permanent counsel.[1] I granted that motion on September 17, 2010, and granted Respondent until October 12, 2010, to respond to the Government's motion.

On October 12, 2010, having secured permanent counsel,[2] Respondent filed a second unopposed motion requesting additional time to respond. I granted that motion on October 13, 2010, and granted Respondent until October 15, 2010, to respond to the Government's Motion for Summary Judgment.

On October 15, 2010, Respondent timely filed her response to the Government's Motion for Summary Judgment.

II. The Parties' Contentions

A. The Government

In support of its motion for summary judgment, the Government asserts that on May 7, 2010, the State of Florida, Department of Health, issued an Order of Emergency Suspension of Respondent's osteopathic medical license, and that Respondent consequently lacks authority to possess, dispense or otherwise handle controlled substances in Florida, the jurisdiction in which she maintains her DEA registration. 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 three documents: (1) The Emergency Order of Suspension referred to above; (2) a copy of Respondent's request for a hearing, filed August 31, 2010, in which Respondent denies that the state suspension ''should remain in full force and effect, thereby prohibiting Sheryl Lavender, D.O., from practicing medicine, and prescribing medications to patients'' (Gov't Mot. Sum. J. at 2 ¶(3) (citing Resp't Req. Hg. at 1 ¶(B)(2))); and (3) a printout dated September 9, 2010, from a Web site maintained by the Florida Department of Health indicating that Respondent's suspension remained in effect as of that date.

B. Respondent

Respondent opposes summary judgment and seeks the opportunity to ''discuss the merits of this matter.'' (Resp't Opp'n Gov't Mot. Sum. J. 2 ¶5.) In sum and in substance, Respondent argues that while ''it is technically true Respondent lacks state authorization to practice medicine at this time, this shall soon be remedied and having the DEA registration withdrawn or otherwise revoked would unnecessarily elongate Dr. Lavender's return to medicine * * *.'' (*Id.* at 1 ¶2.) Respondent also seeks to present evidence contesting two assertions: first, that she failed to comply with federal law in prescribing controlled substances; and second, that her continued registration would be a danger to the public. (*Id.* at 2 ¶4.) Finally, Respondent raises an estoppel and detrimental reliance argument, but concedes ''this particular tribunal is not the appropriate forum in which to argue [those] grounds.'' (*Id.* at ¶3.)

III. Discussion

At issue is whether Respondent may maintain her DEA COR given that Florida has suspended her state license to practice medicine.

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 she is without appropriate authority under the laws of the state in which she 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 judgment 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); *Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F.3d 600, 605 (1st Cir. 1994).

In the instant case, the Government asserts, and Respondent concedes, that Respondent's Florida medical license is presently suspended. While Respondent disagrees that the state suspension of her Florida medical license ''*should* remain in full force and effect, thereby prohibiting [her] from practicing medicine and prescribing medication to patients,'' (Resp't Req. Hg. at 1 ¶ (B)(2) (emphasis supplied)), she does not deny that the state suspension presently removes the state authority upon which her DEA registration is premised. To the contrary, she admits ''it is technically true Respondent lacks state authorization to practice medicine at this time * * *.'' (Resp't Opp'n Gov't Mot. Sum. J. 1 ¶2.)

I therefore find that 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. Because ''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,'' *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (DEA 2006), I do not reach Respondent's other contentions. Under the circumstances discussed above, I conclude that further delay in ruling on the Government's Motion for Summary Judgment is not warranted.

Recommended Decision

I grant the Government's motion for summary judgment and recommend that Respondent's DEA COR BL1667596 be revoked and any pending applications denied.

Dated: October 28, 2010.

Timothy D. Wing,

Administrative Law Judge.

[FR Doc. 2011–20068 Filed 8–8–11; 8:45 am]

BILLING CODE 4410–09–P

[1] In Respondent's first motion for an extension of time, counselor Patrick R. McKamey stated that he represents Respondent in a separate criminal case; that he practices exclusively in criminal litigation; and that he filed a limited appearance in this case only so that Respondent might retain permanent counsel for these administrative proceedings.

