P.S. Docket No. MLB 18-39

November 8, 2018

Appeal of the Determination on Nonmailability

KAB, LLC v. UNITED STATES POSTAL SERVICE

P.S. Docket No. MLB 18-39

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FINAL AGENCY DECISION

Regulation of cannabis and its derivative products remains mired in a jumble of federal law, often conflicting with state laws. I must navigate this legal quagmire to decide whether cannabidiol (CBD) derived from industrial hemp grown in compliance with the Legitimacy of Industrial Hemp Research Act can be mailed. Chief Administrative Law Judge James G. Gilbert issued an Initial Decision in favor of mailability. KaB, LLC v. United States Postal Service, MLB 18-39, 2018 WL 4913891 (September 21, 2018). Pursuant to 39 C.F.R. § 953.13, the Postal Service appealed to the Judicial Officer, the parties filed appellate briefs, and on November 1, 2018, I conducted limited oral argument. I deny the Postal Service's appeal, and rule that the CBD at issue is mailable.

Background of the dispute[1]

KaB mailed a package from Colorado to Utah which the Postal Inspection Service seized. With the consent of the intended recipient, postal inspectors opened the package, which contained CBD. The package was determined to be non-mailable, and KaB challenged that determination.

CBD is believed to have medicinal and therapeutic properties. CBD can be derived either from marijuana or hemp, both of which are varieties of Cannabis sativa L. Industrial hemp, which is used for industrial, commercial and consumer purposes, is a variety of cannabis cultivated to contain a minimal amount of tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana. The CBD in the seized package was derived from industrial hemp, not marijuana. In the Initial Decision, Judge Gilbert concluded that non-psychoactive CBD derived from industrial hemp grown in compliance with § 7606 of the Agricultural Act of 2014, Legitimacy of Industrial Hemp Research, Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912 (2014) (codified at 7 U.S.C. § 5940, hereafter the Hemp Research Act) is mailable. This Final Agency Decision addresses only that issue.[2]

Analysis

If distribution of a controlled substance is unlawful under the Controlled Substances Act, 21 U.S.C. §§ 801–971, the substance is illegal to mail absent limited exceptions not directly implicated in this case.[3] United States Postal Service Publication 52, Hazardous, Restricted, and Perishable Mail, § 453.31 (Aug. 2017); see also 18 U.S.C. § 1716; 39 U.S.C. § 3001; United States v. Smith, No. 16-mj-0441, 2016 WL 4733283 (D. Md. Sept. 2, 2016). Broadly defined in the Controlled Substances Act, marijuana is included in Schedule 1, the statute's most restrictive drug schedule. Judge Gilbert has found that CBD derived from marijuana is not mailable. Initial Decision at 3-4; Sansouci v. United States Postal Service, MLB 18-9, 2018 WL 2045023 (I.D. April 13, 2018). Neither party disagrees. See Postal Service's Appellate Brief at 8; KaB's Reply Brief at 5-6 n. 18; 8; Oral Argument Tr. 16. However, the Hemp Research Act legalizes cultivating and growing industrial hemp "**[n]otwithstanding the**

Controlled Substances Act" under a number of conditions that KaB satisfies.[4] The Hemp Research Act defines industrial hemp, in relevant part, as cannabis with a negligible THC concentration (of not more than 0.3%) if cultivated or grown for purposes of research conducted under a state agricultural pilot program to study its growth, cultivation, or marketing.[5] Despite this definition, the Postal Service contends that identification of industrial hemp covered by the Hemp Research Act is not related to THC content. Rather, the Postal Service argues that only the purpose for which hemp is grown (which must be for research or education) is relevant to determine whether it is a legal product. The plain wording of the statute belies this position. The Hemp Research Act's express language defining industrial hemp by its THC content is consistent with the basic distinction between marijuana, which is psychoactive, and hemp, which is not. While I agree that the purpose for which industrial hemp is grown (research or educational purposes) also must be examined, the Postal Service does not dispute that KaB satisfies the pilot agricultural research program requirements. See supra, n. 4.

The Postal Service next argues that CBD derived from industrial hemp cannot legally be sold or transported even if covered by the Hemp Research Act. The Postal Service emphasizes that the Hemp Research Act only expressly authorizes cultivation and growth of industrial hemp – not its sale or transportation. Although the Postal Service acknowledges that the Hemp Research Act authorizes research into marketing of industrial hemp, it argues that marketing should be given a limited meaning excluding sales and transportation. The core of the Postal Service's position postulates that if Congress had intended to allow for the sale or transportation of industrial hemp, the growth of which the Hemp Research Act otherwise authorizes, it would have said so.

