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UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION

KEVIN L. LOWE, M.D.
DECISION AND ORDER

On May 18, 2016, Chief Administrative Law Judge John J. Mulrooney, II (CALJ), issued the attached Recommended Decision (R.D.).[1] Therein, the CALJ found that it is undisputed that Respondent is currently without authority to handle controlled substances in New York, the State in which he holds DEA Registration FL2580163. R.D. at 4. The CALJ thus granted the Government's Motion for Summary Disposition and recommended that I revoke Respondent's registration and deny any pending applications.

Neither party filed exceptions to the Recommended Decision. Having reviewed the record, I adopt the CALJ's finding that Respondent lacks state authority to handle controlled substances in New York, the State in which he is registered. "State authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance and maintenance of a Federal controlled substances registration." *Frederick Marsh Blanton*, 43 FR 27616, 27617 (1978). *See also Rezik A. Saqer*, 81 FR 22122, 22124-127 (2016). Thus, once the Government establishes that an applicant for a practitioner's registration or a practitioner-registrant does not possess state authority, there are no further facts to be considered and revocation is the mandatory sanction that must be entered under the Controlled Substances Act. Accordingly, I will also adopt the CALJ's recommendation that I revoke Respondent's registration and deny any pending application to renew or modify his registration.

ORDER

[1] All citations to the Recommended Decision are to the slip opinion issued by the CALJ.

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 FL2580163 issued to Kevin L. Lowe, M.D., be, and it hereby is, revoked. I further order that any pending application of Kevin L. Lowe, M.D., to renew or modify the above registration, be, and it hereby is, denied. This Order is effective immediately.[2]

Date: September 14, 2016

Chuck Rosenberg
Acting Administrator

[2]Based on Respondent's acknowledgment that he has been convicted of conspiring to unlawfully distribute controlled substances, *see* Resp.'s Hrng. Req., at 1-2, I find that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

ORDER GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY DISPOSITION AND RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

Chief Administrative Law Judge John J. Mulrooney, II. The Deputy Assistant Administrator, Drug Enforcement Administration (DEA), issued an Order to Show Cause (OSC), dated March 28, 2016, proposing to revoke the DEA Certificate of Registration (COR), Number FL2580163,[3] of Kevin L. Lowe, M.D. (Respondent), pursuant to 21 U.S.C. § 824(a)(3) and 21 U.S.C. § 823(f). In the OSC, the DEA avers that the Respondent's lack of "authority to handle controlled substances in the State of New York, the state in which [the Respondent is] registered with the DEA," is a basis for revocation of the Respondent's COR.[4]

The Respondent, *pro se*, timely filed a Request for Hearing dated April 3, 2016,[5] wherein he conceded that he is currently without state authority to handle controlled substances. *See* Req. for Hr'g at 1 (stating that his "imprisonment has prevented [him] from renewing his state license"). The Respondent also maintained that he is innocent of the crime for which he was convicted and is in the process of appealing his conviction. *Id.* at 1, 3.

On April 22, 2016, the Government filed a Motion for Summary Disposition, seeking a Recommended Decision granting the Government's Motion because Respondent is currently without authority to handle controlled substances in New York. Gov't Mot. at 1. Appended to its Motion, the Government provided a Certification by Cathy Hanczaryk, legal custodian of the official records of the Division of Professional Licensing Services of the New York State Education Department, in which Ms. Hanczaryk attests that the Respondent "is not currently registered to practice the profession [of medicine] in New York" and has not been so registered

[3] The Respondent's DEA COR is current and expires by its terms on March 31, 2017. Gov't Mot. App'x A.
[4] The OSC also alleges that the Respondent was convicted of one count of conspiracy to distribute narcotics involving oxycodone in violation of 21 U.S.C. § 846. OSC at 1.
[5] Respondent apparently filed the Request for Hearing with the Office of Diversion Control, and Government counsel forwarded the request to the Office of Administrative Law Judges on April 11, 2016.

since October 31, 2015. Gov't Mot. App'x B. Ms. Hanczaryk's Certification further states that the Respondent "has not filed a registration renewal application for the period of" November 1, 2015 to October 31, 2017. *Id.* According to a supporting Declaration by Diversion Investigator (DI) Chante Jones, also appended to the Government's Motion, DI Jones personally obtained the Certification by Ms. Hanczaryk after learning that the Respondent, who had been convicted in federal district court, did not have an active license to practice medicine in New York and has been without one since October 31, 2015. Gov't Mot. App'x C at 1-2.

The Respondent's reply to the Government's motion was due on May 11, 2016.[6] Having afforded an additional week of time in the event that the Respondent's reply was mailed but not timely, the Government's motion would appropriately be granted as unopposed. Even without doing so, however, the Government's motion must be granted on the existing record.

In order to revoke a registrant's DEA registration, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 CFR 1301.44(e). Once the DEA has made its *prima facie* case for revocation of the registrant's DEA COR, the burden of production then shifts to the Respondent to show that, given the totality of the facts and circumstances in the record, revoking the registrant's COR would not be appropriate. *Morall v. DEA*, 412 F.3d 165, 174 (D.C. Cir. 2005); *Humphreys v. DEA*, 96 F.3d 658, 661 (3d Cir. 1996); *Shatz v. U.S. Dep't of Justice*, 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston*, 45 Fed. Reg. 72311, 72312 (1980).