[2] Shawn B. McKamey, Esq., filed his notice of appearance on October 13, 2010.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Robert Leigh Kale, M.D., Decision and Order

On September 9, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Robert Leigh Kale, M.D. (Registrant), of Fort Smith, Arkansas.

The Show Cause Order proposed the revocation of Registrant's DEA Certificate of Registration, BK9514375, as a practitioner in Schedules II through V, on the ground that he does ''not have authority to practice medicine or handle controlled substances in the state of Arkansas.'' Show Cause Order at 1 (citing 21 U.S.C. 824(a)(3)).

The Show Cause Order alleged that as a result of action by the Arkansas State Medical Board, Registrant was ''without authority to handle controlled substances in the State of Arkansas, the state in which [he is] registered with DEA,'' and that therefore, his registration was subject to revocation. *Id.* (citing cases). The Show Cause Order also notified Registrant of his right to request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedure for doing either, and the consequence for failing to do either. *Id.* at 2 (citing 21 CFR 1301.43).

On September 10, 2010, the Government initially attempted to serve the Show Cause Order on Registrant by certified mail to him at the address of his registered location. However, the mailing was returned and marked ''Returned to Sender'' and ''Vacant.'' GX E. The Government then attempted to serve the Show Cause Order by certified mail to him at his last known address in Oklahoma, where he also previously held a state license. GXs C & F. However, this package was returned as ''unclaimed.'' GX F.

On October 21, 2010, the Government then sent the Show Cause Order as an attachment to an e-mail which was sent to Respondent at an address that he had previously provided to DEA. GX G. In the accompanying e-mail, the Government wrote: ''Upon receiving this, please confirm receipt via email.'' *Id.* According to the Government's counsel, he ''has not received a response to this e-mail.'' Req. for Final Agency Action at 2. The Government's counsel further represents that upon sending the e-mail, he did not receive an error message or a message that the e-mail was undeliverable. Govt's Statement Regarding Service of the Order to Show Cause, at 1.

On January 7, 2011, the Government filed a Request for Final Agency Action and the Investigative Record with this Office. Req. for Final Agency Action, at 3. Therein, the Government requests that I find that Registrant has waived his right to a hearing because more than thirty days have now passed since the date of service of the Show Cause Order, and that neither Registrant, nor anyone purporting to represent him, has requested a hearing or submitted a written statement in lieu of a hearing. *Id.* at 1. The Government also requests that I issue a Final Order revoking Registrant's registration.

Before proceeding to the merits, it is necessary to determine whether the means employed by the Government to serve the Show Cause Order on Registrant were constitutionally sufficient. The Supreme Court has long held ''that due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' '' *Jones* v. *Flowers,* 547 U.S. 220, 226 (2006) (quoting *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)). Moreover, '' 'when notice is a person's due * * * [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' '' *Jones,* 547 U.S. at 229 (quoting *Mullane,* 339 U.S. at 315).

In *Jones,* the Court further noted that its cases ''require[] the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.'' *Id.* at 230. The Court cited with approval its decision in *Robinson* v. *Hanrahan,* 409 U.S. 38 (1972), where it ''held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison.'' *Jones,* 547 U.S. at 230.[1] *See also Robinson,* 409 U.S. at 40 (''[T]he State knew that appellant was not at the address to which the notice was mailed * * * since he was at that very time confined in * * * jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise appellant of the pendency of the * * * proceedings.''); *Covey* v. *Town of Somers,* 351 U.S. 141 (1956) (holding that notice by mailing, publication, and posting was inadequate when officials knew that recipient was incompetent).

