since it has just spent the past 4 months evaluating the health and safety factors involved in the medical use of cannabis.

Sincerely,

Carl Olsen
130 E. Aurora Avenue
Des Moines, IA 50313-3654
515-288-5798

2 Enclosures

cc:

Thomas Miller
Attorney General of Iowa
Hoover Building, 2nd Floor
Des Moines, IA 50319

Lloyd Jessen
Iowa Board of Pharmacy
400 SW Eighth Street, Suite E
Des Moines, Iowa 50309-4688

Joseph T. Rannazzisi
Deputy Assistant Administrator
U.S. Drug Enforcement Administration
Office of Diversion Control
8701 Morrissette Drive
Springfield, VA 22152

Carl Olsen

From: Jessen, Lloyd [IBPE] [Lloyd.Jessen@ibpe.state.ia.us]
Sent: Monday, November 23, 2009 11:20 AM
To: 'Carl Olsen'
Cc: Jorgenson, Debbie [IBPE]; Witkowski, Terry [IBPE]; Galenbeck, Scott [AG]
Subject: Sacramental Use of Marijuana

Dear Mr. Olsen,

I am writing in response to your letter dated October 27, 2009, regarding the sacramental use of marijuana in Iowa. The Iowa Board of Pharmacy has no authority to allow or approve the sacramental use of marijuana for the following reasons:

1. The peyote exemption in the Iowa Code says nothing about marijuana. Making a claim of religious activity doesn't make all laws inapplicable.
2. The Iowa Code is very specific regarding peyote – exempting (from controlled substance regulation only) peyote use in “bona fide religious ceremonies of the Native American Church.” Peyote use has been subjected to the scrutiny of the legislature and found deserving of a statutory exemption. See Iowa Code section 124.204(8) (2009).
3. The Pharmacy Board is not empowered by statute to determine what is or is not a sacrament nor is the Board empowered to determine that a marijuana sacrament is equivalent to a peyote sacrament.
4. The Board has no authority to apply the peyote exemption to marijuana use. The Board cannot grant such an exemption; only the legislature can – through statute writing.
5. There is no provision in the Iowa Code for the Pharmacy Board to declare that persons are in compliance with Iowa controlled substance laws.

Sincerely,

Lloyd K. Jessen, R.Ph., J.D.
Executive Director
Iowa Board of Pharmacy
RiverPoint Business Park
400 SW 8th Street, Suite E
Des Moines, Iowa 50309-4688
(515) 281-5944
lloyd.jessen@iowa.gov



Oregon

Theodore R. Kulongoski, Governor

Oregon Board Of Pharmacy

800 NE Oregon Street, Suite 150

Portland, OR 97232

Phone: 971/673-0001

Fax: 971/673-0002

E-mail: pharmacy.board@state.or.us

Web: www.pharmacy.state.or.us

June 20, 2008

Mr. Roy Haber

Attorney at Law

540 E. 40th Street

Eugene, OR 97405

Dear Mr. Haber,

On November 8, 2000, after receiving the Santo Daime Memorandum of Law and expert reports, and after holding a hearing, the Oregon Board of Pharmacy concluded that the sacramental use of the Santo Daime tea in the context of a bona fide religious ceremony by practitioners of the Santo Daime religion as described does not constitute abuse of a controlled substance.

On November 22, 2000, after receiving a letter from you on behalf of your clients offering to register with the Board, we advised you that the Board is involved in regulation of the sale and distribution of drugs in Oregon and the investigation of allegations of drug abuse. Since the Church is neither a drug outlet nor, as indicated by the opinion of the Board, involved in abuse of a controlled substance, the Board has no authority to require registration or compliance with any Oregon pharmacy regulations.

The Board has considered the May 2, 2008, proposal of the Santo Daime Church to provide it with copies of documents that record the amount of sacramental tea that is brought into Oregon for Church services in Ashland and any distribution to other Santo Daime congregations in Oregon. Your current request to the Oregon Board of Pharmacy is for the Board to act as a quasi official repository of these documents. For the reasons cited above, the Board feels it must decline your offer to supply it with copies of your sacrament receipt records.

I want to thank you for being open and willing to provide these records on behalf of the Church's effort to demonstrate that it is taking all reasonable steps to prevent the tea from being diverted. As previously stated in its November 22, 2000 letter, the Board does not plan to exercise regulatory authority with regard to the religious practices of the Santo Daime Church in Oregon.

Very truly yours,

Gary Schnabel

Executive Director

- Exhibit "DD" -

