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DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Richard C. Quigley, D.O.
Decision and Order

On November 13, 2013, I, the Deputy Administrator, Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration (hereinafter OTSC/ISO or Order) to Richard C. Quigley, D.O. (Registrant), of Oscoda, Michigan. The Order, which also sought the revocation of Registrant's DEA Certificate of Registration and the denial of any pending applications to renew or modify his registration, alleged, *inter alia*, that on ten occasions between June 6 and August 30, 2013, Registrant prescribed schedule III controlled substances combining hydrocodone and acetaminophen, to four undercover law enforcement officers, without "conduct[ing] a physical examination or properly assess[ing] the needs of [the] individual[s] for controlled substances." *Id.* at 2-3. The Order thus alleged that Registrant acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing the prescriptions and thus violated both federal and state law. *Id*. (citing 21 CFR 1306.04(a); Mich. Comp. Laws sections 333.7333; 333.7405).[1]

Based on "the egregious and repeated nature of [his] misconduct," the Order further concluded that Registrant's "continued registration during the pendency of these proceedings would constitute an imminent danger to the public health or safety." *Id*. at 4. Accordingly, I ordered that Registrant's registration be immediately suspended. *Id*.

[1] 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 electing either option, and the consequence for failing to do either. GX 1, at 5 (citing 21 CFR 1301.43(a), (c), (d) – (e)).

On November 18, 2013, a DEA Diversion Investigator (DI) attempted to serve the OTSC/ISO on Registrant. GX 2, at 2. However, she "discovered that [Registrant] had abandoned his practice, pulled his children out of school, and fled . . . to Canada." *Id*. Upon inquiring with U.S. Customs and Border Protection, the DI determined that Registrant "and his family entered Canada on September 26, 2013" and had not returned to the United States. *Id*. at 2-3.

Simultaneously with the DI's attempt to effect service, on November 18, 2013, a Legal Assistant with the Office of Chief Counsel mailed the OTSC/ISO to Registrant, at the mailing address he had previously provided the Agency, by certified mail, return receipt requested. GX 8. On November 21, 2013, the legal assistant queried the U.S. Postal Service's Track and Confirm" webpage; the webpage stated: "Moved, Left No Address." *Id*. Thereafter, on November 29, the mailing was returned to the Office of Chief Counsel. *Id*.

On December 2, 2013, the Legal Assistant re-mailed the OTSC/ISO to Registrant by First Class Mail to the same address. *Id*. However, on December 11, 2013, the mailing was returned bearing a label which read: "MOVED LEFT NO ADDRESS, UNABLE TO FORWARD, RETURN TO SENDER." *Id*.

Concurrently with her attempts to effect service by mail, on November 20, the Legal Assistant e-mailed the OTSC-ISO to Registrant at the contact e-mail address he had previously provided to the Agency's Registrant Information Consolidated System (RICS). *Id*. at 2. According to the Legal Assistant, she "received notification from my email program that delivery to the recipient was complete. I did not receive any error message that indicated that the email was not delivered." *Id*.

Based on the above, I find that the Government has complied with its constitutional obligation to "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).

Here, while the Government's efforts to effect service by both hand delivery and mail were not effective, several courts have held that the emailing 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); *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). To be sure, courts have recognized that the use of email 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.

Due process does not, however, require actual notice, *Jones*, 547 U.S. at 226 (quoting *Dusenberry*, 534 U.S. 161, 170 (2002)), but rather, only "'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. (quoting Mullane*, 339 U.S. at 314). Here, I conclude that because the Government's use of traditional means of service was rendered futile by Registrant's having fled the United States, the use of email to effect service at an email address he had previously provided the Agency was "reasonably calculated . . . to apprise

[Registrant] of the pendency of the action" where the Government did not receive back either an error or undeliverable message. *See Emilio Luna*, 77 FR 4829, 4830 (2012).[2] I therefore conclude that the Government has satisfied its obligation under the Due Process Clause to properly serve Registrant.

I further find that more than thirty (30) days have now passed since service of the OTSC/ISO and that neither Registrant, nor anyone 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 to submit a written statement in lieu of a hearing. 21 CFR 1301.43(d). I make the following findings.

FINDINGS

Registrant previously held a DEA Certificate of Registration, pursuant to which he was authorized to dispense controlled substances in schedules II through V as a practitioner at the registered address of 2099 N. US Hwy 23, Oscoda, Michigan. GX 22, at 1. According to the affidavit of the Chief of the DEA Registration and Program Support Section, on March 10, 2014, a renewal notice for this registration was mailed to Registrant. *Id*. However, on April 18, 2014, the notice was returned to DEA headquarters as undeliverable, and on April 30, 2014, this registration expired. Thereafter, on May 7, 2014, DEA sent a delinquent renewal notice to Registrant. *Id*. However, when, as of June 1, 2014, no renewal application had been received, the registration was retired from the DEA computer system. *Id*.

[2] In *Robert Leigh Kale*, 76 FR 48898, 48899-900 (2011), the Administrator 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. While here, the Government emailed the OTSC/ISO before it had determined that mailing would be ineffective, given the information it had obtained that Registrant had fled to Canada, I conclude that the Government was not required to wait for the mail to be returned unclaimed or undeliverable before attempting email service.

Pursuant to 5 U.S.C. 556(e), I take official notice of the fact that Registrant was also previously licensed by the State of Michigan as an osteopathic physician. However, Registrant's medical license expired on December 31, 2013.

The Government represents that it did not seize any controlled substances pursuant to the authority granted by the Immediate Suspension Order. Req. for Final Agency Action, at 12.