The *Jones* Court further explained that ''under *Robinson and Covey,* the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice.'' 547 U.S. at 230. The Court also noted that '' ' ''a party's ability to take steps to safeguard its own interests [such as by updating his address] does not relieve the State of its constitutional obligation.'' ' '' *Id.* at 232 (quoting Brief for United States as *Amicus Curiae* 16 n.5 (quoting *Mennonite Bd. of Missions* v. *Adams,* 462 U.S. 791, 799 (1983))). However, the Government is not required to undertake ''heroic efforts'' to find a registrant. *Dusenbery* v. *United States,* 534 U.S. 161, 170 (2002). Nor is actual notice required. *Id.*

Thus, in *Jones,* the Court held that where the State had received back a certified mailing of process as unclaimed and took ''no further action'' to notify the property owner, the State did not satisfy due process. 547 U.S. at 230. Rather, the State was required to ''take further reasonable steps if any were available.'' *Id.*

I conclude that the Government has satisfied its obligation under the Due Process Clause ''to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' '' *Id.* at 226 (quoting *Mullane,* 339 U.S. at 314). Here, following the failure of the first attempt at service, the Government then attempted to serve Registrant by certified mail to him at his last known address in Oklahoma, where he also practices. While *Jones* suggests that once this mailing was returned as unclaimed, the Government could have satisfied its constitutional obligation simply by mailing the Show Cause Order by regular mail, *see id.* at 234–35, the Government then attempted to serve Registrant by e-mailing the Order to him.

Several courts have held that the e-mailing of process can, depending on the facts and circumstances, satisfy due process, especially where service by conventional means is impracticable because a person secretes himself. *See Rio Properties, Inc.* v. *Rio Int'l Interlink,* 284 F.3d 1007, 1017–18 (9th Cir. 2002); *see also Snyder, et al.* v. *Alternate Energy* Inc., 857 N.Y.S.2d 442, 447–449 (N.Y. Civ. Ct. 2008); *In re International Telemedia Associates, Inc.,* 245 B.R. 713, 721–22 (Bankr. N.D. Ga. 2000).

[1] The CSA states that ''[b]efore taking action pursuant to [21 U.S.C. 824(a)] * * * the Attorney General shall serve upon the * * * registrant an order to show cause why registration should not be * * * revoked[] or suspended.'' 21 U.S.C. 824(c). In contrast to the schemes challenged in *Jones* and *Robinson,* which provided for service to the property owner's address as listed in state records, neither the CSA nor Agency regulations state that service shall be made at any particular address such as the registered location. In any event, while in most cases, service to a registrant's registered location provides adequate notice, the Supreme Court's clear instruction is that the Government cannot ignore ''unique information about an intended recipient'' when its seeks to serve that person with notice of a proceeding that it is initiating. *Jones,* 547 U.S. at 230.

While courts have recognized that use of e-mail to serve process has ''its limitations,'' including that ''[i]n most instances, there is no way to confirm receipt of an email message,'' *Rio Properties,* 284 F.3d at 1018, I conclude that the use of e-mail to serve Registrant satisfied due process because service was made to an e-mail address which Registrant provided to the Agency and the Government did not receive back either an error or undeliverable message.[2]

Having found that the service of the Show Cause Order was constitutionally adequate, I further find that Respondent has waived his right to a hearing or to submit a written statement in lieu of a hearing. I therefore issue this Decision and Final Order based on relevant evidence contained in the Investigative Record submitted by the Government. 21 CFR 1301.43(d) and (e). I make the following additional findings of fact.

Findings

Registrant is an anesthesiologist and the holder of DEA Certificate of Registration BK9514375, which authorizes him to dispense controlled substances in Schedules II through V as a practitioner, at the registered address of 2300 South 57th Street, Suite 11, Fort Smith, Arkansas 72903. *See* GX A. His registration expires on December 31, 2011. *Id.*

On April 7, 2009, the Arkansas State Medical Board (Arkansas Board) issued an Emergency Order of Suspension and Notice of Hearing charging Registrant with violations of the Arkansas Medical Practices Act, including that he violated a statute or rule governing the practice of medicine by a medical licensing authority or agency of another State. *See* GX B, at 1 (citing Ark. Code Ann. § 17–95–409(a)(2)(r)).[3] More specifically, the Arkansas Board charged that following a hearing, on March 31, 2009, the Oklahoma Board of Medical Licensure and Supervision found that Registrant had violated numerous provisions of the Oklahoma Statutes and Administrative Code and was guilty of Unprofessional Conduct; the Oklahoma Board thus revoked his Oklahoma medical license. *Id.* at 2 (citations omitted). The Arkansas Board thus suspended Registrant's license to practice medicine ''on an emergency basis, pending a disciplinary hearing * * * or further orders of the Board.'' *Id.* at 3.

