''suspended, revoked or denied by competent State authority'' and the registrant ''is no longer authorized by State law to engage in the * * * dispensing of controlled substances.'' *Id.* at 2.

On November 7, 2008, the ALJ granted the Government's motion, noting that ''it is undisputed that the Respondent currently lacks authority to handle controlled substances in Missouri.'' ALJ at 3. Because Respondent's argument as to the scope of the Agency's authority under 21 U.S.C. 823(a)(3) had previously been rejected with respect to a practitioner who allowed his registration to expire, the ALJ found ''no meaningful basis on which to distinguish expiration of a State authorization from automatic termination by operation of law.'' *Id.* at 5. The ALJ thus applied the Agency's longstanding interpretation that it lacks authority under the Controlled Substances Act to maintain a registration if a registrant lacks authority under State law to dispense controlled substances. *Id.* at 4–5. The ALJ thus recommended that Respondent's registration be revoked and that any pending application to renew or modify his registration be denied.

After the period for filing exceptions lapsed,[2] the record was forwarded to me for final agency action. Having considered the entire record in this matter, I adopt the ALJ's decision in its entirety.

I find that Respondent currently holds DEA Certificate of Registration, BF2847715, which authorizes him to dispense controlled substances in schedules II through V as a practitioner, at the registered location of 2232 S. Garrison Ave., Carthage, Missouri. I also find that Respondent's Missouri Controlled Substances Registration has terminated. I therefore further find that Respondent is currently without authority to dispense controlled substances in Missouri, the State in which he practices medicine and holds his DEA Registration. Moreover, according to the Web site of the Missouri Department of Health and Senior Services, Respondent does not possess a State controlled substances registration.

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle 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 holding a DEA registration.

Accordingly, DEA has held repeatedly that the CSA requires the revocation of a registration issued to a practitioner who lacks authority under state law to dispense controlled substances. Moreover, DEA has applied this rule 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.

For example, in *William D. Levitt*, 64 FR 49882, 49823 (1999), DEA held that because ''state authorization was clearly intended to be a prerequisite to DEA registration, Congress could not have intended for DEA to maintain a registration if a registrant is no longer authorized by the state in which he practices to handle controlled substances due to the expiration of his state license.'' *See also Mark L. Beck*, 64 FR 40899, 40900 (1999); *Charles H. Ryan*, 58 FR 14430 (1993). Moreover, in *Marlou D. Davis*, 69 FR 1307, 1310 (2004), I addressed and rejected the same argument raised by Respondent in a case which involved the same factual scenario as is presented here—the termination under Missouri law of a practitioner's authority which arose because of an address change. In *Davis*, I specifically relied on the reasoning of *Levitt* and rejected the argument that the respondent's registration should be deemed terminated under 21 CFR 1301.52 rather than revoked under 21 U.S.C. 824(a)(3).[3] *Id.* at 1310. Indeed, as the ALJ observed in her recommended decision in this matter, because possessing authority under State law is an essential requirement for holding a CSA registration, there is ''no meaningful basis'' for distinguishing between those registrants who allow their State authority to expire and those whose State authority expires by operation of law. ALJ at 5.

Here, as in *Davis*, Respondent has not notified the Agency that he has permanently ceased the practice of medicine (or the dispensing of controlled substances in the course of medical practice). 21 CFR 1301.52(a). Nor is there any evidence that he has returned his certificate of registration for cancellation. *Id.* 1301.52(c). Accordingly, Respondent's registration cannot be deemed terminated. Because Respondent does not have authority under Missouri law to dispense controlled substances, he does not meet the statutory requirement for holding a registration under Federal law. *See* 21 U.S.C. 823(f). His registration must therefore be revoked.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, BF2847715, issued to John B. Freitas, D.O., be, and it hereby is, revoked. I further order that any pending application of John B. Freitas, D.O., to renew or modify his registration, be, and it hereby is; denied. This Order is effective May 15, 2009.

Dated: April 10, 2009.

Michele M. Leonhart,

Deputy Administrator.

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[2] Respondent did not file exceptions.

[3] While there is a procedure available for terminating a registration, under the Agency's regulation, a registrant who discontinues professional practice must ''notify the [Agency] promptly of such fact.'' 21 CFR 1301.52(a). Moreover, the registrant must return his certificate of registration to the Agency for cancellation, as well as any unexecuted order forms. *Id.* 1301.52(c). Notably, in *Davis*, the respondent did not comply with the regulation and indeed had continued professional practice.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–49]

Joseph Baumstarck, M.D.; Revocation of Registration

On May 19, 2008, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Joseph Baumstarck, M.D. (Respondent), of Lovell, Wyoming. The Order proposed the revocation of Respondent's DEA Certificate of Registration, BB2806480, which authorizes him to dispense controlled substances in schedules II through V, and proposed the denial of any pending applications to renew or modify his registration, on the ground that Respondent had committed acts which render his continued registration inconsistent with the public interest.

