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Dated: August 1, 2017.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 17-22]

John D. Bray-Morris, M.D.; Decision and Order

On February 15, 2017, the Assistant Administrator, Division of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to John D. Bray-Morris, M.D. (hereinafter, Respondent), of Moriarty, New Mexico. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration No. FB5001538, on the ground that he does not hold authority to dispense controlled substances in New Mexico, the State in which he is registered with the Agency. Show Cause Order, at 1 (citing 21 U.S.C. 824(a)(3)).

With respect to the Agency's jurisdiction, the Show Cause Order alleged that Respondent is registered as a practitioner authorized to dispense controlled substances in schedules II through V, at the registered address of 1108 Route 66, P.O. Box 1520, Moriarty, New Mexico. *Id.* The Show Cause Order alleged that this registration expires on July 31, 2017. *Id.*

As for the substantive basis of the proposed action, the Show Cause Order alleged that on January 13, 2017, "the New Mexico [Medical] Board . . . entered an Order of Immediate Suspension and Notice of Contemplated Action . . . suspending [Respondent's] New Mexico Medical License No. 2003-0404 effective on that same date, which remains in effect until further Order of the Board, and that the Board contemplates additional action of restricting, suspending or revoking [his] license to practice as a physician." *Id.* at 2. The Show Cause Order thus alleged that the Board's "Order prohibits [Respondent] from practicing medicine in the State of New Mexico." *Id.*

The Show Cause Order also alleged that the Board's Order of Immediate Suspension was based on Respondent's

violation of an earlier Board order which suspended his medical license for violations of the State's Medical Practice Act. *Id.* The Show Cause Order alleged that these included "unprofessional or dishonorable conduct, including . . . injudicious prescribing . . . and violation of a drug law." *Id.* The Show Cause Order alleged that the earlier Board order "commanded that [Respondent] abstain completely from the use of mind-altering substances and controlled substances . . . [and] that [he] enroll in and maintain compliance with, [the] New Mexico Monitored Treatment Program for habitual or excessive use of intoxicants or drugs." *Id.* at 2.

The Show Cause Order further alleged that the Board's 2017 Order of Immediate Suspension was based on numerous new allegations, including, *inter alia*, that Respondent "resumed the personal and unlawful use of opioid drugs" and that he "willfully thwarted the Board's drug screenings." *Id.* The allegations also include that he "prescribed large and varied amounts of controlled substances to patients without adequate medical justification," engaged in "injudicious and non-therapeutic prescribing of controlled substances," "failed to screen patients for substance abuse disorders," "diverted controlled substances that [he] prescribed . . . to patients from those patients for [his] personal use," and "falsified" medical records "to justify the prescribing of controlled substances." *Id.*

The Show Cause Order thus alleged that pursuant to the Board's Order, Respondent is "not permitted to practice medicine in New Mexico" and therefore "lack[s] authority to handle controlled substances in" the State. *Id.* at 3. The Show Cause Order also asserted that Respondent's "lack of authority to handle controlled substances in New Mexico constitutes grounds to revoke [his] DEA [r]egistration." *Id.* at 3 (citing 21 U.S.C. 802(21) and 824(a)(3)).

The Show Cause Order notified Respondent of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, and the procedure for electing either option. Show Cause Order, at 3-4 (citing 21 CFR 1301.43). Finally, the Order notified Respondent of his right to submit a corrective action plan. *See* 21 U.S.C. 824(c)(2)(C).

On February 22, 2017, a DEA Diversion Investigator assigned to the Albuquerque District Office personally served the Show Cause Order on Respondent. Gov. Mot. for Summ. Disp., at GX D, at 1-2. Thereafter, on March

23, 2017, Respondent, through his counsel, requested a hearing on the allegations and a stay pending resolution of the New Mexico Medical Board matter, then scheduled for May 17-19, 2017. *See* Resp. Hrng. Req. The matter was placed on the docket of the Office of Administrative Law Judges, and assigned to Chief Administrative Law Judge John J. Mulrooney, II (hereinafter, CALJ).

