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DEPARTMENT OF JUSTICE
Drug Enforcement Administration

[Docket No. 18-15]

Decision and Order: Kevin G. Morgan, RN/APN

On December 22, 2017, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Kevin G. Morgan, RN/APN (Respondent), of Nederland, Texas. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration No. MM2890312 on the ground that he does "not have authority to handle controlled substances in the state of Texas, the state in which [Respondent is] registered with the DEA." Order to Show Cause, at 1 (citing 21 U.S.C. §§ 823(f), 824(a)(3)).

With respect to the Agency's jurisdiction, the Show Cause Order alleged that Respondent is the holder of Certificate of Registration No. MM2890312, pursuant to which he is authorized to dispense controlled substances as a practitioner in schedules III through V, at the registered address of 1003 Nederland Ave., Nederland, Texas. *Id.* The Order also alleged that this registration does not expire until January 31, 2019. *Id.*

Regarding the substantive ground for the proceeding, the Show Cause Order alleged that on December 1, 2017, the Texas State Board of Nursing (TSBN), "suspended [Respondent's] nursing license, including [Respondent's] prescriptive authority" and that "[t]his suspension remains in effect." *Id.* at 2. The Order alleged that the TSBN's suspension was "based on allegations that [Respondent] acted outside [his] authorized scope of practice and misrepresented information to the public which was likely to deceive the public." *Id.* The Order further alleged that Respondent is therefore "without authority to handle controlled substances in Texas, the

[S]tate in which [he is] registered with the DEA." *Id*. Based on his "lack of authority to [dispense] controlled substances in . . . Texas," the Order asserted that "DEA must revoke" his registration. *Id*. (citing 21 U.S.C. §§ 802(21), 823(f)(1), 824(a)(3)).

The Show Cause Order notified Respondent of (1) his right to request a hearing on the allegations or to submit a written statement in lieu of a hearing, (2) the procedure for electing either option, and (3) the consequence for failing to elect either option. *Id*. at 2-3 (citing 21 CFR § 1301.43). The Show Cause Order also notified Respondent of his right to submit a corrective action plan. *Id.* at 3-4 (citing 21 U.S.C. § 824(c)(2)(C)).

On January 23, 2018, Respondent filed a letter with the Office of Administrative Law Judges (OALJ) in which he requested a hearing on the allegation of the Show Cause Order and stated his desire to explain "how he is not a threat, provided great care, and how the State of Texas erroneously and wrongly suspended his license." Letter from Respondent's Counsel to Hearing Clerk (dated January 22, 2018) (hereinafter, Hearing Request), at 1. The matter was placed on the OALJ's docket and assigned to Chief Administrative Law Judge John J. Mulrooney, II (hereinafter, CALJ). On January 23, 2018, the CALJ issued an order entitled "Order Directing the Filing of Government Evidence of Lack of State Authority Allegation and Briefing Schedule" (hereinafter, "Briefing Order") in which the CALJ found, *inter alia*, that "the Respondent, by counsel, filed a letter which requested a hearing in the matter of [sic] order to show cause. Therefore, the letter is construed as the Respondent's Request for Hearing." Briefing Order, at 1.

Pursuant to 21 CFR 1301.43(a), "any person entitled to a hearing . . . and desiring a hearing shall, within 30 days after the date of receipt of the order to show cause, . . . file with the Administrator a written request for a hearing." *Accord* Show Cause Order, at 2. The CALJ did

not indicate in his Briefing Order or in his Recommended Decision – and the rest of the administrative record does not indicate – when Respondent received the Show Cause Order. Without any evidence in the record establishing when Respondent received the Show Cause Order, the only way in which I could find that Respondent's Hearing Request was timely is if it had been filed with the Administrator within 30 days of the December 22, 2017 date of the Show Cause Order. However, the OALJ did not receive Respondent's Hearing Request until January 23, 2018.[1] Hearing Request, at 1. Accordingly, I find that Respondent's Hearing Request was not timely filed pursuant to 21 CFR 1301.43(a), and as a result, Respondent waived his right to a hearing.

In the absence of a timely hearing request, I also find that the CALJ consequently lacked jurisdiction to hear the case. *Accord David A. Ruben, M.D.*, 83 FR 12027, 12028 (2018) (same) (citing *Brown's Discount Apothecary BC, Inc., and Bolling Apothecary, Inc.*, 80 FR 57393, 57394 (2015) ("in the absence of a hearing request, the ALJ had no authority to rule on the issue of whether its registration should be revoked")). I therefore cancel the hearing *nunc pro tunc* held by the CALJ by summary disposition. *See* 21 CFR 1301.43(e); *accord Ruben*, 83 FR at 12028. Accordingly, I will treat this case as a Request for Final Agency Action and issue this Decision and Order based on the relevant evidence forwarded to my office by the CALJ on March 19, 2018.[2] *See id.* I make the following findings.

[1] Although the front of Respondent's Hearing Request is stamped "Received" by the Office of Administrative Law Judges on January 23, 2018, the fax confirmation page attached to the Hearing Request states that it arrived in that office on "January 22, 2018." *Compare* Hearing Request, at 1, *with id.* at 3. In any event, neither date is within 30 days of the December 22, 2017 date of the Show Cause Order.