Show Cause Order at 1 (citing 21 U.S.C. 824(a)(4)).

The Show Cause Order alleged that Respondent had repeatedly issued controlled-substance prescriptions without establishing a legitimate doctor-patient relationship in violation of Federal and state laws in that he failed to obtain adequate patient histories or failed to perform adequate physical examinations of his patients. *Id.* (citing 21 U.S.C. 841(a)(1), 21 CFR 1306.04, & Wyo. Stat. § 33–26–402(a)). The Order further alleged that Respondent issued controlled-substance prescriptions to persons he knew to be drug addicts and that these persons were not using the drugs for a legitimate medical purpose. *Id.* Relatedly, the Order alleged that Respondent did ''nothing to confirm that these patients are not diverting the controlled substances'' that he prescribed. *Id.* at 1–2.

The Show Cause Order further alleged that ''on at least four occasions in January and February 2008, Respondent had prescribed schedule II controlled substances for the purpose of detoxification and/or maintenance treatment,'' notwithstanding that he was not registered to conduct a narcotic-treatment program, and that the drugs he prescribed were ''not approved by the Food and Drug Administration (FDA) for detoxification and/or maintenance treatment in an office-based setting.'' *Id.* at 2 (citing 21 U.S.C. 823(g)(1) & 21 CFR 1306.07(a)). Relatedly, the Order alleged that in April 2008, Respondent had discussed with a police officer who claimed to be addicted to prescription pain killers, how he prescribed drugs containing oxycodone, a schedule II controlled substance, to treat addicts for addiction.[1] *Id.* The Order also alleged that Respondent's illegal practices were ongoing. *Id.* I thus concluded that Respondent's ''continued registration during the pendency of these proceeds would constitute an imminent danger to the public health and safety.'' *Id.* (citing 21 U.S.C. 824(d)).

On May 22, 2008, the Order was served on Respondent. On June 16, 2008, Respondent requested a hearing on the allegations. Letter of Joseph Baumstarck, Jr., to Hearing Clerk (June 16, 2008). Respondent denied the allegations, but further stated that because he had been charged criminally, he was exercising his Fifth Amendment right against self-incrimination. *Id.*

On June 25, 2008, the Government moved for summary disposition (and to stay the filing of pre-hearing statements) on the ground that on June 9, 2008, the Wyoming Board of Medicine had summarily suspended Respondent's state medical license and that the suspension was to remain in effect pending the resolution of the Board's proceeding. Gov. Mot. for Summ. Disp. at 2. The Government further noted that while a practitioner in Wyoming must hold both a medical license and a state issued controlled-substance registration (which is issued by the Board of Pharmacy), and Respondent still held a state controlled-substance registration, he was currently without authority to practice medicine and thus could not prescribe any drug (whether controlled or non-controlled). *Id.* at 3.

In support of its motion, the Government attached the State Board's order which summarily suspended Respondent's medical license. *Id.* at Ex. B. As grounds for its action, the Board's order noted that on May 19, 2008, Respondent had been indicted by a federal grand jury on four counts of unlawful distribution of hydrocodone and two counts of unlawful distribution of oxycodone. *Id.* at 1–2 (citing 21 U.S.C. 841(a)(1)(B) & (1)(D) and *id.* § 841(a)(1)(B) & (1)(C)). The order also noted that the Board had received an Adverse Action Report from the National Practitioner Data Bank indicating that on May 29, 2008, North Big Horn Hospital of Lovell, Wyoming, had summarily suspended Respondent's clinical privileges pending the resolution of the criminal case. *Id.* at 3. The order further noted that on June 5, 2008, the Board had received a report from the state Pharmacy Board that Respondent had prescribed Suboxone on multiple occasions ''without the required DEA endorsement.'' [2] *Id.* Finally, the Order noted that as a condition of his release from custody, the Federal District Court had imposed a restriction that Respondent could ''continue the practice of medicine only after the Board * * * creates a plan regarding the prescribing of any controlled substances'' and that he ''shall not see patients without another licensed physician present in the room with him,'' and that Respondent had told the Medical Board's Executive Secretary that he intended to seek a removal of the condition that another physician directly supervise his practice. *Id.* at 2–3. Based on all of these findings, the State Board concluded that ''the public health, safety or welfare imperatively requires emergency action and that a summary suspension of [Respondent's] license is necessary to protect the citizens of Wyoming.'' *Id.* at 4.