On March 23, 2017, the CALJ ordered the Government to "file proof of service" as well as evidence to support the lack of state authority allegation, as well as any motion for summary disposition, any motion challenging the timeliness of the hearing request, and any response to Respondent's stay request by March 31, 2017 at 2 p.m. *See* Order Directing the Filing of Government Evidence of Lack of State Authority Allegation and Briefing Schedule. The CALJ's order also directed that, in the event the Government filed a motion for summary disposition or a motion challenging the timeliness of his hearing request, Respondent was to file any response by April 10, 2017 at 2 p.m. *Id.*

On March 31, 2017, the Government filed its Motion for Summary Disposition. *See* Gov. Mot. for Summ. Disp. As support for its Motion, the Government provided a copy of Respondent's Certificate of Registration showing that he is registered in New Mexico, a certified copy of the New Mexico Medical Board's Order of Immediate Suspension and Notice of Contemplated Action (Jan. 13, 2017), a printout of Respondent's licensing status as of March 25, 2017 from the Board's Web site, and a Declaration from a Diversion Investigator (DI). *Id.* at Exhibits A-D. Based on the suspension of his medical license by the New Mexico Medical Board, the Government moved for summary disposition and a recommendation by the ALJ that Respondent's DEA practitioner's registration be revoked and that any pending applications for a registration in New Mexico be denied. Mot. for Summ. Disp., at 8. The Government also requested that the CALJ deny Respondent's requests for a hearing and a stay of the proceeding. *Id.*

On April 10, 2017, Respondent filed his reply, requesting that the ALJ deny the Government's motion and stay the matter until after the Board hearing. Respondent's Reply, at 1. While Respondent admitted that his license to practice medicine in New Mexico had been suspended, he stated that "he has not yet had an opportunity to challenge the allegations in the . . . Order" and that "a due process hearing [was]

scheduled for May 17–18, 2017.” *Id.* Respondent stated that he “contests many of the allegations contained in the Summary Suspension Order and the Notice of Contemplated Action” and that “it will not be appropriate or proportional discipline for the Medical Board to uphold the suspension or to revoke his license.” *Id.* at 1–2.

Respondent also argued that “[t]he plain language of Section 824(a)(3) provides that the loss of state authority constitutes a discretionary, not mandatory, basis for revocation.” *Id.* at 2. He further argued that “a stay . . . would afford [him] with his due process right to be heard in a meaningful manner in the State . . . proceeding.” *Id.* at 2 (citation omitted). He also argued that the Government would not suffer any prejudice should a stay be granted because “the Medical Board proceeding will be completed within the next few months.” *Id.* And finally, he contended that “[i]f . . . [he] prevailed in his administrative hearing in front of the Medical Board, it would be contrary to due process considerations and judicial economy to then force [him] to reapply for his” DEA registration. *Id.*

On April 11, 2017, the CALJ granted the Government’s motion and recommended that Respondent’s registration be revoked. Order Denying The Respondent’s Request For A Stay; Granting The Government’s Motion For Summary Disposition; And Recommended Rulings, Findings Of Fact, Conclusions Of Law, And Decision of the Administrative Law Judge (hereinafter, R.D.), at 4–5.

Denying Respondent’s request for a stay, the CALJ noted that the Agency has repeatedly held that “revocation is warranted even where 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.” *Id.* at 3 (quoting *Kamal Tiwari*, 76 FR 71604, 71606 (2011)). The CALJ also explained that “[e]ven when the Respondent is actively engaged in appealing a temporary decision, the Agency has noted that ‘[i]t is not DEA’s policy to stay [administrative] proceedings . . . while registrants litigate in other forums,’ *id.* (quoting *Newcare Home Health Servs.*, 72 FR 42126, 42127 n.2), and that a stay “is ‘unlikely to ever be justified’ due to ancillary proceedings.” *Id.* at 3–4 (citing *Grider Drug #1 & Grider Drug #2*, 77 FR 44070, 44104 n.97 (2012)).¹

¹ The CALJ also cited *Odetta L. Campbell*, 80 FR 41062, 41064 (2015), which he characterized as

The CALJ also granted the Government’s motion for summary disposition. *Id.* at 6. According to the CALJ, “[d]espite the discretionary language set forth in [section] 824(a)(3) and highlighted by the Respondent . . . DEA has long held that possession of authority under state law to dispense controlled substances is not only a prerequisite to obtaining a DEA registration but also an essential condition for maintaining it.” *Id.* at 4 (citing cases). The CALJ then explained that “[t]he basis for the Agency’s position lies with two other statutes in the Controlled Substances Act (CSA) which requires that, in order to obtain or maintain a DEA registration, a practitioner must be authorized to handle controlled substances in the state in which he practices.” *Id.* (citing 21 U.S.C. 823(f) and 802(21)). The CALJ then explained that “[b]ecause, in the Agency’s view, ‘possessing authority under state law to handle controlled substances is an essential condition for holding a DEA registration,’ the Agency has consistently held that ‘the CSA requires the revocation of a registration issued to a practitioner who lacks [such] authority.’” *Id.* at 5 (citations omitted). Because there is “no dispute . . . that . . . Respondent currently lacks state authority to handle controlled substances in New Mexico due to the Board’s [Jan. 13, 2017] Order,” the CALJ held that “he is not entitled to maintain his . . . registration” and granted the Government’s motion for summary disposition. *Id.* at 6.

