(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health or safety.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration denied. See Henry J. Schwartz, Jr., M.D., Docket No. 88–42, 54 FR 16,422 (1989).

In this case, factors one, two, four, and five are relevant in determining whether the Respondent's continued registration would be inconsistent with the public interest. As to factor one, ''recommendation of the appropriate State licensing board,'' the Pennsylvania Bureau has issued an extensive and comprehensive show cause order alleging that the Respondent has engaged in a twelve year pattern of prescribing controlled substances to individuals who were not his patients. The Bureau asserted that such conduct, if found, would violate state law and regulations, potentially justifying revocation of his medical license and imposition of a fine for each instance of such behavior. However, the result of this show cause order is not contained in the record reviewed at this time by the Deputy Administrator. Therefore, although relevant that the Bureau, after investigating the Respondent's conduct, initiated disciplinary action, the Deputy Administrator has weighed the State's actions accordingly, remaining aware that the Bureau has merely asserted allegations, and that the outcome of the State's actions remains unknown.

As to factor two, the Respondent's ''experience in dispensing * * * controlled substances,'' and factor four, the Respondent's ''[c]ompliance with applicable State, Federal, or local laws relating to controlled substances,'' the investigative file clearly alleges, and the Respondent has not denied, that he engaged in a course of conduct over a twelve year period which clearly violated federal regulations promulgated pursuant to the Controlled Substances Act. Specifically, to be effective, a prescription for a controlled substance ''must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 C.F.R. 1306.04(a); see also Harlan J. Borcherding, D.O, 60 FR 28,796, 28,798 (1995). The Respondent's issuing prescriptions for controlled substances to individuals unknown to him and not under his medical care would not meet this criteria. Further, the Respondent's prescribing of controlled substances to Justice Larsen merely upon his request, without seeing him, examining him, or otherwise making a medical evaluation prior to issuing the prescription, demonstrated behavior such that the patient's demands seemed to replace the physician's judgment. The Deputy Administrator has previously found that prescriptions issued under such circumstances were not a legitimate medical purpose: for example, when an undercover officer dictated the controlled substance to be given, ''rather than Respondent, as a practitioner, determining the medication appropriate for the medical condition presented by the officer.'' *Ibid.* Such uncontroverted actions on the part of the Respondent are preponderating evidence that he has dispensed controlled substances in violation of federal law.

As to factor five, ''[s]uch other conduct which may threaten the public health or safety,'' the Deputy Administrator finds significant that the Respondent, in issuing controlled substance prescriptions for the use of Justice Larsen, failed to coordinate these prescriptions with his patient's other care providers. Although, in the normal course of prescribing, safeguards may exist at pharmacies to prevent over-prescribing of controlled substances to a single patient, in this case, since the prescriptions were not issued in the patient's name, such safeguards would fail to identify this patient as a recipient of multiple, controlled substances prescriptions.

Further, the public was at risk from the potential for diversion of controlled substances by both the patient who could have received, undetected, multiple prescriptions for controlled substances, and the named individuals who were prescribed controlled substances without a legitimate medical need. The very safeguards established to prevent such dangers were circumvented by the Respondent's practice. Although evidence exists to show that diversion, in this case, did not occur, the potential remained over a twelve year period for such abuse, and this potential created a threat to the public interest, as well as to the safety of this individual patient. Therefore, the Deputy Administrator finds that the public interest is best served by revoking the Respondent's DEA Certificate of Registration at this time. The Respondent is certainly free to reapply for a Certificate of Registration and to provide information which would assure the Deputy Administrator that the Respondent's future prescribing practices would not pose a threat to the public interest.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824, and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration, AH1675252, issued to Earl A. Humphreys, M.D. be, and it hereby is, revoked, and any pending applications for renewal of said registration are denied. This order is effective February 28, 1996.

Dated: January 23, 1996.

Stephen H. Greene,

Deputy Administrator.

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[Docket No. 94–19]

Terrence E. Murphy, M.D.; Revocation of Registration

On November 30, 1993, the Deputy Assistant Administrator (then Director), Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Terrence E. Murphy, M.D., (Respondent) of Tulsa, Oklahoma, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration, AM2822876, under 21 U.S.C. 824(a), and deny any pending applications for renewal of his registration as a practitioner under 21 U.S.C. 823(f), as being consistent with the public interest. Specifically, the Order to Show Cause alleged that:

1. [The Respondent's] continued registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4), as evidenced by, but not limited to, the following:

a. Effective October 26, 1988, the State of Alabama, Alabama State Board of Medical Examiners, Medical Licensure Commission (Alabama Board) suspended [the Respondent's] medical license for one year and, thereafter, placed [his] medical license on indefinite probation.

b. [The Respondent] materially falsified an application for a controlled substance license to the Oklahoma Board of Narcotics and Dangerous Drugs, submitted by [the Respondent] on June 20, 1990, by indicating on such application that [he] never had a previous registration suspended, when, in fact, [his] Alabama medical license had been suspended by the Alabama Board, effective October 26, 1988. [The Respondent] also materially falsified such application by answering that [he] had never been physiologically or psychologically addicted to controlled dangerous substances, when, in

fact, the Jay Hospital, located in Jay[,] Florida, terminated [his] staff privileges at that facility based upon [his] excessive use of drugs, narcotics, alcohol, chemicals or other substances which rendered [him] unable to practice medicine with reasonable skill and safety to patients. Shortly thereafter [he] entered a drug treatment program for impaired physicians in the State of Florida and [he was] diagnosed as being in the early stages of substance abuse.

