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DEPARTMENT OF JUSTICE

DRUG ENFORCEMENT ADMINISTRATION

EMILIO LUNA, M.D.
DECISION AND ORDER

On July 12, 2011, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Emilio Luna, M.D. (Registrant), of Phoenix, Arizona. The Show Cause Order proposed the revocation of Registrant's DEA Certificate of Registration as a practitioner, on the grounds that he does not possess authority to handle controlled substances in Arizona, the State in which he is registered with DEA, and that his continued registration is inconsistent with the public interest. Show Cause Order at 1 (citing 21 U.S.C. § 824(a)(3) & (4)).

More specifically, the Show Cause Order alleged that on September 1, 2010, the Federal Bureau of Investigation arrested and charged Registrant with distributing child pornography in interstate commerce. Id. The Order further alleged that on September 3, 2010, the Arizona Medical Board issued an Interim Order for Practice Restriction and Consent Order, under which Registrant is prohibited "from prescribing any form of treatment including prescription medications." Id. 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 procedures for doing either, and the consequence for failing to do either. Id. at 2 (citing 21 CFR 1301.43).

The Government initially attempted to serve the Show Cause Order on Registrant by certified mail, return receipt requested, addressed to him at his registered location. However, the mailing was returned to the Agency and stamped "Returned to Sender Attempted Not Known"; in addition, the word "Refused" was handwritten on the envelope. GX 4. Simultaneously, the

Show Cause Order was e-mailed to Registrant at the e-mail address he had previously provided to the Agency. GX 5. Thereafter, the Government did not receive back either an error or undeliverable message. See Gov. Statement Re: Service of the Order to Show Cause. In addition, several weeks later, Diversion Investigators attempted to personally serve Registrant at his registered location. GX 6, at 1. However, the DIs were told that Registrant "was not present and no longer practices at the clinic." Id.

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

[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

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

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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.

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). Even assuming that the Government's attempts to serve Registrant by certified mail and personal service[2] did not comply with the Supreme Court's instruction, 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). While courts have recognized that the 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.[3] See Robert Leigh Kale, 76 FR 48898, 48899-900 (2011).

Having found that the service of the Show Cause Order was constitutionally adequate, I further find that thirty days have now passed since service of the Order and neither Registrant, nor any one purporting to represent him, has either requested a hearing or submitted a written statement in lieu of a hearing. I therefore find that Registrant has waived his right to a hearing or

[2] As for the use of mail, after Jones, it seems relatively clear that when certified mail is returned unclaimed, in most cases, the Government can satisfy its constitutional obligation by simply re-mailing the Show Cause Order by regular first class mail. Jones, 547 U.S. at 234-35. It also seems doubtful that any court would hold that going to the clinic where Registrant formerly practiced would 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, 547 U.S. at 226 (quoting Mullane, 339 U.S. at 314). At that point, nearly a year had passed since the State Board had prohibited Registrant from practicing medicine and it was a widely publicized fact that Registrant was a fugitive from justice and wanted by the FBI.

[3] While in Kale, I explained that 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, given Registrant's status as a fugitive and the likelihood that the traditional methods would (and ultimately did) prove futile, I conclude that the timing of the Government's use of e-mail service does not constitute prejudicial error.

to submit a written statement in lieu of a hearing, see 21 CFR 1301.43(d), and issue this Decision and Final Order based on relevant evidence contained in the Investigative Record submitted by the Government. Id. 1301.43(d) & (e). I make the following additional findings of fact.

FINDINGS

Registrant is the holder of DEA Certificate of Registration BL5670686, which authorizes him to dispense controlled substances in schedule II through V at the registered location of 4137 N. 108th Ave., Phoenix, Arizona 85037. GX 1. Registrant's registration does not expire until March 31, 2013. Id. At the time this proceeding was commenced, Registrant was also the holder of an allopathic medicine license issued by the Arizona Medical Board. GX 2, at 1.

On September 1, 2010, Registrant was arrested by the Federal Bureau of Investigation and charged with distributing child pornography in interstate commerce. Id.; see also GX 6, at 2. The next day, the State Board received word of the arrest and concluded that "if Respondent were to practice medicine in Arizona there would be a danger to the public health and safety." Id. at 2. The following day, the Board's Executive Director and Registrant entered into an Interim Order, pursuant to which Registrant was "not [to] practice clinical medicine or any medicine involving direct patient care, and [wa]s prohibited from prescribing any form of treatment including prescription medications, until [he] applie[d] to the Board and receive[d] permission to do so." Id.

Subsequently, on October 6, 2011, the Board revoked Registrant's medical license. GX 7. I therefore find that Registrant is currently without authority under the laws of Arizona to dispense controlled substances, the State in which he holds his DEA registration.

DISCUSSION

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to dispense 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 practitioner's registration.

Accordingly, DEA has held that revocation of a registration is warranted whenever a practitioner's state authority to dispense controlled substances has been suspended or revoked. David W. Wang, 72 FR 54297, 54298 (2007); Sheran Arden Yeates, 71 FR 39130, 39131 (2006); Dominick A. Ricci, 58 FR 51104, 51105 (1993); Bobby Watts, 53 FR 11919, 11920 (1988). See also 21 U.S.C. § 824(a)(3) (authorizing revocation of 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").

As found above, on September 3, 2010, the Arizona Board issued an Interim Order prohibiting Registrant "from prescribing any form of treatment including prescription medications," GX 2, at 2, and on October 6, 2011, the Board issued an Order revoking his medical license. GX 7, at 4. Accordingly, Registrant is without authority to dispense controlled

substances in the State where he practices medicine and holds his DEA registration, and is therefore no longer entitled to hold his registration. See 21 U.S.C. §§ 802 (21), 823(f), 824(a)(3). Therefore, pursuant to the authority granted under 21 U.S.C. § 824(a)(3), his registration will 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), I order that DEA Certificate of Registration BL5670686, issued to Emilio Luna, M.D., be, and it hereby is, revoked. I further order that any pending application of Emilio Luna, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[4]

Date:
January 17, 2012

Michele M. Leonhart
Administrator

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[4] Based on the findings of the Arizona Board, I conclude that the public interest requires that this Order be made effective immediately. 21 CFR 1316.67.