I find that Congress indeed has said so.

I need not analyze the meaning of "marketing" as used in the Hemp Research Act, which the Initial Decision extensively examines. I believe that a third statute – the Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 729, 132 Stat. 348, 388 (2018) (hereafter the Appropriations Act) – resolves the question.

The Appropriations Act of 2018 is the third in a succession of annual appropriations laws specifying that appropriated funds cannot be used "to prohibit the transportation, processing, sale, or use of industrial hemp . . . that is grown or cultivated in accordance with . . . the [Hemp Research Act], within or outside the State in which the industrial hemp is grown or cultivated." 132 Stat. at 388 (2018). Whatever the Hemp Research Act may have meant previously concerning transportation of covered industrial hemp, by the Appropriations Act, Congress clarified its intention to allow interstate transportation. See, e.g., Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 380-81 (1969) (subsequent legislation declaring the intent of an earlier statute entitled to great weight in statutory construction).

The Postal Service argues, though, that forbidding agencies from using appropriated funds to prohibit the transportation, processing, sale, or use of industrial hemp, does not mean that Congress legalized the product's sale or transportation. For purposes of my mailability analysis, I do not see the point of entertaining such a legal nicety. To me, the Appropriations Act, which expressly clarifies or modifies the Hemp Research Act, establishes clear Congressional policy authorizing transportation of covered industrial hemp. See, e.g., *Republic Airlines, Inc. v. United States Dept. of Transp., 849 F.2d 1315, 1318-22 (10th Cir. 1988)* (Congress can modify an underlying statute through an appropriations act so long as there is clear Congressional intent to do so).

Nonetheless, citing two supporting documents, the Postal Service emphasizes that the Drug Enforcement Administration (DEA) has stated that the Hemp Research Act did not remove hemp-derived CBD from the Controlled Substances Act. The Postal Service argues that I should defer to the DEA's position and conclude that hemp-derived CBD is not mailable.[6]

A March 16, 2018 declaration in the record of this case from a DEA chemist who is section chief of its Drug and Chemical Evaluation Section, Diversion Control Division, states that CBD is a Schedule 1 drug which is not excepted from the Controlled Substances Act (Declaration ¶ 2). The declaration does not distinguish CBD derived from industrial hemp, but states that the Hemp Research Act did not modify CBD's Schedule 1 status or authorize CBD's commercial distribution (Declaration ¶ 4).

In 2016, the U.S. Department of Agriculture in consultation with the DEA and the U.S. Food and Drug Administration, issued a Joint Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53395 (Aug. 16, 2016) (hereafter Joint Statement). The Joint Statement provides that those agencies interpret the law to mean that CBD derived from industrial hemp grown and cultivated in accordance with the Hemp Research Act has not been removed from the Controlled Substances Act and remains a Schedule 1 drug. The Joint Statement also asserts that general commercial activity for industrial hemp, including its interstate transportation, is not permitted.

In a series of letters to the issuing agencies, the Congressional drafters of the Hemp Research Act contested the Joint Statement as inconsistent with Congressional intent. They also expressed their disagreement with the Joint Statement as inconsistent with the Hemp Research Act in an amicus brief filed in a federal appellate case. See Appellant's Reply Exhs. E-H.

The language in the Appropriations Act forbidding appropriated funds from being used to prohibit transportation, sale, or use of industrial hemp grown in accordance with the Hemp Research Act appears to have been Congress' response to the agencies' failure to change the Joint Statement despite Congressional requests (Initial Decision at 11, 14). KaB represents this to be the case (Oral Argument Tr. 17-18), and the Postal Service did not contest that representation, which rings true to me.[7]

To summarize the parties' respective positions on deferral, the Postal Service argues that I should defer to the DEA's interpretation of the law, as the agency with superior expertise in the field and the agency responsible to assign the appropriate schedule status of substances pursuant to the Controlled Substances Act (see Oral Argument Tr. 7-8, 20). In opposition, KaB argues that I should reject the DEA's conclusions as inconsistent with the applicable statutes, as evidenced by the contrary positions expressed by the Congressional drafters of the relevant law (see Oral Argument Tr. 8-17, 20).

The inconsistency between what I see as the plain meaning of the law and the DEA's apparent contrary interpretation troubles me. I recognize that the DEA has superior expertise than the Postal Service's Judicial Officer regarding controlled substances. Nonetheless, close examination of the two interpretive documents on which the Postal Service relies eases my concern.