2. [The Respondent] materially falsified an application for a DEA Certificate of Registration, submitted by [him] on December 27, 1990, by indicating on such application that [he] had never had a State professional license or controlled substance registration suspended, denied, restricted or placed on probation, when, in fact, the Alabama Board suspended [his] medical license and placed [his] license on indefinite probation thereafter, effective October 26, 1988. 21 U.S.C. 824(a)(1).

On December 28, 1993, the Respondent, through counsel, filed a timely request for a hearing, and following prehearing procedures, a hearing was held in Tulsa, Oklahoma, on November 1–2, 1994, before Administrative Law Judge Paul A. Tenney. At the hearing, both parties called witnesses to testify and introduced documentary evidence, and after the hearing, counsel for both sides submitted proposed findings of fact, conclusions of law and argument. On March 2, 1995, Judge Tenney issued his Findings of Fact, Conclusions of Law, and Recommended Ruling, recommending that the Deputy Administrator permit the Respondent to retain his DEA Certificate of Registration in spite of the violation of 21 U.S.C. 824(a)(1), but that he issue a formal reprimand. Both parties filed exceptions to Judge Tenney's decision, and on April 11, 1995, Judge Tenney transmitted the record of these proceedings to the Deputy Administrator.

The Deputy Administrator has considered the record in its entirety and the filings of the parties, and pursuant to 21 C.F.R. 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts, except to the extent noted below, the Findings of Fact, Conclusions of Law and Recommended Ruling of the Administrative Law Judge, and his adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Deputy Administrator finds that the parties stipulated that the Respondent is a physician who possesses an unrestricted license to practice medicine in the State of Oklahoma. Further, as of the time of the hearing before Judge Tenney, the Oklahoma Board of Medical Licensure (Oklahoma Board) did not have any disciplinary proceedings pending against the Respondent, had not recommended that any action be taken against the Respondent's registrations by the DEA or the Oklahoma Bureau of Narcotics and Dangerous drugs, and neither party has filed any information indicating that such proceedings or recommendations have been subsequently made by the Oklahoma Board.

In the mid-1980's, the Respondent moved to Alabama and obtained an Alabama medical license. However, in July 1987, the Respondent moved to Jay, Florida, where he became licensed and practiced medicine until December 1987, when his staff privileges at the Jay Hospital were revoked. Conflicting evidence was admitted concerning allegations that the Respondent abused substances while practicing medicine at the Jay Hospital. The Respondent testified that, in an attempt to clear up these allegations, he had admitted himself into the Friary on the Shore (Friary), a substance abuse treatment center. He stayed there from January 18–20, 1988, but left despite the recommendation for inpatient treatment. According to Friary medical records, the Respondent had admitted to occasional alcohol use, use of Lorcet for neck pain, use of marijuana while in college, and occasional use of cocaine during his medical residency. The records further indicated that the Respondent's wife believed he took antidepressants and benzodiazepines. A psychologist at the Friary had concluded that the Respondent appeared to have

> many of the compulsive, stressful, addictive personality traits that are often present among individuals who are prone to medicating psychological problems with psychoactive substances. He is likely to be a very unreliable reporter regarding addictive behavior, as are most individuals with the disease of chemical dependency. This complicates his current diagnosis with regard to addictive illness. However, on the basis of his life history and his denial of his responsibility for the situation in which he finds himself, intensive psychotherapy is recommended.

The psychologist gave the diagnostic impression of ''[p]sychoactive substance abuse, including cannabis, cocaine, amphetamines, and possible other substances.'' However, Dr. Perillo, to whom the Respondent was referred by the Friary on January 19, 1988, had concluded that there was ''[p]ossible chemical dependency and abuse, by history,'' and that he could not ''say with any certainty that this person has a definite substance abuse problem.''

