

membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Strategic Test AB, Woburn, MA; Integrated Device Technology, Inc. (IDT), San Jose, CA; DGE Inc., Rochester Hills, MI; Tundra Semiconductor Corp., Fremont, CA; Tyco Electronics, Middletown, PA; and Crystek Corporation, Fort Myers, FL, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PXI Systems Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On November 22, 2010, PXI Systems Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 8, 2011 (66 FR 13971).

The last notification was filed with the Department on September 22, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act October 25, 2010 (75 FR 65511).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11-2]

Gregory F. Saric, M.D.; Decision and Order

On November 2, 2010, Administrative Law Judge (ALJ) Timothy D. Wing issued the attached recommended decision. Thereafter, Respondent filed exceptions to the decision.

Having reviewed the record in its entirety including the ALJ's recommended decision, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended Order.

In his Exceptions, Respondent argues that "the ALJ's Recommended Decision fails to take into account certain exceptions where a suspension or stay of revocation has been granted in circumstances similar to that of Respondent's." Exceptions at 1 (citing *Stuart A. Bergman, M.D.*, 70 FR 33193 (2005)). Respondent notes that "[i]n

Bergman[], the ALJ delayed issuing her ruling on the Government's Motion for Summary Disposition for over two months to allow for a pending state board hearing." *Id.* Respondent states that "he is currently receiving treatment in [an] approved rehabilitation program and will likely complete his treatment next month," that "[h]e is in full compliance with the Florida Department of Health and the Florida Professionals Resource Network and will appear before the Florida Board of Medicine to have his license reinstated in early 2011." *Id.* at 1-2.

Respondent contends that a stay of this Final Order "will allow him time to complete his rehabilitation and have the state suspension of his medical license lifted" and that "such a stay * * * is within the Deputy Assistant Administrator's authority and would not disserve the public interest." *Id.* Respondent thus requests that the issuance of this Final Order be stayed for ninety (90) days¹ in order to allow him "time to have the temporary suspension of his Florida medical license lifted." *Id.*

However, more than ninety days have already passed since Respondent filed his Exceptions, and yet Respondent has submitted no evidence to this Office establishing that the Florida Board of Medicine has re-instated his medical license. Nor has Respondent even submitted evidence as to when he is scheduled to appear before the Florida Board.

Moreover, in circumstances similar to those raised by Respondent, DEA has repeatedly denied requests to stay the issuance of a final order of revocation, noting that "[u]nder the Controlled Substances Act, 'a practitioner must be currently authorized to handle controlled substances in 'the jurisdiction in which [he] practices' in order to maintain [his] DEA registration.'" *Newcare Home Health Servs.*, 72 FR 42126 (2007) (quoting *Bourne Pharmacy, Inc.*, 72 FR 18273, 18274 (2007) (quoting 21 U.S.C. 802(21)). *See also* 21 U.S.C. 802(21) ("[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to * * * dispense * * * a controlled substance in the course of professional practice"); *id.* § 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 he practices."); *Bourne Pharmacy*, 72 FR at 18274 (revoking registration; "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 [state] law to dispense a controlled substance.").

Thus, Respondent's reliance on *Bergman* is misplaced.² As I further explained in *Newcare*, "[i]t is not DEA's policy to stay proceedings under section 304 while registrants litigate in other forums." 72 FR at 42127 (citing *Bourne Pharmacy*, 72 FR at 18273; *Oakland Medical Pharmacy*, 71 FR 50100 (2006); *Kennard Kobrin, M.D.*, 70 FR 33199 (2005)). This is so, because in addition to the CSA's requirement that a practitioner hold state authority in order to be registered, whether Respondent's state license will be re-instated is entirely speculative. Nor is there any evidence in the record as to when such action may occur.

Therefore, I adopt the ALJ's recommendation that Respondent's registration be revoked.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, BS5109889, issued to Gregory F. Saric, M.D., be, and it hereby is, revoked. I further order that any pending application of Gregory F. Saric, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective April 25, 2011.

Dated: March 10, 2011.

Michele M. Leonhart,
Administrator.

Larry P. Cote, Esq., for the Government.
George F. Indest, III, Esq., for Respondent.

Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

Administrative Law Judge Timothy D. Wing. On September 9, 2010, the Deputy Assistant Administrator, DEA, issued an Order to Show Cause (OSC) of

² While in *Bergman*, the ALJ stayed the proceeding until after the registrant's state board hearing, the decision of the Agency, which revoked his registration, did not endorse this practice. Moreover, the decision expressly noted that "[d]enial or revocation is also appropriate when a state license has been suspended, but with the possibility of future reinstatement." 70 FR at 33193 (collecting cases).

¹ While Respondent requested that the Deputy Assistant Administrator stay the issuance of the Final Order, given that the Deputy Assistant Administrator has no authority to issue the Agency's Final Order, I address the request as if it was directed to this Office.

DEA COR BS5109889, dated September 9, 2010, and served on Respondent on September 15, 2010. The OSC provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR BS5109889 pursuant to 21 U.S.C. 824(a)(3), on the grounds that Respondent lacks authority to handle controlled substances in Florida, the state in which he maintains his DEA registration. On October 8, 2010, Respondent, through counsel, in a letter dated October 5, 2010, timely requested a hearing with the DEA Office of Administrative Law Judges (OALJ).

I issued an Order for Prehearing Statements on October 13, 2010. On October 18, 2010, the Government filed a Motion for Summary Disposition. On October 18, 2010, I issued an order staying the proceedings pending the resolution of the Government's motion and directing Respondent to reply to the Government's motion, if at all, by October 25, 2010. On October 21, 2010, Respondent, through counsel, filed a Motion for Enlargement of Time and Motion to Require the Government to Serve Pleadings Via Facsimile. I granted that motion on October 21, 2010, and granted Respondent until November 1, 2010, to respond to the Government's motion.

On October 29, 2010, Respondent timely filed his response to the Government's Motion for Summary Disposition.

II. The Parties' Contentions

A. The Government

In support of its motion for summary disposition, the Government asserts that on August 24, 2010, the State of Florida Board of Medicine (Board) issued a final order indefinitely suspending Respondent's Florida Medical license, and that Respondent consequently lacks authority to possess, dispense or otherwise handle controlled substances in Florida, the jurisdiction in which he maintains his DEA registration. The Government notes that in Respondent's request for a hearing, Respondent admits that he is currently without a Florida medical license. (Gov't Mot. Sum. Disp. at 1 (citing Resp't Hg. Req. dated October 5, 2010, at 2.)) The Government contends that such state authority is a necessary condition for maintaining a DEA COR and therefore asks that I summarily recommend to the Deputy Administrator that Respondent's COR be revoked. In support of its motion, the Government attaches the Board's final order referred to above, marked for identification as Exhibit A.

B. Respondent

Respondent opposes summary disposition, in sum and in substance "because he is in the process of cooperating completely with the Florida Board of Medicine, Department of Health, to have its temporary suspension of his license lifted and we expect this to happen in the near future." (Resp't Hg. Req. at 2; *see also* Resp't Opp'n Sum. Disp. at 2 ¶¶ 4-5.) Respondent states that the revocation of his DEA COR "would cause him tremendous hardship upon his return to the active practice of medicine" (Resp't Opp'n Sum. Disp. at 2 ¶ 6) and seeks to proceed with the pending administrative proceedings.

In the alternative, Respondent argues that 21 U.S.C. 824(a)(3) allows the suspension of a DEA registration as an alternate remedy to revocation, and that "suspension is a far more appropriate remedy given the facts of this matter and the temporary nature of the suspension of the Respondent's medical license." (Resp't Opp'n Sum. Disp. at 1 ¶¶ 2-3.) Respondent therefore argues that if summary disposition is proper, then I should not recommend revocation but instead "order the immediate suspension of Respondent's DEA registration until such time as his Florida medical license has been reinstated." (*Id.* at 2 ¶ 8.)

III. Discussion

At issue is whether Respondent may maintain his DEA COR given that Florida has suspended his state license to practice medicine, even though the suspension may be temporary.

Under 21 U.S.C. 824(a)(3), a practitioner's loss of state authority to engage in the practice of medicine and to handle controlled substances is grounds to revoke a practitioner's registration. Accordingly, this agency has consistently held that a person may not hold a DEA registration if he is without appropriate authority under the laws of the state in which he does business. *See Scott Sandarg, D.M.D.*, 74 FR 17,528 (DEA 2009); *David W. Wang, M.D.*, 72 FR 54,297 (DEA 2007); *Sheran Arden Yeates, M.D.*, 71 FR 39,130 (DEA 2006); *Dominick A. Ricci, M.D.*, 58 FR 51,104 (DEA 1993); *Bobby Watts M.D.*, 53 FR 11,919 (DEA 1988).