The significance of the DEA section chief's declaration is reduced by the declaration's failure to distinguish CBD derived from industrial hemp from CBD derived from marijuana, which is central to the dispute before me. The declaration also fails to consider the clarifying (or modifying) Appropriations Act provision. Similarly, the Joint Statement does not mention the crucial language of the Appropriations Act. The Joint Statement also includes an express disclaimer – it "does not establish any binding legal requirements." Nonetheless, the DEA's present position appears to remain that CBD, regardless of its source, is a controlled substance (see Oral Argument Tr. 17-19, 22).

In contrast, nineteen members of Congress have concluded that the Joint Statement incorrectly interprets the law that those Congressional members drafted (see Appellant's Reply Exhs. E-H; Oral Argument Tr. 13-14). Congress' subsequent passage of the Appropriations Act provision, in my view, essentially overrides the DEA's contrary position, as it appears Congress intended to do. This analytical context leads me away from the DEA's position, and directly back to the actual wording of the law and its plain meaning.

Interpreting this deferral doctrine (which I simplify somewhat because this case is an administrative decision and the parties did not analyze the doctrine in depth), the Supreme Court has emphasized that the initial determination is whether Congress has spoken directly to the precise question at issue. If it has and if the intent of Congress is clear, that is the end of the matter, and an agency's contrary construction of the statute must give way, without deferral, to the unambiguously expressed intent of Congress. City Of Arlington, Tex. v. F.C.C., 569 U.S. 290, 296 (2013).

It is clear to me that Congress addressed this precise question, and that the Hemp Research Act created a clear exception to the Controlled Substances Act. The "[n]otwithstanding the Controlled Substances Act" introductory proviso allows for no other reasonable interpretation. See Initial Decision at 8-9; see also Hemp Indus., Ass'n. v. U.S. Drug Enf't. Admin., 720 Fed. Appx. 886 (9th Cir. 2018) ("The [Hemp Research Act] contemplates potential conflict between the Controlled Substances Act and preempts it.").[8] Additionally, by virtue of the Appropriations Act, Congress manifested its intent to legalize transportation of industrial hemp which otherwise complies with the Hemp Research Act. I find any conflicting position by the DEA impossible to reconcile with the statute's plain language. Therefore, I must conclude that the interpretation to the contrary by the DEA is inconsistent with the statutory mandate and would frustrate the policy that Congress sought to implement. See *S.E.C. v. Sloan, 436 U.S. 103, 118 (1978)*; see also *Bd. of Governors, FRS v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986)* (deference to agency interpretation cannot be applied to alter the clearly expressed intent of Congress); McLean v. Crabtree, 173 F.3d 1176, 1181 (9th Cir. 1999) (no deference to agency's interpretation that conflicts with the plain language of the statute).

The Postal Service offers a final statutory interpretation argument, based on the Hemp Farming Act of 2018, S.

2667, H.R. 5485 (115th Congress, 2018), available at https://www.congress.gov/115/bills/s2667/BILLS-115s2667pcs.pdf, which would legalize all industrial hemp by removing it from Schedule 1 of the Controlled Substances Act. The Postal Service argues that the bill shows that industrial hemp remains covered as a Schedule 1 controlled substance; otherwise there would be no need for the legislation. KaB counters that the proposed bill would broaden and make permanent the more limited experimental exception for industrial hemp in the Hemp Research Act.

The Hemp Farming Act of 2018 has not been enacted into law as of the date of this decision. There is no value in speculating about the meaning of proposed legislation that has not been enacted. Therefore, I consider the Postal Service's argument to be unhelpful as an interpretative aid. See, e.g., Lockhart v. United States, 546 U.S. 142, 146-47 (2005) (declining to read any meaning into an unsuccessful legislative effort to amend a statute); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994) (failed legislative proposals are a particularly dangerous ground on which to rest interpretation of a prior statute).

To summarize my legal analysis, I conclude that the Hemp Research Act, as supplemented by the Appropriations Act, provides an exception to the Controlled Substances Act, allowing the interstate transportation of industrial hemp, including CBD derived from it, so long as it complies with the Hemp Research Act's requirements. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

As I have explained, I interpret the wording of the relevant legislation to be plain, clear, unambiguous, and capable of only one reasonable interpretation. While the DEA may disagree, the drafters of the legislation do not. Therefore, I must enforce the law according to its terms so long as the text is not absurd, and it certainly is not. See Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000).