On October 11, 1988, the Respondent and the Alabama State Board of Medical Examiners (Alabama Board) entered into a stipulation in which the Respondent agreed, *inter alia,* that he had prescribed controlled substances to various individuals identified in an administrative complaint, but he denied that any of these prescriptions were for anything other than a legitimate medical purpose. However, he neither admitted nor denied the allegations set forth in the administrative complaint as follows:

> 32. Knowingly permitting the dispensation of controlled substances to multiple patients from his medical office while he was absent from the State of Alabama.
>
> 33. Failure to appear before the Board of Medical Examiners for an interview per the Board's request.
>
> 34. In January 1988, summary suspension of medical staff privileges at a Florida hospital based for, *inter alia,* failure to maintain adequate medical standards, for engaging in disruptive behavior, for ''the reasonable belief of physical impairment which may adversely affect patient care'', for using inappropriate clinical judgment, and for patient and staff loss of confidence.
>
> 35. Substance abuse.
>
> 36(b). Intentional avoidance of service of an order for blood and urine samples for a drug screen.
>
> 36(c). From February to May, 1988, writing prescriptions for ''office use'' in violation of federal regulations.
>
> 37. Continuation in practice of the Respondent would constitute an immediate danger to [the Respondent's] patients and to the public.

In the stipulation, the Alabama Board agreed to a disposition of the allegations ''without the necessity of making any further findings of fact or adjudications of fact with respect to these allegations,'' and the Respondent agreed to submit to blood and urine sampling for a drug screen, which tested negative. Although the Alabama administrative complaint contained allegations of substance abuse by the Respondent, he neither denied nor admitted the allegations, and they were never formally adjudicated.

On October 26, 1988, by which time the Respondent had ceased practicing medicine in Alabama, a consent order was entered, in which the Chairman of the Medical Licensure Commission of Alabama found that sanctions were authorized against the Respondent because he had ''committed multiple violations of § 34–24–360(8), *Code of Alabama,* 1975'' (prescribing, dispensing, furnishing or supplying controlled substances to persons for other than a legitimate medical purpose). Further, the order provided that the Respondent's license to practice medicine was suspended for one year,

after which the license would be on indefinite probation, and the Respondent would need express, written permission from the Medical Licensure Commission to re-engage in the practice of medicine in Alabama. As a condition precedent to re-entering medical practice in Alabama, the Respondent also had to voluntarily admit himself to a substance abuse program approved in advance in writing by the State Board of Medical Examiners, and successfully complete all inpatient or residential treatment recommended by the supervising physician. Even if the Respondent became authorized to re-enter medical practice in Alabama, ''the Alabama Controlled Substances Registration Certificate of the Respondent shall be limited to Schedules IV and V.'' Also, the Respondent was ordered to pay a $500.00 fine. In 1989, the Respondent requested the termination of his probation in Alabama, but on March 19, 1990, the Licensure Commission denied his request, finding that there had been ''insufficient objective evidence submitted to reasonably satisfy the Commission that [the Respondent] has complied with the Consent Order.''

Further, after an administration proceeding was held by the Florida Department of Professional Regulation, a final order dated February 12, 1991, was issued by the Florida Board of Medicine, finding that the Respondent had violated a Florida statute by having his license to practice medicine revoked, suspended, or otherwise acted against by the Alabama licensing authority, and ordered the Respondent to pay a $500.00 fine and, if the Respondent sought reactivation of his Florida license, ordering it to be placed on probation with the terms and conditions to be set by the Board.

On October 24, 1988, the Respondent voluntarily submitted to the jurisdiction of the Oklahoma Board, and he agreed to a five-year probation on an Oklahoma Supervised Medical Doctor Certificate with numerous terms and conditions, including *inter alia* that during the probational period: (1) He would not ''prescribe, administer or dispense any medications for his personal use, to specifically include controlled dangerous substances''; (2) he would ''take no medication except that which is authorized by a physician treating him for a legitimate medical need'' and that he would ''inform any physician treating him of allegations made concerning [his] previous use of controlled dangerous substances''; (3) he would ''submit biological fluid specimens * * * for analysis''; (4) he would ''continue under psychiatric care and shall authorize said treating physician to report to the Board quarterly on [his] progress, and [he] shall continue all supportive programs and therapy recommended thereby''; (5) he would ''not prescribe, administer or dispense any Schedule drugs or controlled dangerous substances, until authorized by the Board.'' The Respondent, however, made clear that his agreement was not ''to be construed as an admission * * * of any allegations made against him by licensing authorities in any other State, all material allegations of which are expressly denied.'' On January 13, 1990, the Respondent's application for reinstatement with the Oklahoma Board as a licensed physician and surgeon was granted and he was placed on probation for a period of three years.

However, on May 24, 1990, the Oklahoma Board issued an order restoring an unrestricted medical license to the Respondent. The Board found that the Respondent had fulfilled the terms and conditions of his probation, and that he ''could function as a medical doctor with an unmodified license without endangering public health, safety, or welfare.'' Yet the Order also stated: ''In the event Dr. Murphy returns to active practice in Oklahoma, he will appear before the Oklahoma Board and comply with any terms and conditions imposed at that time, if any, and will submit to the normal post-probation visit by the Board staff,'' including the requirement that the Respondent submit to random blood and urine analysis. From August 3, 1988, until June 1989, the Respondent submitted random blood and urine samples for analysis to Gary K. Borrell, M.D., a physician appointed by the Oklahoma Board, with all test results being negative. Further, the Respondent submitted into evidence an affidavit from Dr. Borrell, attesting that he had never ''observed any of the physical symptoms that [he] would identify as indicative of an abstinence syndrome or of drug withdrawal[, nor any] indications that [he] would interpret as acute toxicity from a substance of abuse.'' Dr. Borrell also opined that the Respondent was not ''physiologically addicted'' to any substance.