[2] In his Briefing Order, the CALJ ordered the Government to file evidence to support its allegation that Respondent lacks state authority to handle controlled substances, and any motion for summary disposition on these grounds, on February 2, 2018. Briefing Order at 1-2. The CALJ also directed Respondent to file his response to any summary disposition motion on February 15, 2018. *Id.* at 2. On February 2, 2018, the Government filed its Motion for Summary Disposition, and the Respondent filed his response on February 15, 2018. *See* Government's Motion for Summary Disposition (hereinafter, "Govt. Mot."); Response to the DEA's Proposed Revocation and Motion to

FINDINGS OF FACT

Respondent is a holder of DEA Certificate of Registration No. MM2890312. Government Exhibit (GX) 1 to Govt. Mot. Pursuant to his registration, Respondent is authorized to dispense controlled substances in schedules III through V as an "MLP-Nurse Practitioner." *Id.* Respondent's registered address is 1003 Nederland Ave., Nederland, Texas. *Id.* Respondent's registration does not expire until January 31, 2019. *Id.*

On December 1, 2017, the TSBN issued an "Order of Temporary Suspension" stating that Respondent's "Permanent Advanced Practice Registered Nurse License Number AP123323 with Prescription Authorization Number 13799 and Permanent Registered Nurse License Number 758246 . . . to practice nursing in the State of Texas is/are, hereby SUSPENDED IMMEDIATELY." GX 2, at 17. The TSBN issued this Order after finding that "given the nature of the charges, the continued practice of nursing by [Respondent] constitutes a continuing and imminent threat to public welfare." *Id.* Finally, the TSBN stated that "a probable cause hearing be conducted . . . not later than seventeen (17) days following the date of the entry of this order, and a final hearing on the matter be conducted . . . not later than the 61st day following the date of the entry of this order." *Id.* There is no evidence in the record establishing that the TSBN ever lifted this suspension. Based on the above, I find that Respondent does not currently have authority under the laws of Texas to dispense controlled substances.

Temporarily Abate and Stay the Proceedings for Fifty Days (hereinafter, "Respondent's Brief" or "Resp. Br."). On February 20, 2018, the CALJ issued his Order granting summary disposition and Recommended Decision. Order Granting the Government's Motion for Summary Disposition and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision (hereinafter, Recommended Decision or R.D.). Neither party filed exceptions to the CALJ's Recommended Decision. Although the CALJ's Recommended Decision did not establish that he had jurisdiction in this case, I will nonetheless consider the administrative record that he submitted to me in its entirety.

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 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." Also, DEA has 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); *see also Frederick Marsh Blanton*, 43 FR 27616 (1978) ("State authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance and maintenance of a Federal controlled substances registration.").

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 CSA, 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

engages in professional practice. *See, e.g.*, *Calvin Ramsey*, 76 FR 20034, 20036 (2011); *Sheran Arden Yeates, M.D.*, 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, because "the controlling question" in a proceeding brought under 21 U.S.C. § 824(a)(3) is whether the holder of a practitioner's registration "is currently authorized to handle controlled substances in the [S]tate," *Hooper*, 76 FR at 71371 (quoting *Anne Lazar Thorn*, 62 FR 12847, 12848 (1997)), the Agency has also long held that revocation is warranted even where a practitioner has lost his state authority by virtue of the State's use of summary process and the State has yet to provide a hearing to challenge the suspension. *Bourne Pharmacy*, 72 FR 18273, 18274 (2007); *Wingfield Drugs*, 52 FR 27070, 27071 (1987). Thus, it is of no consequence that the TSBN summarily suspended Respondent's state medical license. What is consequential is the undisputed fact that Respondent is no longer currently authorized to dispense controlled substances in Texas, the State in which he is registered. Accordingly, Respondent is not entitled to maintain his DEA registration, and I will therefore order that his registration be revoked.[3]

[3] The CALJ received and considered the Government's Motion for Summary Disposition and Respondent's Brief. In his brief, Respondent "d[id] not contest that he is subject to a temporary suspension of his state prescriptive authority." Resp. Br. at 1. However, Respondent argued that he will be presenting evidence at "a probable cause hearing to be held on March 6, 2018," that his suspension "was granted on flawed information and false allegations," and that he "has not had the chance to defend his self [sic] against these allegations." *Id.* However, as already noted above, the TSBN suspended Respondent's nursing license and his authority to issue prescriptions. GX 2, at 17. As of the date of this order, Respondent has not filed a motion for reconsideration on the ground that the TSBN has lifted the suspension. The CALJ concluded that the fact that the State has yet to provide a hearing to challenge Respondent's suspension does not change the undisputed fact that Respondent's state prescriptive authority is suspended. R.D. at 7-8. Accordingly, if the CALJ had the authority to issue his conclusion rejecting Respondent's argument, I would have adopted this conclusion.

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 No. MM2890312, issued to Kevin G. Morgan, RN/APN, be, and it hereby is, revoked. I further order that any pending application of Kevin G. Morgan to renew or modify the above registration, or any pending application of Kevin G. Morgan for any other DEA registration in the State of Texas, be, and it hereby is, denied. This Order is effective immediately.[4]

Dated: June 14, 2018

Robert W. Patterson
Acting Administrator

[4] For the same reasons which led the TSBN to suspend Respondent's license and prescriptive authority, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

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