Neither party filed exceptions to the CALJ’s Recommended Decision. Thereafter, the record was forwarded to my Office for Final Agency Action. Having considered the record and the Recommended Decision, I adopt the CALJ’s recommendation that I revoke Respondent’s registration.² I make the following factual findings.

“holding revocation proceedings in abeyance at the post-hearing adjudication level for a lengthy period pending the resolution of both criminal fraud charges and concurrent state administrative proceedings against the respondent.” R.D. at 4. However, before the hearing was even held, Campbell allowed her registration to expire and she submitted an application only after she received a largely favorable decision from an ALJ. Thus, the matter did not involve a revocation, but rather, an application. Moreover, had Campbell been convicted of health care fraud, she would have been subject to mandatory exclusion from federal health care programs and her application would have been subject to denial on that basis.

² I also adopt the ALJ’s ruling denying Respondent’s motion for a stay of the proceeding. As for Respondent’s contention that a stay of this proceeding “would afford [him] with his due process right to be heard in a meaningful manner in the State . . . proceeding,” Resp.’s Reply, at 2, the New Mexico Board has an obligation to provide him with Due Process regardless of whether a stay

Findings

Respondent holds DEA Certificate of Registration No. FB5001538, pursuant to which he is authorized to dispense controlled substances in schedules II–V as a practitioner, at the registered address of 1108 Route 66, P.O. Box 1520, Moriarty, New Mexico. Mot. for Summ. Disp., at GX A. His registration does not expire until July 31, 2017. *Id.*

On January 13, 2017, the New Mexico Medical Board issued an Order of Immediate Suspension and Notice of Contemplated Action to Respondent, suspending his license to practice medicine. Mot. for Summ. Disp., Exhibit B, at 1–8. According to Respondent, a Board hearing was scheduled for May 17–18, 2017. Resp. Reply, at 1. However, subsequent to the CALJ’s issuance of his decision, Respondent has submitted no evidence showing that his license had been reinstated, and according to the Board’s Web site of which I take official notice, Respondent’s license to practice medicine in New Mexico remains suspended as of the date of this Order. See Respondent’s Reply, at 1, *see also* Board Web site at <http://cgi.docboard.org/cgi-shl/nhayer.exe>.³

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (CSA), “upon a finding that the registrant . . . has had his State license . . . suspended [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.” With respect to

is granted in this proceeding. See U.S. CONST., amend. XIV, § 1. As for his further contention that if he “prevailed . . . in front of the Medical Board, it would be contrary to due process considerations and judicial economy to . . . force [him] to reapply for his” DEA registration, all DEA registrants (including those who have never been subject to a DEA Show Cause proceeding) are required to periodically reapply for their registration; he also provides no authority for the notion that there is a property interest under the Due Process Clause in not having to periodically reapply for a registration. I thus reject his contention that he was entitled to a stay.

³ In accordance with the Administrative Procedure Act (APA), an agency “may take official notice of facts at any stage in a proceeding—even in the final decision.” U.S. Dept. of Justice, Attorney General’s Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA’s regulations, Respondent is “entitled on timely request to an opportunity to show to the contrary.” 5 U.S.C. 556(e); see also 21 CFR 1316.59(e). To allow Respondent the opportunity to refute the facts of which I take official notice, Respondent may file a motion for reconsideration within 15 calendar days of the date of service of this Order which shall commence on the date this Order is mailed.

a practitioner, DEA has also long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper*, 76 FR 71371 (2011), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); *Frederick Marsh Blanton*, 43 FR 27616 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined "the term 'practitioner' [to] mean[] a . . . physician . . . or other person 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." 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that "[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices." 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the Act, DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the State in which he practices medicine. *See, e.g., Hooper*, 76 FR at 71371–72; *Sheran Arden Yeates*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci*, 58 FR 51104, 51105 (1993); *Bobby Watts*, 53 FR 11919, 11920 (1988); *Blanton*, 43 FR at 27616.