On June 11, 1990, the Respondent executed an application for registration with the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control (Oklahoma Bureau) for authorization to handle controlled substances. Questions seven and eight of that application state:

> 7. Has a previous registration held by the applicant under any name or corporate or legal entity, been surrendered, revoked, suspended, denied or is such action pending?
>
> 8. Have you ever been physiologically or psychologically addicted to controlled dangerous substances?

The Respondent had answered ''No'' to both questions. At the hearing before Judge Tenney, the Respondent explained that he had provided the negative response because he read the question as distinguishing between ''license'' and ''registration'', and since his Oklahoma Bureau registration had not been suspended, he thought the correct answer was ''No.'' The Respondent denied any drug use without a prescription since his ''college'' days.

On August 10, 1990, the Oklahoma Bureau issued an order to show cause to the Respondent, referencing his answers to questions seven and eight, and on September 12, 1990, the Oklahoma Bureau and the Respondent entered into a stipulation. The Stipulation listed as findings of fact the Oklahoma Board's actions against the Respondent's medical license, and concluded as a matter of law that ''by virtue of the action of the Oklahoma State Board of Medical Licensure and Supervision, [the Respondent] has had a restriction or limitation placed upon his professional license'', and that ''upon such a finding, the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control shall deny a request for registration. * * *'' The stipulation then recommended that the Respondent's request for registration be denied until September 15, 1990, ''after which time he may be registered.'' The Oklahoma Bureau then issued an order reflecting the terms of the stipulation.

On October 3, 1984, DEA Certificate of Registration AM2822876 was assigned to the Respondent. The Respondent executed a renewal application for this registration on December 27, 1990, in which he answered ''No'' to the following question:

> 2b. Has the applicant ever been convicted of a crime in connection with controlled substances under State or Federal law, or ever surrendered or had a Federal controlled substance registration revoked, suspended, restricted or denied, or ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?

On January 11, 1991, the DEA renewed the Respondent's Certificate of Registration AM2822876, for a period of three years.

At the hearing before Judge Tenney, the Respondent's mother testified that when the Respondent had received the renewal application, the deadline was imminent, so he signed the blank form and she then filled in the application

and mailed it. Further, she stated she knew that her son had had problems with his medical license but not with ''his drug licensing,'' which was the subject of the application. She also testified that she never intended to deceive the DEA by responding ''No'' to the question on the form now in dispute.

The Respondent testified before Judge Tenney, explaining that his mother's recollection of events was consistent with his memory of how the December 1990 DEA renewal application had been completed. He stated he still found question 2(b) to be confusing, but that he had not intended to deceive the DEA about his licensing problems in Alabama and Florida. The Respondent further testified that he had signed the form before his mother had prepared it, and that he had not discussed the application with his mother. ''I don't discuss these things hardly at all. I go to work. I work seven days a week as a doctor. I work 100 hours a week. I don't sit around worrying about these applications.'' However, when examined concerning the specific question, the Respondent testified that he did not remember telling the DEA Investigator that he had thought question 2(b) only applied to a conviction. He stated, ''Now, I don't have a transcript of what I said to [the DEA Investigator], and I don't remember if I said that or not, I can just remember that—you know, that was 1990; it is 1994 now * * *. I can just remember the general gist of it. I didn't think I filled it out wrong, and I didn't intend to fill it out wrong.'' When asked: ''Well, if [the DEA Investigator], then, indicates that you told her that it only applies to a conviction, would you challenge her assertion? The Respondent stated: ''I would challenge anybody's memory four years later. Yes, I would.''

However, the DEA Investigator testified that when she questioned the Respondent concerning question 2(b), he had first argued with her concerning the actual content of the question. After the Investigator had another investigator read the question from the application to him, then the Respondent stated that ''it hadn't been his intent to defraud or to lie, falsify his application * * * he basically said he thought the question had said convictions.''

Regarding the Respondent's application before the Oklahoma Bureau and the resulting show cause order, the Investigator testified that the Respondent had informed her that he had never had any problems with the Oklahoma Bureau. However, when questioned further, the Respondent had told the Investigator that his attorney had taken care of any problems relating to that application.

