

laws of the state in which he does business. *See Scott Sandarg, D.M.D.*, 74 Fed. Reg. 17,528 (DEA 2009); *David W. Wang, M.D.*, 72 Fed. Reg. 54,297 (DEA 2007); *Sheran Arden Yeates, M.D.*, 71 Fed. Reg. 39,130 (DEA 2006); *Dominick A. Ricci, M.D.*, 58 Fed. Reg. 51,104 (DEA 1993); *Bobby Watts M.D.*, 53 Fed. Reg. 11,919 (DEA 1988).

Summary disposition in a DEA revocation 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 Fed. Reg. 33,193 (DEA 2005); *Roger A. Rodriguez, M.D.*, 70 Fed. Reg. 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 Fed. Reg. 5661 (DEA 2000); *see also Philip E. Kirk, M.D.*, 48 Fed. Reg. 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, and Respondent concedes, that Respondent's Indiana controlled substance registration is suspended. This allegation is confirmed by the January 3, 2012 letter from the Board to Respondent. 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 Illinois.

## B. Respondent's Right to Due Process

"[W]here the state has revoked a registrant's license to handle controlled substances, summary revocation of the registrant's DEA registration is only appropriate if the registrant will be afforded a state hearing on the merits of the state revocation or suspension." *Schultz*, 76 Fed. Reg. at 78,697; *cf. Odette Louise Campbell, M.D.*, No. 09-62 (DEA May 11, 2010) (order remanding for further proceedings where it did not appear that state law provided registrant with opportunity to challenge merits of state suspension based solely upon DEA immediate suspension).

In the present case, the Board suspended Respondent's state controlled substance registration based upon Ind. Code § 35-48-3-5(e), which states:

(e) If the Drug Enforcement Administration terminates, denies, suspends or revokes a federal registration for the manufacture, distribution, or dispensing of controlled substances, a registration issued by the board under this chapter is automatically suspended.

Section 35-48-3-5(f) further provides, however, that "[t]he board may reinstate a registration that has been suspended under subsection (e), after a hearing, if the board is satisfied that the applicant is able to manufacture, distribute, or dispense controlled substances with reasonable skill and safety to the public \* \* \*." Thus, Respondent is entitled to a hearing to challenge the Board's automatic suspension of his state controlled substance registration. Furthermore, not only has Respondent requested such a hearing, but he concedes that the Board has confirmed that he will be afforded such a hearing.

Because Respondent is afforded adequate due process under state law, and 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 Fed. Reg. 39,130, 39,131 (DEA 2006), I conclude that summary disposition is appropriate. *See Kamal Tiwari, M.D.*, 76 Fed. Reg. 71,604 (DEA 2011) (summarily revoking the respondents' DEA registrations for lack of state authority where the state summarily suspended the registrants' state controlled substance registrations based upon DEA's immediate suspension, noting that the registrants "are entitled to a hearing to challenge the underlying allegations before the State board"). It is therefore

**ORDERED** that the hearing in this case, scheduled to commence on February 21, 2012, is hereby **CANCELLED**; and it is further

**ORDERED** that all proceedings before the undersigned are **STAYED** pending the Agency's issuance of a final order.

## Recommended Decision

I grant the Government's Motion for Summary Disposition and recommend that Respondent's DEA COR BR9738595 be revoked and any pending applications for renewal or modification be denied.

Dated: January 27, 2012

**Timothy D. Wing,**

*Administrative Law Judge.*

[FR Doc. 2012-12119 Filed 5-17-12; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 12-19]

### Richard H. NG, D.O.; Decision and Order

On December 23, 2011, Administrative Law Judge (ALJ) Timothy D. Wing issued the attached recommended decision. Neither party filed exceptions to the decision. Having reviewed the entire record, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended Order.

To make clear, DEA's longstanding rule that a practitioner may not hold a registration if he lacks authority under state law to dispense controlled substances and that the loss of such authority subjects a practitioner's registration to revocation is not based solely on 21 U.S.C. 824(a)(3), which is a grant of authority to either suspend or revoke a registration "upon a finding" that a registrant "has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the \* \* \* dispensing of controlled substances." As explained in numerous cases, DEA's rule derives primarily from two other provisions of the CSA, 21 U.S.C. 802(21), which defines the term "practitioner," and 21 U.S.C. 823(f), which sets forth the requirements for obtaining a registration as a practitioner.

More specifically, the CSA defines "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). Consistent with this definition, Congress, in setting the requirements for obtaining a practitioner's registration, provided 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). Accordingly, because one cannot obtain a practitioner's registration unless one holds authority under state law to dispense controlled substances, and because where a

registered practitioner's state authority has been revoked or suspended, the practitioner no longer meets the statutory definition of a practitioner, DEA has repeatedly 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 both obtaining and maintaining a practitioner's registration. *See* ALJ at 4 (citing cases).<sup>1</sup> So too, "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 at which he may ultimately prevail." *Kamal Tiwari, M.D.*, 76 FR 71604, 71606 (2011); *see also Bourne Pharmacy, Inc.*, 72 FR 18273, 18274 (2007); *Anne Lazar Thorn*, 62 FR 12847 (1997). Accordingly, I adopt the ALJ's recommended order.

