

DEPARTMENT OF THE INTERIOR**National Park Service****Flight 93 National Memorial Advisory Commission; Notice of meeting**

AGENCY: National Park Service.

ACTION: Notice of April 28, 2007 meeting.

SUMMARY: This notice sets forth the date of the April 28, 2007 meeting of the Flight 93 Advisory Commission.

DATES: The public meeting of the Advisory Commission will be held on Saturday, April 28, 2007 from 12 noon to 3 p.m. (Eastern) and 9 a.m. to 12 noon (Pacific). The Commission will meet jointly with the Flight 93 Memorial Task Force.

Location: The meeting will be held in Fort Mason, Building 201, Golden Gate National Parks, San Francisco, California 94123-0022. To access Fort Mason, please use the entrance at Franklin and Bay Streets.

The meeting will be connected to the East Coast via teleconference at the Flight 93 National Memorial Office, 109 West Main Street, Suite 104, Somerset, Pennsylvania 15501. The public is encouraged and welcome to attend either the west coast meeting or the east coast teleconference.

Agenda: The April 28, 2007 joint Commission and Task Force meeting will consist of:

- (1) Opening of Meeting and Pledge of Allegiance.
- (2) Review and Approval of Commission Minutes from January 27, 2007.
- (3) Reports from the Flight 93 Memorial Task Force and National Park Service. Comments from the public will be received after each report and/or at the end of the meeting.
- (4) Old Business.
- (5) New Business.
- (6) Public Comments.
- (7) Closing Remarks.

FOR FURTHER INFORMATION CONTACT:

Joanne M. Hanley, Superintendent, Flight 93 National Memorial, 109 West Main Street, Somerset, PA 15501, 814.443.4557.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. Address all statements to: Flight 93 Advisory Commission, 109 West Main Street, Somerset, PA 15501.

Dated: March 23, 2007.

Joanne M. Hanley,

Superintendent, Flight 93 National Memorial.

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DEPARTMENT OF JUSTICE**Drug Enforcement Administration**

[Docket No. 06-68]

Bourne Pharmacy, Inc.; Revocation of Registration

On July 26, 2006, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Bourne Pharmacy, Inc., (Respondent) of Buzzards Bay, Massachusetts. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, AB2802468, as a retail pharmacy, and to deny any pending applications for renewal or modification of the registration, on the ground that Respondent's continued registration would be inconsistent with the public interest. Show Cause Order at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Show Cause Order alleged that on September 21, 2005, investigators from DEA and the Massachusetts Board of Pharmacy had executed an administrative inspection warrant at Respondent and found it to be in violation of various federal regulations. *See id.* at 2. Specifically, the Show Cause Order alleged that: (1) Respondent had failed to maintain a biennial inventory as required by 21 CFR 1304.11(c) and 1304.21, (2) had failed to maintain drug destruction records as required by 21 CFR 1304.21(a), (3) was storing controlled substances at a non-registered location in violation of 21 CFR 1304.04, and (4) was improperly storing order forms for Schedule II controlled substances. Show Cause Order at 2.

The Show Cause Order further alleged that on August 22, 2005, Dr. Michael Brown, a Massachusetts based physician, was arrested and charged with various drug offenses under state law, including conspiracy to violate drug laws and possession of various categories of controlled substances with the intent to distribute. *See id.* at 2. According to the Show Cause Order, investigators further determined that during the calendar year 2005, forty-five percent of the prescriptions for Schedule II controlled substances filled by Respondent were written by Dr. Brown; in the month of April 2005

alone, 92 of 168 Schedule II prescriptions filled by Respondent were written by Dr. Brown. *Id.* at 2-3.

Finally, the Show Cause Order alleged that on October 25, 2005, the Massachusetts Board of Pharmacy had issued a "Final Order of Summary Suspension," which suspended Respondent's state pharmacy permit and controlled substance registration, and that these suspensions remain in effect. *Id.* at 3. The Show Cause Order thus alleged that Respondent lacked authority under state law to handle controlled substances and that this authority is "a necessary prerequisite for DEA registration." *Id.*

Respondent, through its counsel, requested a hearing; the matter was assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner. Shortly thereafter, the Government moved for summary disposition on the ground that the Massachusetts Board of Pharmacy had issued a Final Order of Summary Suspension against Respondent's state pharmacy permit and the pharmacist's license of its owner (Mr. Gerald Liberfarb) and pharmacist in charge. Mot. for Summ. Disp. at 2. Attached to the Government's motion was the State's summary suspension order, as well as a copy of Respondent's DEA registration (which does not expire until July 31, 2008). *See* Attachments 1 & 2 to Mot. for Summ. Disp.

Respondent opposed the Government's motion. Respondent contended that "on October 24, 2005, [it] had already voluntarily surrendered its [state] registered drug store certificate" and controlled substance registration to the Massachusetts Department of Public Health, "to be held in escrow pending a hearing on the merits to be held * * * before the Board of Registration in Pharmacy." Resp. Opp. at 1. Respondent also argued that the Massachusetts Board "has never implemented or executed the Final Order of Summary Suspension," and that it has meritorious defenses to the DEA Show Cause Order. *Id.* Finally, Respondent contended that it was "both premature and unduly prejudicial to act upon the Government's Motion * * * until after [the] state agency" held its hearing and made a decision. *Id.* at 2.