Between July 26 and August 3, 1992, the Respondent began working at the Physicians Injury Clinic (Clinic), located at 3015 East Skelly Drive, Tulsa, Oklahoma. Prior to that date, the Respondent had worked at a medical facility located at 1412 North Robinson Road, Oklahoma City, Oklahoma. On August 6, 1992, personnel from the Clinic's corporate headquarters, located in Oklahoma City, placed an order for controlled substances with a pharmaceutical distributor using the Respondent's DEA number. The order was to be delivered to the Skelly Drive clinic, where the Respondent was then the only physician. However, the address listed on the Respondent's DEA Certificate of Registration was the Robinson Road address.

At the request of the distributor, personnel at the Clinic's headquarters sent a facsimile of the Respondent's DEA registration and a copy of a letter dated July 22, 1992, from the Clinic to the DEA, requesting that the Respondent's registration be changed to the Skelly Drive location. On August 11, 1992, a representative of the distributor telephoned a DEA Diversion Investigator to verify whether the change of address had been approved, and that Investigator informed the representative that the Respondent was still registered at Robinson Road and that the shipment could not be sent to the unregistered location. Subsequently, on August 25, 1992, DEA investigators took a notice of inspection to the Clinic, and the Clinic's office manager consented to an inspection, which was supervised by the Diversion Investigator. The office manager, in response to questions asked by the DEA investigators, took the investigators to ''a locked cabinet in a locked room,'' which contained various Schedules III and IV controlled substances. At the time of the search, the office manager explained to the Investigator that the substances ''belonged to the clinic,'' and no evidence was produced to indicate when the substances had been placed in the cabinet. The Clinic is not registered by the DEA or the Oklahoma Bureau to handle controlled substances. An inventory was conducted, and the controlled substances were sealed until the Respondent's registration change of address was approved by the DEA on October 9, 1992. After such approval, DEA representatives returned to the clinic, unsealed the controlled substances, found no signs of tampering and, after conducting another inventory, found that all of the substances were still there.

At the hearing before Judge Tenney, the Diversion Investigator testified that in approximately ten to twenty percent of the cases where a distributor calls to verify a potential purchaser's address, the DEA registration contains an outdated address. He then stated that he had never recommended revocation of a DEA Certificate of Registration on that basis alone. Another Investigator testified that personnel at the Clinic had placed the order, and that she had not discovered any evidence to indicate that the Respondent had personally placed such an order.

On January 12, 1994, the Respondent executed a subsequent DEA renewal application to keep his registration active during the course of these proceedings. In filling out the application, the Respondent testified that he had sought the advice of counsel to ensure that all responses were correct. In response to question 2(b), which was answered incorrectly on the previous renewal application, the Respondent now correctly answered ''Yes.'' In a comment block, the Respondent wrote, *inter alia:* ''In summary, I hold a license to practice in Oklahoma. I have appeared before the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, who thoroughly investigated all of the previous allegations of Florida and Alabama and dismissed the Show Cause Order prior to the hearing. I have been found eligible for licensing in Oklahoma for the past six years.'' On this application, the Respondent did indicate his new address in Hartshorne, Oklahoma, although the Respondent had been living in Hartshorne since November 1993.

Initially, 21 U.S.C. 824(a)(1) states:

> (a) A registration pursuant to section 823 of this title to * * * distribute, or dispense a controlled substance may be suspended or revoked * * * upon a finding that the registrant—
>
> (1) has materially falsified any application filed pursuant to or required by this subchapter * * *

Thus, as Judge Tenney noted, the Deputy Administrator may revoke or suspend the Respondent's registration upon a showing that he ''materially falsified'' any application filed pursuant to the applicable Controlled Substances Act provisions. Here, the Deputy Administrator concurs with Judge Tenney's finding that the Government did establish a *prima facie* case under 21 U.S.C. 824(a)(1). Specifically, the appropriate test in determining whether the Respondent materially falsified any application is whether the Respondent ''knew or should have known'' that he submitted a false application. See Bobby

Watts, M.D., 58 Fed. Reg. 46,995 (1993); accord Herbert J. Robinson, M.D., 59 Fed Reg. 6,304 (1994).

Here, written on the Respondent's 1990 DEA renewal application was a false answer to question 2(b), for the answer failed to acknowledge the adverse actions taken in Alabama and Florida against his professional license. In determining that such a false answer was also materially false, Judge Tenney wrote in his opinion at 29–30:

> The incorrect response to question 2(b) is clearly ''material.'' As noted by counsel for the Respondent in his closing argument, if the Respondent correctly had checked ''YES'' to the question, that would have been a red flag to [the] DEA to go check with the [State] licensing authorities. . . . *Cf.* . . . *Gonzales* v. *United States*, 286 F.2d 118, 120 (10th Cir. 1960) (addressing a statute concerning ''material false statements. . . ., i.e., statements that could affect or influence the exercise of a government function''), *cert. denied*, 365 U.S. 878, 81 S. Ct. 1028, 6 L.Ed. 2d 190 (1961).