Finally, I acknowledge the Postal Service's concern that the Inspection Service may not be able to distinguish a mailable package containing hemp-derived CBD from a package containing marijuana or marijuana-derived CBD without additional information or examination of the contents (Oral Argument Tr. 24-27). I also recognize that I must use caution not to compromise the Inspection Service's law enforcement capabilities.

As the Judicial Officer, acting as and binding the agency without further internal review, see 39 U.S.C. § 204 ("The Judicial Officer shall be the agency for the purposes of the requirements of chapter 5 of title 5, to the extent that functions are delegated to him by the Postmaster General."), I assure the Postal Service that I do not take its concern lightly. However, this is not a situation in which I predominantly assess Postal Service policy interests to interpret mail delivery rules. See, e.g., Seaman and Breunig, MD 16-215 (P.S.D. October 28, 2016), 2016 WL 10572254 (interpreting Postal Service delivery standards on a bright-line basis in consideration of the Postal Service's primary interest to deliver the mail quickly and efficiently). Rather, the Postal Service's applicable mailability rules depend entirely on whether a package contains a controlled substance that is unlawful under federal law. Publication 52, § 453.31. This leads me back directly to my interpretation of that underlying law as explained in this decision, which I must render using my independent legal judgment. In the end, this policy consideration does not alter that legal judgment.

I encourage the Postal Service to work with the industry to address the Inspection Service's law enforcement concerns in light of this decision, perhaps by changing mailing standards to accommodate the situation, such as through appropriate registrations and package labelling. See Oral Argument Tr. 29-33.

Conclusion and Order

The Postal Service's appeal is denied. The package mailed by KaB which the Postal Inspection Service seized is mailable. The Inspection Service therefore shall release the seized package, as directed by KaB.

Gary E. Shapiro
Judicial Officer

[1] I assume that the reader is familiar with the Initial Decision, the facts therein, and that decision's supporting references. In the interest of readability, I will not repeat these except for necessary context.

[2] I express no opinion on mailability of any other cannabis or hemp product. Chief Administrative Law Judge Gilbert has issued several Initial Decisions ruling that CBD derived from marijuana (rather than from industrial hemp covered by the Hemp Research Act) is not mailable. See, e.g., Sansouci v. United States Postal Service, MLB 18-9,

2018 WL 2045023 (I.D. April 13, 2018). Judge Gilbert also issued an Initial Decision ruling that medical marijuana is not mailable. Gillespie v. United States Postal Service, MLB 17-271, 2018 WL 2688560 (I.D. May 23, 2018). In none of the cases did the self-represented appellants appeal to the Judicial Officer for a Final Agency Decision. My opinion on such matters therefore must await another day. That day may be coming though, as 66 related cases are pending before the Postal Service's Office of Administrative Law Judges.

[3] Controlled substances can be mailed, for example, if both the mailer and the addressee are registered with the DEA. Publication 52, § 453.31(a). Prescription medicines containing controlled substances are mailable under the conditions identified in Publication 52, § 453.31(c). Packaging and labelling requirements for such mailings may be found in Publication 52, § 453.4.

[4] The Postal Service does not contest KaB's compliance with these conditions or the other material factual findings in the Initial Decision. See Order and Memorandum of Telephone Conference, October 24, 2018. I will not review the conditions necessary to satisfy the Hemp Research Act, and refer the reader to the Initial Decision for a thorough analysis.

[5] The United States is the world's largest consumer of hemp products. See S. Res. 532, 115th Cong. (June 5, 2018). The Hemp Research Act appears to have been designed to allow for domestic growth of an agricultural product that otherwise is being imported.

[6] The Postal Service also appears to rely on a 2015 position statement from the DEA's Office of Public Affairs. Postal Service Appellate Brief at 8. However, that position statement is not in the record (Oral Argument Tr. 4-5) and the Postal Service's citation for it, Appellate Brief n. 22, references a journal article (Postal Service Appellate Exhibit G) that mentions but does not include that document. I cannot consider a position statement that was not presented to me and to which I do not have access.

[7] The parties did not raise expiration of the Appropriations Act of 2018 in this appeal, and I resolve this case as it stood at the time of the Initial Decision's issuance, without regard to any such issue. For a thorough discussion, I refer the reader to the Initial Decision at 11-15.

[8] While Hemp Industries is a non-precedential unpublished Memorandum Opinion by the Ninth Circuit Court of Appeals, it is the only decision brought to my attention or revealed by research which directly addresses this point. As I find it to have persuasive utility in the absence of other precedent and as it addresses precisely the same issue that is before me, I consider the decision. See generally, Smith v. Astrue, 639 F.Supp.2d 836, 843 (W.D. Mich. 2009).