Summary disposition in a DEA suspension case is warranted even if the period of suspension of a respondent's state medical license is temporary, or even if there is the potential for reinstatement of state authority because "revocation is also appropriate when a state license had been suspended, but with the possibility of future

reinstatement." *Stuart A. Bergman, M.D.*, 70 FR 33,193 (DEA 2005); *Roger A. Rodriguez, M.D.*, 70 FR 33,206 (DEA 2005).

It is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, under the rationale that Congress does not intend administrative agencies to perform meaningless tasks. *See Layfe Robert Anthony, M.D.*, 67 FR 35,582 (DEA 2002); *Michael G. Dolin, M.D.*, 65 FR 5661 (DEA 2000); *see also Philip E. Kirk, M.D.*, 48 FR 32,887 (DEA 1983), *aff'd sub nom. Kirk v. Mullen*, 749 F.2d 297 (6th Cir. 1984). *Accord Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 605 (1st Cir. 1994).

In the instant case, the Government asserts that Respondent's Florida medical license is presently suspended. (*See* Gov't Mot. Sum. Disp. at 1.) This allegation is confirmed by Government Exhibit A, as well as Respondent's own admission: In predicting that the suspension of his Florida medical license will soon be lifted, Respondent by necessity concedes the fact of its suspension. (Resp't Hg. Req. dated October 5, 2010, at 2; Resp't Opp'n Sum. Disp. at 2 ¶ 4.) I therefore find there is no genuine dispute as to any material fact, and that substantial evidence shows that Respondent is presently without state authority to handle controlled substances in Florida. Consequently, I conclude that summary disposition is appropriate.

Respondent's assertion that losing his DEA COR would cause him hardship does not alter this conclusion. Respondent cites no authority, and a review of agency precedent reveals none, for the contention that potential hardship to a registrant may prevent revocation of a DEA COR pursuant to 21 U.S.C. 824(a)(3) where the registrant lacks state authority to handle controlled substances.

In the alternative, Respondent argues that even if revocation is warranted, Section 824(a)(3) permits me to recommend suspension instead of revocation. The crux of Respondent's argument turns on the disjunctive language of § 824(a)(3), which provides that a registration "may be suspended or revoked * * *" where a registrant lacks state authority to handle controlled substances. *Id.* (emphasis supplied). Respondent cites no authority in support of his reading of § 824(a)(3).

Respondent's interpretation of § 824(a)(3) ignores the weight of settled, contrary agency precedent that has consistently imposed revocation and not suspension on similar facts. *See Stuart*

A. Bergman, M.D., 70 FR 33,193 (DEA 2005) (denying respondent's request for temporary suspension and granting motion for summary disposition where respondent lacked state authority); see also *Roy Chi Lung*, 74 FR 20,346, 20,346 (DEA 2009) ("Respondent * * * lack[s] authority to handle controlled substances in California * * * Respondent is therefore *not entitled* to maintain his DEA registration.") (emphasis supplied); *Sheran Arden Yeates, M.D.*, 71 FR 39,130, 39,131 (DEA 2006) ("DEA does not have statutory authority under the Controlled Substances Act to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices."). See generally 21 CFR 1301.01(17) (2010) (defining "individual practitioner" as a person, other than a pharmacist, pharmacy or institutional practitioner, possessing state authority to dispense a controlled substance in the course of a professional practice). Under the circumstances discussed above, I conclude that further delay in ruling on the Government's Motion for Summary Disposition is not warranted.

Recommended Decision

I grant the Government's motion for summary disposition and recommend that Respondent's DEA COR BS5109889 be revoked and any pending applications denied.

Dated: November 2, 2010

Timothy D. Wing,

Administrative Law Judge.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09-35]

Robert L. Dougherty, M.D.; Denial of Application

On March 16, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Robert L. Dougherty, M.D. (Respondent), of Poway, California. ALJ Ex. 1. The Show Cause Order proposed the denial of Respondent's pending application for a DEA Certificate of Registration as a practitioner, on the ground that his "registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f)." *Id.* at 1.