The Respondent attempted to mitigate this falsification by presenting evidence that his mother had completed the application after he had signed it, and she had mailed it without his reviewing the completed form. However, the Deputy Administrator agrees with Judge Tenney's conclusion: ''This lack of attention, or inattention, was the predominant reason for the wrong statement, and the Respondent 'should have known' of the inaccuracy.'' Further, in an analogous case in which a practitioner blamed an application falsification upon a dental nurse who had assisted him in filling out the application, the Administrator of the DEA had held the practitioner responsible, finding it noteworthy that the practitioner signed his name to the application. *Robert L. Vogler, D.D.S.*, 58 Fed. Reg. 51,385 (1993).

Next, the Respondent argued that the DEA had failed to comply fully with the licensing requirements of the Administrative Procedure Act (APA) before initiating this administrative proceeding, and thus the DEA would be precluded from acting upon his registration. Specifically, the Respondent argued that 5 U.S.C. § 558(c) requires DEA to provide him with prior written notice and an opportunity to correct his application errors, and that the DEA had failed to meet these requirements.

Section 558(c) provides in relevant part:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the . . . suspension, [or] revocation . . . of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) Notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) Opportunity to demonstrate or achieve compliance with all lawful requirements.

However, on this issue, the Deputy Administrator concurs with Judge Tenney's analysis and conclusion:

> To the extent that 5 U.S.C. § 558 applies to the instant proceeding, the Respondent overlooks the ''willfulness'' exception to section 558's requirement of written notice and an opportunity to achieve compliance. In cases of ''willfulness,'' the registrant is not given ''another chance'' to achieve compliance. . . . It is concluded that the material falsification in the instant case, which resulted because the Respondent grossly neglected his obligation to be truthful, is tantamount to ''willfulness'' under 5 U.S.C. § 558(c). The DEA, therefore, was not required to give the Respondent written notice and an opportunity to correct the renewal application before initiating this proceeding.

Further, the Respondent argued in his response to the Government's exceptions, that '' 'Willfulness' means a voluntary, intentional violation of a known legal duty,'' requiring actual knowledge, and not the lesser standard of ''should have known.'' However, cases interpreting the meaning of ''willful'' as used in the APA have noted that the term is often used ''to characterize conduct marked by careless disregard'' of statutory requirements. *Eastman Produce Co.* v. *Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *see, e.g., Biological Resources, Inc.*, 55 Fed. Reg. 30,752 (Health and Human Services 1990) (noting that a ''number of cases that have considered the meaning of willfulness in license revocation proceedings have noted that willful conduct can be found either when a person intentionally does a prohibited act or when a person acts with careless disregard of statutory requirements''). The Deputy Administrator finds that the Respondent's conduct was ''willful,'' for he acted with ''careless disregard'' for the statutory and regulatory requirements when he submitted his 1990 DEA renewal application with the incorrect response to question 2(b). Thus, the Deputy Administrator agrees with Judge Tenney, that DEA's subsequent actions did not violate 5 U.S.C. 558.

Next, pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator may revoke a DEA Certificate of Registration, or deny a pending application for registration, if he determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered.

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health or safety.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration denied. See *Henry J. Schwarz, Jr., M.D.*, Docket No. 88–42, 54 Fed. Reg. 16,422 (1989).

In this case, factors one, two, four, and five are relevant in determining whether the Respondent's certificate should be revoked and any pending application denied as being inconsistent with the public interest. As to factor one, ''recommendation of the appropriate State licensing board,'' the Government argued that actions taken against the Respondent's medical licenses in Alabama, Florida, and Oklahoma, as well as the suspension of his Oklahoma Bureau registration, support a finding that State licensing board's recommendations lead to a conclusion adverse to the Respondent's retention of his DEA registration. Judge Tenney disagreed with this proposition, finding instead that the Alabama and Florida adverse actions were five years old, and the factual bases for such action were ''sketchy at best.'' Further, Judge Tenney found more persuasive the fact that Oklahoma authorities had granted the Respondent an unrestricted medical license and an unrestricted controlled substances registration, and that since 1990, there have been no negative allegations nor pending disciplinary proceedings against the Respondent. Thus, Judge Tenney concluded that ''the whole evidence supports a favorable 'recommendation [by] the appropriate State licensing board or professional disciplinary authority.' ''

Here, although the Deputy Administrator agrees with Judge Tenney's factual findings, he disagrees with his conclusion. For the Deputy Administrator also finds significant that in the 1988 Alabama Consent Order, the Respondent's license was placed on indefinite probation, and that as a

condition precedent for his receiving a medical license, the Respondent had to voluntarily admit himself to a substance abuse program and successfully complete it. Further, even if the Respondent became authorized to re-enter medical practice in Alabama, his controlled substances registration would remain limited to Schedules IV and V. Also, in 1990, the Alabama Licensure Commission denied the Respondent's request for termination of his probation, noting ''insufficient objective evidence submitted to reasonably satisfy the Commission that [the Respondent] has complied with the Consent Order.'' Similarly, in 1991, the Florida Board ordered that, if the Respondent sought reactivation of his Florida license, such reinstatement would result in his receiving a probationary license with the terms and conditions to be set by the Board. Therefore, two States recommend, after investigating allegations of misconduct, that probationary requirements be levied against the Respondent's medical license, with stated conditions to be met in Alabama before even a probationary license would be issued.