In support of its contention, Respondent's counsel attached a letter he had written to an attorney for the State Board memorializing the fact that Respondent had delivered its state registration and certificates to be held by the State "in escrow until a final decision is issued on the merits." Ex. 1 to Resp. Opp. Respondent also attached other documents including a "Notice of Fourth Rescheduled Hearing," Ex. 2 to

Resp. Opp., and a “Rescheduled Second Pre-Hearing Conference Order.” Ex. 3 to Resp. Opp.

The ALJ granted the Government’s motion. The ALJ found that there was no material factual dispute regarding whether Respondent currently has authority under Massachusetts law to handle controlled substances. ALJ Dec. at 3. The ALJ specifically rejected Respondent’s contention that its state controlled substance registration had not been suspended, but rather, was being held in escrow by the Massachusetts Board pending a final decision. *Id.* Relatedly, the ALJ also dismissed Respondent’s argument that the State never implemented the summary suspension order, reasoning that “whether the license is suspended pending a hearing on the merits, or is held in escrow,” is irrelevant, because “[i]n either event, Respondent is without authority to handle controlled substances in Massachusetts.” *Id.* The ALJ thus held that Respondent is not entitled to maintain its DEA registration and recommended that I revoke Respondent’s registration. The ALJ then forwarded the record to me for final agency action.

Having considered the record as a whole, I adopt the ALJ’s holding that Respondent is currently without authority to handle controlled substances in Massachusetts and is therefore not entitled to maintain its DEA registration. Here, the State’s “Final Order of Summary Suspension,” which is signed by the Board’s President, clearly ordered the suspension, effective October 23, 2005, of Respondent’s state controlled substance registration “pending a final decision on the merits.”

Respondent’s assertion that the State “has never executed or implemented the Final Order of Summary Suspension” does not raise a genuine issue of fact that requires a hearing to resolve. Respondent’s evidence—*i.e.*, a letter to the Board’s lawyer discussing an agreement to surrender its state registration to be held in escrow pending a final decision—does not create a factual dispute as to whether Respondent’s state registration has been suspended. As a leading authority explains, “evidence in opposition to the motion that is clearly without any force is insufficient to raise a genuine issue.” Charles Allen Wright, *et al.*, *Federal Practice and Procedure* section 2727 (3d. ed. 2006).¹ In short, this letter

contains nothing that refutes the Government’s assertion that Respondent’s state controlled substance registration has been suspended.

Under the Controlled Substances Act (CSA), it is irrelevant that Respondent’s state registration is being held in escrow pending state proceedings. Under the Act, a practitioner must be currently authorized to handle controlled substances in “the jurisdiction in which [it] practices” in order to maintain its DEA registration. *See* 21 U.S.C. 802(21) (“[t]he term ‘practitioner’ means a * * * pharmacy * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which [it] practices * * * to * * * dispense * * * a controlled substance in the course of professional practice”). *See also id.* section 823(f) (“The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which [it] practices.”).

Furthermore, in section 304, Congress expressly authorized the revocation of a DEA registration issued to a registrant whose “State license or registration [has been] suspended * * * by competent State authority and is no longer authorized by State law to engage in the * * * dispensing of controlled substances.” *Id.* section 824(a)(3). By definition, a suspension is of a finite duration. *See Merriam-Webster’s Collegiate Dictionary* 1187 (10th ed. 1998) (defining “suspend” as “to debar temporarily from a privilege * * * or function”). Under the CSA, it does not matter whether the suspension is for a fixed term or for a duration which has yet to be determined because it is continuing pending the outcome of a state proceeding. Rather, what matters—as DEA has repeatedly held—is whether Respondent is without authority under Massachusetts law to dispense a controlled substance. *See Oakland Medical Pharmacy*, 71 FR 50100, 50,102 (2006) (“a registrant may not hold a DEA registration if it is without appropriate authority under the laws of the state in which it does business”); *Accord Rx Network of South Florida, LLC*, 69 FR 62,093 (2004); *Wingfield Drugs, Inc.*, 52 FR 27,070 (1987).

Because the State suspended its controlled substances registration, Respondent clearly lacks authority under Massachusetts law to handle controlled substances. Therefore, it is not entitled to maintain its DEA registration.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that DEA Certificate of Registration, AB2802468, issued to Bourne Pharmacy, Inc., be and it hereby is, revoked. I further order that any pending applications for renewal or modification of such registration be, and they hereby are, denied. This order is effective May 11, 2007.

Dated: March 30, 2007.

Michele M. Leonhart,
Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 06-58]

Piyush V. Patel, M.D.; Revocation of Registration

On May 9, 2006, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Piyush V. Patel, M.D. (Respondent) of Midland, Texas. The Show Cause Order proposed the revocation of Respondent’s DEA Certificate of Registration, AP1614800, as a practitioner, on the ground that Respondent’s license to practice medicine in the State of Texas had been revoked, and that Respondent was therefore “without authority to handle controlled substances in Texas, the State in which [he] practices.” Show Cause Order at 1. The Show Cause Order also informed Respondent of his right to request a hearing.

Respondent, acting *pro se*, filed a timely request for a hearing; the matter was assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner. In that request, Respondent stated that he was currently incarcerated and requested that the hearing be delayed until after his release on April 7, 2007. Respondent also indicated that he was not currently licensed by the Texas State Board of Medical Examiners.

On June 21, 2006, the Government moved for summary disposition on the ground that Respondent was “not currently authorized to engage in the active practice of medicine or to handle controlled substances in Texas.” Mot. for Summary Disp. at 2. In support of its motion, the Government attached an “Agreed Order” (dated August 26, 2005) which Respondent had entered into with the Texas State Board of Medical

¹ Respondent’s other evidence likewise does not create a factual dispute as to whether its state controlled substance registration has been suspended.