The Show Cause Order alleged that on October 27, 1995, the DEA Deputy

Administrator (DA) issued a Final Order revoking Respondent's registration based on his prescribing of controlled substances to three patients. *Id.* (citing 60 FR 55047). More specifically, the Show Cause Order alleged that the DA had "found that [Respondent's] prescribing of controlled substances to Patient #1 'on demand,' 'virtually upon request,' with 'virtually no scrutiny' and with 'virtually no records or monitoring' demonstrated a gross lack of judgment and showed that some of the prescriptions issued were outside the course of professional practice." *Id.*

With regard to Patient #2, the Show Cause Order alleged that the DA "found that * * * Respondent's prescribing of controlled substances to an admitted drug abuser showed a disregard of the requirements for detailed attention to individual patient behavior necessary for the dispensing of controlled substances." *Id.* With regard to Patient #3, the Show Cause Order alleged that the DA found that Respondent's "prescribing of an excessive number of refills of controlled substances over a six month period, without requiring a clinical examination or visit, demonstrated a reckless disregard for medical standards in dispensing controlled substances and violations of Federal regulations and state law[.]" and that he "had violated Federal and state record-keeping requirements for controlled substances." *Id.*

Finally, the Show Cause Order alleged that on June 25, 1997, the Medical Board of California (MBC) issued a decision which "severely criticized [Respondent's] treatment of [P]atient #1." *Id.* The Order alleged that the MBC had found that Respondent "had engaged in repeated negligent acts and had demonstrated incompetence in [his] treatment of the patient[.]" and that "[t]his misconduct included prescribing controlled substances to an obvious drug addict." *Id.* at 1-2.

Respondent requested a hearing on the allegations, and the matter was placed on the docket of the Agency's Administrative Law Judges (ALJ). Following pre-hearing procedures, on March 10, 2010, an ALJ conducted a hearing on the matter in San Diego, California, at which both parties called witnesses to testify and the Government introduced documentary evidence. Thereafter, both parties filed briefs containing their proposed findings of fact, conclusions of law, and argument.

On June 9, 2010, the ALJ issued her recommended decision (also ALJ). Therein, the ALJ found that the Government had "met its prima facie burden." ALJ at 22. However, the ALJ reasoned that all of the facts and

circumstances should be considered including that Respondent's "mistakes" involved only "a very small portion of his patients," that one of the patients was a relative who has since died and that this "decreases the likelihood that similar circumstances would reoccur," and that Respondent's "mis-judgments were well intentioned." *Id.* at 22-24. Next, the ALJ reasoned that "there was controversy in the medical community with regards to his prescribing practices, and that his methods have since been adopted by the FDA, though not necessarily DEA," and that his prescribing methods, while "found to be objectionable over ten years ago * * * may, according to the record, arguably not be objectionable now." *Id.* at 24. The ALJ thus concluded that "the circumstances surrounding his prescribing practices have changed." *Id.*

Finally, the ALJ noted that in the 1995 Final Order, the Agency had made four summarized findings.¹ *Id.* at 25. While the ALJ noted that Respondent did not "completely acknowledge his past problems with refill practices with regards to Patient #2," she found it relevant that the ALJ who conducted the earlier hearing had "recognized discrepancies in the Government's evidence relating to how many refills were actually authorized." *Id.* With respect to the Agency's finding that Respondent failed "to act in a timely manner upon, and to take responsibility for, receipt of information given to him or to his staff concerning the forged prescriptions of Patient #3," the ALJ reasoned that "the record demonstrates that [he] received information about possibly forged prescriptions, made inquiries, questioned the patient, was deceived, and ultimately stopped prescribing to the patient." *Id.* at 26. Finally, with respect to Patient #1, the ALJ characterized the Agency's finding as that he had maintained an "inadequate treatment record." *Id.* at 26. Reasoning that "[t]here is no question that the Respondent demonstrated remorse with regards to his record-keeping," and that the "DA's summarized findings focused on record-keeping," the ALJ concluded that

¹ As the basis for rejecting the ALJ's recommended sanction of a one-year suspension and revoking Respondent's registration, the DA cited four findings: (1) Respondent's "failure to acknowledge the need for adequate recordkeeping to insure [sic] that controlled substances are not diverted"; (2) his "lack of remorse concerning his * * * unlawful recordkeeping and refill practices"; (3) his "failure to act in a timely manner upon, and to take responsibility for, receipt of information given him or to his staff concerning the forged prescriptions of Patient #3"; and (4) his "lack of acknowledgement that the inadequate treatment record of Patient #1 could have ultimately jeopardized that patient's welfare." 60 FR at 55051.