As to factor two, the Respondent's ''experience in dispening * * * controlled substances,'' the Deputy Administrator agrees with Judge Tenney's findings and conclusions. The Government noted that the Alabama Medical Board had found that the Respondent had allowed his staff to administer and prescribe controlled substances in his absence, and that the Respondent had abused drugs. The Government then argued that such conduct was adverse to the public interest.

However, Judge Tenney concluded that a preponderance of the evidence failed to support this contention. Specifically, the evidence of improper dispensing of controlled substances merely consisted of a finding in the Alabama administrative complaint, which led to a consent order in which the Respondent ''neither admitted nor denied'' the factual allegations. No further adjudication of the facts was conducted. Based on this limited evidence of record, Judge Tenney concluded that ''I too am unable to find with any substantiality that the Respondent allowed his staff to administer and prescribe controlled substances in his absence.'' Furthermore, no other evidence of record supports a finding that the Respondent was unlawfully dispensing controlled substances.

As to the allegation of the Respondent's drug abuse, Judge Tenney found that ''[i]n sum, there was some evidence of occasional past drug abuse, but no persuasive evidence indicative of drug use or abuse during the last decade that would threaten the current public interest under 21 U.S.C. 823(f)(2).'' Although the Deputy Administrator does not condone the Respondent's past conduct of admitted unlawful drug use, he agrees with Judge Tenney's conclusion. For the Respondent's drug screenings from August 1988 to May 1990 were negative, and no contrary evidence was submitted to show drug abuse from 1990 to 1994.

As to factor four, the Respondent's ''[c]ompliance with applicable State, Federal, or local laws relating to controlled substances,'' Judge Tenney found that the Respondent had violated a Federal regulation related to controlled substances, 21 C.F.R. § 1301.61. Specifically, the Respondent ''should have determined whether the July 22, 1992, request by the [Clinic] to modify his registration address had been approved by the DEA before operating at Skelly Drive.'' The Deputy Administrator agrees with this finding. However, Judge Tenney found several mitigating facts, such as the fact that the July 22 letter was generated prior to the Respondent's first day of work at the Clinic, that there was no evidence of diversion of controlled substances from the unregistered office at Skelly Drive, and that the DEA Investigator had never recommended revocation of a DEA registration on the basis of a failure to timely update an address.

Although the Deputy Administrator acknowledges these mitigating facts, he also finds relevant the fact that the Alabama Consent Order found sanctions authorized because, *inter alia,* the Respondent had committed multiple violations of the *Code of Alabama* Section 34–24–360(8) pertaining to the prescribing, dispensing, furnishing or supplying of controlled substances to persons for other than a legitimate medical purpose. Although the facts presented in the record are inadequate to determine the specific conduct underlying such a conclusion, it is still significant under factor four that a State licensing board found that the Respondent's conduct resulted in multiple violations of the State's controlled substances statute.

As to factor five, ''[s]uch other conduct which may threaten the public health or safety,'' the Government argued that the Respondent's lack of candor raised doubts as to his suitability for DEA registration. However, the Deputy Administrator agrees with Judge Tenney's finding concerning the Respondent's change of address request to DEA. The Government failed to present preponderating evidence that the Respondent was less than candid when he denied placing the controlled substances order for the Clinic prior to receiving the change of address approval from the DEA. Judge Tenney found that the Respondent's testimony on this point was credible and was corroborated by the testimony of the Clinic's office manager.

Further, Judge Tenney found as mitigating evidence, the Respondent's subsequent DEA renewal application with the correct answer to question 2(b). However, it is also significant that in the comment section of this 1994 application, the Respondent wrote that he had been ''eligible for licensing in Oklahoma for the past six years.'' Yet the Respondent failed to disclose that from 1988 to 1990 he had an Oklahoma Supervised Medical Doctor Certificate with numerous terms and conditions, to include that he would ''not prescribe, administer or dispense any Schedule drugs or controlled dangerous substances, until authorized by the Board.'' Again, the Respondent has failed to be candid in his renewal application by stating he was ''eligible for'' his license, when in fact he knew that for two of the six years he referenced, his eligibility had relevant restrictions. Although his response may not reach the level of ''material falsification'', it certainly failed to disclose significant, relevant information. As noted by the Administrator in Bobby Watts, supra: ''Since DEA must rely on the truthfulness of information supplied by applicants in registering them to handle controlled substances, falsification cannot be tolerated.'' Here, the Respondent's lack of candor makes questionable his commitment to DEA regulatory requirements fostered to protect the public from the diversion of controlled substances.