## 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), I order that DEA Certificate of Registration AN1255733, issued to Richard H. Ng, D.O., be, and it hereby is, revoked. I further order that any pending application of Richard H. Ng, D.O., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.<sup>2</sup>

Dated: May 4, 2012.

**Michele M. Leonhart,**

*Administrator.*

*Jonathan P. Novak, Esq., for the*

*Government*

*Glen D. Crick, Esq., Lillian Walanka,*

*Esq.,*

*Michael D. Monico, Esq., Jacqueline*

*Jacobson, Esq., for the Respondent*

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

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication governed by the Administrative Procedure Act, 5 U.S.C. 551 et seq., to determine whether a practitioner's Certificate of Registration (COR) with the Drug Enforcement

Administration (DEA, Government or Agency) should be revoked. Without this registration, Richard H. Ng, D.O. (Respondent) would be unable to lawfully possess, prescribe, dispense or otherwise handle controlled substances.

## I. Procedural Posture

On November 18, 2011, the Deputy Assistant Administrator, DEA, issued an Order to Show Cause (OSC) to Respondent. The OSC provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR AN1255733, pursuant to 21 U.S.C. 824(a)(3)-(4) and 823(f), alleging that Respondent's continued registration is inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f), and that Respondent's medical license in the State of Illinois has been suspended.

On December 20, 2011, I issued an Order for Statements Addressing Respondent's State Authority and Order for Prehearing Statements (Order).

On December 20, 2011, the Government filed a Motion for Summary Disposition. On December 21, 2011, I stayed the proceedings pending resolution of the Government's motion. On December 22, 2011, Respondent filed a Motion in Opposition to DEA'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 October 25, 2011, the Illinois Department of Financial and Professional Regulation (IDFPR) executed an order summarily suspending Respondent's medical license, effective immediately. (Gov't Mot. Summ. Disp. at 1.) The Government contends that such state authority is a necessary condition for maintaining a DEA COR and, therefore, asks that I grant its motion and forward the matter to the Administrator.<sup>1</sup> (*Id.* at 1-2.) In support of its motion, the Government cites Agency precedent and attaches the Notice of Temporary

Suspension and Order entered by the IDFPR as Exhibit A.

### B. Respondent

Although Respondent concedes that his "Illinois Controlled Substances Registration is presently in suspended status," he argues that the suspension is temporary in nature pending an evidentiary hearing before the IDFPR. (Resp't Mot. in Opp'n at 1.) Respondent notes that an evidentiary hearing will be scheduled "in the very near future," and he believes that his license will be restored to active status. (*Id.* at 1-2.) In support of his motion, Respondent cites *Stuart A. Bergman, M.D.*, 70 Fed. Reg. 33,193 (DEA 2005), and argues that the facts of this case similarly warrant a delay in ruling on the Government's motion until after the conclusion of the evidentiary hearing before the IDFPR. (*Id.* at 2.)

## III. Discussion

At issue is whether Respondent may maintain his DEA COR given that Illinois, the State in which Respondent maintains his DEA COR, has suspended Respondent's Physician and Surgeon License and Controlled Substance License.

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 revocation 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." *Bergman*, 70 FR at 33,193; *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*

<sup>1</sup> This citation is to the slip opinion as issued by the ALJ.

<sup>2</sup> The suspension order of the Illinois Department of Financial and Professional Regulation found that "the public interest, safety and welfare imperatively require emergency action" and that "Respondent's actions constitute an imminent danger to the public." *Department of Fin. & Prof. Reg. v. Richard H. Ng, D.O.*, No. 2011-08881 (Ill. Dep't of Fin. & Prof. Reg. Oct. 25, 2011) (order imposing temporary suspension). Accordingly, I likewise conclude that the public interest necessitates that this order be effective immediately. *See* 21 CFR 1316.67.

<sup>1</sup> The OSC provides Respondent with an opportunity to show cause "as to why DEA should not revoke" Respondent's DEA COR. (OSC at 1.) The OSC then factually alleges that Respondent's DEA COR "expired by its terms on October 31, 2011," and that Respondent filed a timely request to renew his registration. (*Id.*) The Government requests that I "forward the matter to the Administrator for a Final Order with a recommendation that Respondent's DEA application for registration be denied." (Gov't Mot. Summ. Disp. at 2.) For purposes of this Recommended Decision, I will treat the Government's request as one to revoke Respondent's DEA COR and deny any pending applications for renewal or modification.