The Controlled Substances Act (CSA) requires that, in order to maintain a DEA registration, a practitioner must be authorized to handle controlled substances in the state in which he practices. *See* 21 U.S.C. 823(f) ("The Attorney General shall register practitioners

[6] The Government requested additional time to file its Motion, which was granted, and the Respondent's original due date was likewise extended.

. . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices."); *see also* 21 U.S.C. 802(21) (the CSA defines "practitioner" as "a physician . . . licensed, registered, or otherwise permitted, . . . by the jurisdiction in which he practices . . . to . . . dispense [or] administer . . . a controlled substance in the course of professional practice"). DEA has long held that possession of authority under state law to dispense controlled substances is not only a prerequisite to obtaining a registration, but also an essential condition for maintaining one. *Serenity Café*, 77 Fed. Reg. 35027, 35028 (2012); *David W. Wang, M.D.*, 72 Fed. Reg. 54297, 54298 (2007); *Sheran Arden Yeates, M.D.*, 71 Fed. Reg. 39130, 39131 (2006); *Dominick A. Ricci, M.D.*, 58 Fed. Reg. 51104, 51105 (1993); *Bobby Watts, M.D.*, 53 Fed. Reg. 11919, 11920 (1988). Because "possessing authority under state law to handle controlled substances is an essential condition for holding a DEA registration," this Agency has consistently held that "the CSA requires the revocation of a registration issued to a practitioner who lacks [such] authority." *John B. Freitas, D.O.*, 74 Fed. Reg. 17524, 17525 (2009); *see James Alvin Chaney, M.D.*, 80 Fed. Reg. 57391, 57391 (2015); *Scott Sandarg, D.M.D.*, 74 Fed. Reg. 17528, 17529 (2009); *Roy Chi Lung, M.D.*, 74 Fed. Reg. 20346, 20347 (2009); *Roger A. Rodriguez, M.D.*, 70 Fed. Reg. 33206, 33207 (2005); *Stephen J. Graham, M.D.*, 69 Fed. Reg. 11661, 11662 (2004); *Abraham A. Chaplan, M.D.*, 57 Fed. Reg. 55280, 55280-81 (1992); *see also Harrell E. Robinson, M.D.*, 74 Fed. Reg. 61370, 61375 (2009) (Agency revoked a registration based on loss of state authority after hearing before an ALJ, but also considered the public interest factors in its analysis); *but see* 21 U.S.C. 824(a)(3) (loss of state authority constitutes a discretionary basis for sanction, not a mandatory basis). The Agency has deemed this rule to be applicable "not only where a registrant's state authority has been suspended or revoked, but also where a practitioner with an existing DEA registration has lost his state

authority for reasons other than through formal disciplinary action of a State board," such as "expiration of [a] state license." *Freitas*, 74 Fed. Reg. at 17525 (citing *William D. Levitt, D.O.*, 64 Fed. Reg. 49822, 49823 (1999)); *see Mark L. Beck, D.D.S.*, 64 Fed. Reg. 40899, 40900 (1999); *Charles H. Ryan, M.D.*, 58 Fed. Reg. 14430, 14430 (1993).

Congress does not intend for administrative agencies to perform meaningless tasks. *See Philip E. Kirk, M.D.*, 48 Fed. Reg. 32887 (1983), *aff'd sub nom. Kirk v. Mullen*, 749 F.2d 297 (6th Cir. 1984); *see also Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 605 (1st Cir. 1994); *NLRB v. Int'l Assoc. of Bridge, Structural & Ornamental Ironworkers, AFL-CIO*, 549 F.2d 634 (9th Cir. 1977); *United States v. Consol. Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971). Thus, it is well-settled that, where no genuine question of fact is involved or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required. *See Jesus R. Juarez, M.D.*, 62 Fed. Reg. 14945 (1997); *Dominick A. Ricci, M.D.*, 58 Fed. Reg. 51104 (1993). Here, the supplied Certification by Ms. Hanczaryk establishes, and the Respondent concedes,[7] that the Respondent is currently without authorization to handle controlled substances in New York, the jurisdiction where the Respondent holds the DEA COR that is the subject of this litigation.

Summary disposition of an administrative case is warranted where, as here, "there is no factual dispute of substance." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("[A]n agency may ordinarily dispense with a hearing when no genuine dispute exists."). At this juncture, no genuine dispute exists over the fact that the Respondent lacks state authority to handle controlled substances in New York. Because the Respondent lacks such state authority, Agency precedent dictates that he is not entitled to maintain his DEA registration.

[7] The Respondent conceded his lack of state authority in his Request for Hearing. Req. for Hr'g at 1 (stating that his "imprisonment has prevented [him] from renewing his state license").

Simply put, there is no contested factual matter adducible at a hearing that would, in the Agency's view, provide authority to allow the Respondent to continue to hold his COR.[8]

Accordingly, I hereby

GRANT the Government's Motion for Summary Disposition; and further

RECOMMEND that the Respondent's DEA registration be **REVOKED** forthwith, and any pending applications for renewal be **DENIED**.

Dated: May 18, 2016

s/ JOHN J. MULROONEY, II
Chief Administrative Law Judge

[8] However, should the Respondent's state authority be renewed, he may apply for a new DEA COR. *See Franklyn Seabrooks, M.D.*, 79 Fed. Reg. 44196, 44197 n.1 (2014).

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