Further, the Respondent has failed to take responsibility for his past conduct. The Deputy Administrator finds significant that the Alabama Board required the Respondent to successfully complete a substance abuse treatment program before reinstating his medical license, even on a probationary basis. Further, when the respondent self-admitted himself into the Friary for evaluation, a psychologist had concluded that intensive psychotherapy was recommended based, not only upon the Respondent's addictive personality traits, but also upon the facts that (1) he was a ''very unreliable reporter regarding addictive behavior, as are most individuals with the disease of chemical dependency,'' and (2) ''his denial of his responsibility for the

situation in which he finds himself.''. However, the record discloses that the Respondent did not follow this advice and enter the Friary or any other treatment program, and the record contains no evidence that he has since sought such treatment.

Also significant was the Respondent's failure to acknowledge his responsibility to review his DEA renewal application before submission, instead he testified in 1994 that ''I don't sit around worrying about these applications.'' The Deputy Administrator agrees with the Government attorney that such conduct raises grave doubts as to the Respondent's commitment to precise regulatory compliance in the future, a commitment needed to meet the responsibilities of a DEA registration for the handling of controlled substances.

Therefore, after reviewing the entire record, the Deputy Administrator finds that the public interest is best served by revoking the Respondent's DEA Certificate of Registration and denying any pending application. The Respondent's violations of statutory and regulatory provisions, his admitted past drug abuse and the lack of evidence that the Respondent completed a substance abuse treatment program as recommended by the Alabama Board and treating physicians at the Friary, and his continuing failure to take responsibility for compliance with DEA regulatory requirements, support a finding that the public interest is best served by revoking his registration and denying any pending applications at this time.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824, and 28 C.F.R. 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AM2822876 issued to Terrence E. Murphy, M.D., be, and it hereby is, revoked, and any pending applications for renewal of said registration are denied. This order is effective February 28, 1996.

Dated: January 23, 1996.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 96–1559 Filed 1–26–96; 8:45 am]

BILLING CODE 4410–09–M

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Mathematical Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name and Committee Code: Special Emphasis in Mathematical Sciences (1204).

Date and Time: February 12–13, 1996; 8:30 a.m. until 5:00 p.m.

Place: Room 340, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Dr. Kichoon Yang, Program Director, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone: (703) 306–1881.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate the Analysis Program nominations/applications as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act.

Dated: January 23, 1996.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 96–1450 Filed 1–26–96; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Availability of the Revision 1 to the License Application Review Plan for a Geologic Repository for Spent Nuclear Fuel and High-Level Radioactive Waste—Draft Review Plan

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

SUMMARY: The Nuclear Regulatory Commission is announcing the availability of Revision 1 to NUREG–1323, ''The License Application Review Plan for a Geologic Repository for Spent Nuclear Fuel and High-Level Radioactive Waste—Draft Review Plan.''

ADDRESSES: Copies of NUREG–1323, Revision 1 can be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, D.C. 20402–9328. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161–0002. A copy of NUREG–1323, Revision 1 is available for public inspection and/or copying at the NRC Public Document Room, 2120 L Street (Lower Level), N.W., Washington, D.C. 20555–0001.

FOR FURTHER INFORMATION CONTACT: Sandra L. Wastler, High-Level Waste and Uranium Recovery Projects Branch, Division of Waste Management, Office of Nuclear Safety and Safeguards, Nuclear Regulatory Commission, 11545 Rockville Pike, MD 20852. Telephone: (301) 415–6724.

SUPPLEMENTARY INFORMATION: The License Application Review Plan (LARP) provides guidance to the NRC staff who will review the U.S. Department of Energy's (DOE's) license application to construct a mined geologic repository for the disposal of spent nuclear fuel and other high-level radioactive waste at Yucca Mountain, Nevada. The LARP is intended to ensure the quality and uniformity of the staff reviews and establishes the appropriate review priorities, and presents a well-defined base from which to evaluate proposed changes in the scope and requirements of the staff reviews. Because it is a public document, it will also make available to DOE and other interested parties information on the staff's review process so that they may better understand the review strategies, procedures, and acceptance criteria that the staff will use.

The LARP, Revision 0 was issued in September, 1994. Revision 0 represented the staff's initial efforts in developing the LARP and was comprised of both completed and outlined individual review plans. The LARP was and continues to be, however, a work in progress. This draft version, designated Revision 1, represents the staff's latest efforts in the development of the LARP and includes 12 newly completed review plans. Appendix D provides a status of the development of the individual review plans.

Dated at Rockville, Maryland, this 17th day of January 1996.

For the Nuclear Regulatory Commission.

Joseph J. Holonich,

Chief, High-Level Waste and Uranium Recovery Projects Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguard.

[FR Doc. 96–1523 Filed 1–26–96; 8:45 am]

BILLING CODE 7590–01–P