*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, and Respondent concedes, that Respondent's Illinois license to practice medicine and handle controlled substances is suspended. This allegation is confirmed by Government Exhibit A. 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 Illinois. I decline to delay ruling on the Government's motion, particularly in light of the fact that Respondent does not appear to have a scheduled hearing date before the IDFP. *Compare Bergman*, 70 FR at 33,193 (noting that the ALJ delayed ruling on the Government's motion where the respondent had an evidentiary hearing scheduled before the state board). 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 conclude that summary disposition is appropriate. It is therefore

*Ordered* that the hearing in this case, scheduled to commence on March 6, 2012, is hereby *cancelled*; and it is further

*Ordered* that all proceedings before the undersigned are *stayed* pending the Agency's issuance of a final order.

#### Recommended Decision

I grant the Government's Motion for Summary Disposition and recommend that Respondent's DEA COR AN1255733 be revoked and any pending applications for renewal or modification be denied.<sup>2</sup>

Dated: December 23, 2011.

**Timothy D. Wing,**

*Administrative Law Judge.*

[FR Doc. 2012-12121 Filed 5-17-12; 8:45 am]

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<sup>2</sup> Notably, Respondent requests that I recommend the immediate suspension of his registration, rather than revocation, citing 21 U.S.C. 824(a)(4). (Resp't Mot. in Opp'n at 3.)

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 12-30]

#### James Edgar Lundeen, Sr., M.D.; Dismissal of Proceeding

On December 19, 2011, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to James Edgar Lundeen, Sr., M.D. (Respondent), of Uniontown, Ohio. The Order proposed the revocation of Respondent's DEA Certificate of Registration as a practitioner, and the denial of any pending application to renew or modify the registration, on the ground that Respondent does not have authority under Ohio law to practice medicine or dispense controlled substances. Show Cause Order at 1.

Following service of the Show Cause Order, Respondent requested a hearing. Thereafter, the Government moved for summary disposition; Respondent opposed the motion. On February 22, 2012, the ALJ granted the Government's motion, finding that there was no dispute as to the material fact that Respondent does not possess authority under Ohio law to dispense controlled substances and that he was therefore not entitled to hold his DEA registration. ALJ Dec. at 4-7. The ALJ thus recommended that Respondent's registration be revoked and that any pending application to renew or modify his registration be denied. *Id.* at 8. Neither party filed exceptions to the ALJ's decision and on March 20, 2012, the ALJ forwarded the record to me for Final Agency Action.

Upon review of the record, it was noted that the Government had alleged in the Show Cause Order that Respondent's registration was due to expire on March 31, 2012. Show Cause Order at 1. The record, however, contained no evidence as to whether Respondent had filed a renewal application.<sup>1</sup> Because in the absence of a timely renewal application, Respondent's registration would expire, *see* 5 U.S.C. 558(c), pursuant to 5 U.S.C. 556(e) and 21 CFR 1316.59, I have taken official notice of Respondent's registration record with the Agency.<sup>2</sup>

<sup>1</sup> Nor does the record contain a copy of Respondent's Registration or any other evidence establishing the Agency's jurisdiction. Henceforth, the ALJs should ensure that such evidence is submitted for the record prior to acting upon any dispositive motion.

<sup>2</sup> In accordance with the Administrative Procedure Act (APA), an agency "may take official notice of facts at any stage in a proceeding-even in

According to this record, Respondent has not filed a renewal application. Accordingly, I find that Respondent's registration has expired.

Under DEA precedent, "if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *Ronald J. Riegel*, 63 FR 67132, 67133 (1998); *see also Thomas E. Mitchell*, 76 FR 20032, 20033 (2011). Moreover, in the absence of an application (whether timely filed or not), there is nothing to act upon. Accordingly, because Respondent has allowed his registration to expire and has not filed any application, this case is now moot and will be dismissed.<sup>3</sup>

#### Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b), I hereby order that the Order to Show Cause issued to James Edgar Lundeen, Sr., M.D., be, and it hereby is, dismissed. This order is effective immediately.

Dated: May 4, 2012.

**Michele M. Leonhart,**  
*Administrator.*

[FR Doc. 2012-12118 Filed 5-17-12; 8:45 am]

**BILLING CODE 4410-09-P**

## NATIONAL SCIENCE FOUNDATION

### Proposal Review Panel for Materials Research; 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:* Site visit review of the Materials Research Science and Engineering Center (MRSEC) at the University of Chicago by the Division of Materials Research (DMR) #1203.

*Dates & Times:* June 6, 2012; 6:00 p.m.-8:30 p.m.

June 7, 2012; 7:15 a.m.-8:30 p.m.

June 8, 2012; 7:15 a.m.-3:00 p.m.

*Place:* University of Chicago, Chicago, IL.

*Type of Meeting:* Part open.

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 fifteen calendar days of service of this order which shall commence on the date this order is mailed.

<sup>3</sup> While the Show Cause Order will be dismissed, under 21 U.S.C. 823(f), Respondent is not entitled to be registered until he is again "authorized to dispense \* \* \* controlled substances under the laws of the State in which he practices."