Registrant subsequently allowed his Arkansas medical license to expire; his license remains in inactive status as of the date of this order. GX C. I therefore find that Registrant is currently without authority to dispense controlled substances under the laws of the State in which he is registered with DEA.

Discussion

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle controlled substances in the ''jurisdiction in which he practices'' in order to maintain a DEA registration. *See* 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 distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice''). *See also 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.''). As these provisions make plain, possessing authority under state law to handle controlled substances is an essential condition for obtaining and maintaining a DEA registration.

The CSA further authorizes the Agency to revoke a registration ''upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances.'' 21 U.S.C. 824(a)(3). Moreover, DEA has consistently held that revocation of a registration is warranted whenever a practitioner's state authority to dispense controlled substances has been suspended or revoked, and has done so even when a practitioner's state authority has been summarily suspended and the State has yet to provide the practitioner with a hearing to challenge the State's action and at which he may ultimately prevail. *See Robert Wayne Mosier,* 75 FR 49950 (2010) (''revocation is warranted * * * even in those instances where a practitioner's state license has only been suspended, and there is the possibility of reinstatement''); *accord Bourne Pharmacy,* 72 FR. 18273, 18274 (2007). Finally, because holding state authority is a statutory requirement for registration as a practitioner, *see* 21 U.S.C. 802(21) and 823(f), DEA has held that revocation is warranted even when a registrant has merely allowed his registration to expire. *James Stephen Ferguson,* 75 FR 49994, 49995 (2010); *Mark L. Beck,* 64 FR 40899, 40900 (1999). *See also Anne Lazar Thorn,* 62 FR 12847, 12848 (1997) (''the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather, it is whether the Respondent is currently authorized to handle controlled substances'').

As found above, on April 7, 2010, the Arkansas State Medical Board suspended Registrant's state medical license. Moreover, his Arkansas license is now expired and in inactive status. Because Registrant is without authority to dispense controlled substances in Arkansas, the State in which he holds the DEA registration which is the subject of this proceeding, he is not entitled to maintain the registration. *See* 21 U.S.C. 802(21), 823(f), 824(a)(3). Accordingly, Registrant's registration will be revoked and any pending application will be denied.

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, BK9514375, issued to Robert Leigh Kale, M.D., be, and it hereby is, revoked. I further order that any pending application of Robert Leigh Kale, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[4]

Dated: July 27, 2011.

Michele M. Leonhart,

Administrator.

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BILLING CODE 4410–09–P

[2] To make clear, however, the use of e-mail to serve an Order to Show Cause is acceptable only after traditional methods of service have been tried and been ineffective.

[3] Under Arkansas law, the ''Board may revoke an existing license, impose penalties as listed in § 17–95–410, or refuse to issue a license in the event the holder or applicant * * * has committed any of the acts or offenses defined in this section to be unprofessional conduct.'' Ark. Code Ann. § 17–95–409(a)(1). The statute further provides that ''[t]he words 'unprofessional conduct' as used in the Arkansas Medical Practices Act, § 17–95–201 *et seq.,* § 17–95–301 *et seq.,* and § 17–95–401 *et seq.,* mean * * * [h]aving been found in violation of a statute or a rule governing the practice of medicine by a medical licensing authority or agency of another state.'' *Id.* § 17–95–409(a)(2)(r).

[4] For the same reasons cited by the Arkansas Board as warranting its Emergency Order of Suspension, I find that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Powered Industrial Trucks Standard

ACTION: Notice.