Mootness

The Government acknowledges that Registrant's registration expired on April 30, 2014 and that "he did not timely renew." *Id*. Indeed, there is no pending application – whether timely or not – before the Agency. Thus, there is neither an existing registration to revoke nor a pending application to act upon. Under Agency precedent, these findings ordinarily render a show cause proceeding moot. *See, e.g.*, *Ronald J. Riegel*, 63 FR 67132 (1998).

DEA, however, has recognized a limited exception to this rule in cases which commence with the issuance of an immediate suspension order because of the collateral consequences which may attach with the issuance of such a suspension. *See William R. Lockridge*, 71 FR 77791, 77797 (2006). The "collateral consequences" may include the loss of title to any controlled substances that have been seized pursuant to the immediate suspension order, *see* 21 U.S.C. 824(f), harm to reputation, and having to report the suspension on future applications to either this Agency or State Board. *See Lockridge*, 71 FR at 77797.

Here, the Government acknowledges that no controlled substances were seized in this case (indeed, Registrant was already in Canada). Instead, it argues that "DEA has recognized that a final agency action is necessary to address 'harm to reputation' and other adverse collateral consequences that result from the initial suspension of [a] registration." Req. for Final Agency Action, at 12-13 (citing *Lockridge*, 71 FR at 77797 (citing *In re Surrick*, 338 F.3d 224, 230 (3d

Cir. 2003); *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 228 (5th Cir. 1998); *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367, 1370 (11th Cir. 1989) (quotation omitted))).

Yet each of these cases had a critical factor that distinguishes them from the present case – the person challenging the action cared enough to show up and litigate. Not so here.

In *Lockridge*, the Agency declined to find a case moot where a physician who had been issued an immediate suspension order fully litigated the allegations of a show cause order and allowed his registration to expire only after the ALJ issued a decision recommending that his DEA registration be revoked. 71 FR at 77796. While the Agency relied in part on the collateral consequences which attach with the issuance of an immediate suspension order, noting that the suspension would have to be reported on any future DEA application and likely on any state application, as well as the potential harm to the physician's reputation, it also noted that the parties had expended considerable resources in litigating the allegations and that there was also no evidence that the physician intended to permanently cease the practice of medicine. *Id*. at 77797.

Subsequent to *Lockridge*, however, the Agency has held several cases moot notwithstanding the issuance of an immediate suspension order. *See Tin T. Win*, 78 FR 52802 (2013); *Robert Charles Ley*, 76 FR 20033 (2011); *Elmer P. Manolo*, 73 FR 50353 (2008).

In *Manolo*, the Agency issued an immediate suspension order to a physician. While the physician initially requested a hearing on the allegations, thereafter the State suspended his medical license and the Government successfully moved for summary disposition. *See* 21 U.S.C. 824(a)(3).

On review, the Agency noted that the physician had allowed his DEA registration to expire and failed to file a renewal application. 73 FR at 50353. Further noting that the

Government did not seek to litigate the allegations underlying the immediate suspension order but sought revocation based on the physician's loss of his state authority, the then-Deputy Administrator ordered the parties to brief the issue of whether the case was now moot, and further directed the physician, in the event he contended that the case was not moot, to explain why he did not "file a renewal application and what collateral consequences attach[ed] as a result of the suspension order." *Id*. at 50354.

While the Government acknowledged that the case had become moot and should be dismissed, Respondent did not comply with the briefing order. *Id.* Based on the physician's "failure to comply with the briefing order, his failure to file a renewal application, and his failure to provide any evidence of his intent to remain in professional practice or of other collateral consequences that attached with the issuance of the suspension order," the then-Deputy Administrator held that the case was moot. *Id. See also Ley*, 76 FR at 20033-34 (holding case moot where physician subject to ISO allowed his registration to expire, failed to identify any collateral consequences, and waived his right to challenge the allegations).

More recently, in *Win*, an ISO was served on a physician who then failed to request a hearing or submit a written statement in lieu of a hearing. 78 FR at 52802. Shortly after the Government filed its request for final agency action, the physician's registration expired. *Id*. at 52803. On review, the Administrator took official notice of the Agency's registration records and determined that the physician had failed to file a renewal application. *Id*. The Administrator then directed the Government to notify her as to whether any controlled substances had been seized pursuant to the ISO thus creating a collateral consequence which precluded a finding of mootness. *Id*. Thereafter, the Government notified the Administrator that no controlled

substances had been seized and acknowledged that the case was moot. *Id*. Accordingly, the Administrator dismissed the case as moot. *Id*.

While the Government asserts that this case is not moot because of the "harm to [Registrant's] reputation" and other potential collateral consequences such as his having to disclose the suspension on future applications, Request for Final Agency Action, at 12; it ignores that Registrant has not sought to challenge the allegations.[3] So too, not only did Registrant allow his Michigan license to expire, he has fled the United States. These findings are more than sufficient to conclude that Registrant does not intend to remain in professional practice (at least in this country).

Accordingly, I conclude that this proceeding is moot.

ORDER

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that the Order to Show Cause and Immediate Suspension of Registration issued to Richard C. Quigley, D.O., be, and it hereby is, dismissed. This Order is effective immediately.

Dated: August 15, 2014

Thomas M. Harrigan
Deputy Administrator

[3] Here, while the thirty-day period for requesting a hearing would have lapsed sometime in late December 2013, and Registrant's registration did not expire until April 30, 2014, the Request for Final Agency Action was not submitted until June 18, 2014.

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