Moreover, revocation is warranted even when a state board has resorted to summary process in suspending a practitioner's dispensing authority and the state has yet to provide the practitioner with a hearing to challenge the board's action. This is so "because 'the controlling question' in a proceeding brought under 21 U.S.C. 824(a)(3) is whether the holder of a DEA registration "is currently authorized to handle controlled substances in the [S]tate.'" *Gentry Reeves Dunlop*, 82 FR 8432, 8433 (2017) (quoting *Hooper*, 76 FR at 71371 (quoting *Anne Lazar Thorn*, 62 FR 12847, 12848 (1997))); *see also Bourne Pharmacy*, 72 FR 18273, 18274 (2007); *Wingfield Drugs*, 52 FR 27070, 27071 (1987). Thus, it is of no consequence that the New Mexico Board has employed summary process in suspending Registrant's state license. What is consequential is that

Respondent is no longer currently authorized to dispense controlled substances in the State in which he is registered.

In his reply to the Government's Motion for Summary Disposition, Respondent argued that the authority contained in 21 U.S.C. 824(a)(3) is a "discretionary, not mandatory basis for revocation." Respondent's Reply, at 2. While Respondent cites *James Alvin Chaney*, 80 FR 57391 n.1 (2015), as support for his contention, footnote one of the Agency's Decision in *Chaney* addressed whether the respondent in that case had an active registration. Moreover, Respondent's contention that the Agency's sanction authority in cases involving a practitioner's loss of his state controlled substance dispensing authority remains discretionary, was squarely addressed and rejected in footnote 2 of the *Chaney* decision, as it has been in countless Agency decisions. *See Chaney*, 80 FR 57391 n.2; *see also, e.g., Charles Szyman*, 81 FR 64937, 64938 n.1 (2016); *see also Rezik A. Saqer*, 81 FR 22122, 22127 (2016); *James L. Hooper*, 76 FR 71371 (2011). And the Agency's rule has been upheld by two courts of appeals. *See Hooper v. Holder*, 481 Fed. Appx. 826, 828 (4th Cir. 2012) ("[b]ecause sections 823(f) and 802(21) make clear that a practitioner's registration is dependent upon the practitioner having state authority to dispense controlled substances, the [Administrator's] decision to construe section 824(a)(3) as mandating revocation upon suspension of a state license is not an unreasonable interpretation of the CSA"); *Maynard v. DEA*, 117 Fed. Appx. 941, 944–45 (5th Cir. 2004) (rejecting contention that DEA could not revoke practitioner's registration where state board's disciplinary panel "merely temporarily suspended" medical license "without notice"). I will therefore order that Respondent's registration be revoked and that any pending application be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration No.FB5001538, issued to John D. Bray-Morris, M.D., be, and it hereby is, revoked. Pursuant to the authority vested in me by 21 U.S.C. 823(f), I further order that any pending application of John D. Bray-Morris, M.D., to renew or modify his registration, or for any other registration in the State of New Mexico, be, and it

hereby is, denied. This Order is effective immediately.⁴

Dated: July 27, 2017.

Chuck Rosenberg,

Acting Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Marcia L. Sills, M.D.; Decision and Order

On January 21, 2015, the Deputy Assistant Administrator, of the then Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Marcia L. Sills, M.D. (hereinafter, Respondent). The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration AS1456361, pursuant to which she is authorized to dispense controlled substances in schedules II through V, at the registered location of 2741 NE 34 St., Fort Lauderdale, Florida. GE 1, at 6. As grounds for the proposed action, which also includes the denial of any pending application for renewal and any other applications for new DEA registrations, the Show Cause Order alleged that Respondent's "continued registration is inconsistent with the public interest." *Id.* (citing 21 U.S.C. 824(a)(4) and 823(f)).

With respect to the Agency's jurisdiction, the Show Cause Order alleged that while Respondent's registration was due to expire on February 28, 2014, she "submitted a timely renewal" application. *Id.* The Order thus asserted that her "registration continues in effect pursuant to 5 U.S.C. 558(c)." *Id.*

As for the substantive grounds for the proceeding, the Show Cause Order set forth numerous allegations that between November 2011 and July 2012, Respondent violated Florida and Federal controlled substances laws in her prescribing of controlled substances to an undercover officer and seven other patients. *Id.* at 6–10. With respect to the undercover officer, the Order alleged that on both May 31, 2012 and July 16, 2012, Respondent issued prescriptions to him for both oxycodone 30 mg, a schedule II controlled substance, and clonazepam, a schedule IV controlled substance, which were not for a

⁴ For the same reasons that led the New Mexico Board to summarily suspend Respondent's medical license, I find that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.