Upon reviewing the Government's motion, the ALJ issued a memorandum which provided Respondent with the opportunity to respond to the motion. Memorandum to Parties (June 25, 2008). The following day, Respondent submitted a letter to the Hearing Clerk in which he stated that he opposed the Government's motion, but that because of the pending criminal case and his invocation of his Fifth Amendment privilege, he was ''unable * * * to adequately address'' the issues, and that the Agency was therefore denying him his right to Due Process. Ltr. of Joseph Baumstarck, Jr., to Hearing Clerk (June 26, 2008). Respondent further contended that ''[t]he actions which the government's statement alleges as having occurred in regard to my ability to practice in Wyoming are the result of the DEA's action which is the issue being contested here.'' *Id.* Respondent then requested that the proceeding be postponed until his criminal case was resolved. *Id.*

Thereafter, the Government moved to deny Respondent's request for a postponement and also requested that the ALJ grant its motion for summary disposition. *See* Gov. Response to Resp.'s Req. for Postponement and Resp.'s Opp. In its motion, the Government maintained that under the Controlled Substances Act (CSA), the Agency does not have authority to maintain the registration of a practitioner who lacks state authority to handle controlled substances and ''that the reason for [Respondent's] state suspension is irrelevant.'' *Id.* at 2 & n 1. The Government further argued that Respondent had also been ''investigated by state and local law enforcement [and] thus, his assertion that DEA is the cause of his [s]tate medical license suspension is without merit.'' *Id.* The Government also maintained that granting its motion for summary disposition would not violate Respondent's right to Due Process because the granting of such motions (when no material facts are in dispute) is a common feature of adjudicatory proceedings. *Id.* at 2. Finally, the Government urged the ALJ to reject Respondent's request for a postponement because the issue in the case—whether he is without state authority to handle controlled substances—could be litigated without Respondent having to testify (by submitting documentary evidence to the

[1] The Order also alleged that on at least eight occasions, Respondent had violated Federal law by failing to include his registration number and the patient's address on controlled-substance prescriptions. Show Cause Order at 2 (citing 21 U.S.C. 842(a); 21 CFR 1306.05(a)).

[2] The State Board's Order also noted the allegations contained in my Order to Show Cause and Immediate Suspension of Registration. Ex B at 2.

contrary), and because ''there [was] no guarantee that'' his criminal case would be resolved by date he claimed it would be. *Id.* at 3.

On July 1, 2008, Respondent sent an additional letter to the Hearing Clerk in which he reiterated his previous objections to the Government's position, including his contention that his inability ''to practice medicine in Wyoming [is] the result of the DEA's action which is the issue being contested here.'' Letter of Respondent to Hearing Clerk (June 30, 2008). Respondent disputed the Government's argument that he could reapply for a new registration as ''beg[ging] the question of due process.'' *Id.* He also contended that the Government's argument that the criminal case could be rescheduled several times was irrelevant to the issue of whether this proceeding should be stayed because he had ''no control over the scheduling of court cases.'' *Id.*

On the same day, the ALJ stayed the proceeding pending her review of the Government's motion. ALJ at 6. On July 16, 2008, the ALJ granted the Government's motion. *Id.* at 7. Noting that it was ''undisputed that Respondent is without state authority to hand controlled substances in Wyoming,'' *id.*, the ALJ applied the Agency's long-settled ruled that a practitioner may not maintain his registration if he lacks authority to handle controlled substances under the laws of the State in which he practices. Id. at 6–7. The ALJ thus recommended that Respondent's registration be revoked and that any pending applications be denied.

On July 23, 2008, Respondent submitted his ''formal objection'' to the ALJ's decision. Letter of Respondent to Hearing Clerk (July 23, 2008). Respondent ''reiterate[d] [his] previous position that it is ludicrous that a government entity is able to cause by its original action a secondary action by another government entity and then use the second action to justify the original action.'' *Id.* Respondent also restated his position that he was ''unable to give a detailed statement'' regarding the allegations because he had been criminally charged and was exercising his Fifth Amendment rights.

Thereafter, the record was forwarded to me for final agency action. Having considered the entire record in this matter (including the issues raised by Respondent in his July 23, 2008 letter), I adopt the ALJ's decision in its entirety.

I find that Respondent currently holds DEA Certificate of Registration, BB2806480, which authorizes him to dispense controlled substances in schedule II through V as a practitioner at registered premises of 342 E. Main St., Lovell, Wyoming. Respondent's registration does not expire until July 31, 2009.

On June 6, 2008, the Wyoming Board of Medicine summarily suspended Respondent's physician's license and further ordered that ''such suspension shall continue pending proceedings for revocation or other action against'' his license. GX B. The State's order cited five different grounds as support for its order including: (1) That on May 19, 2008, Respondent had been indicted in federal court on six counts of unlawful distribution of controlled substances; (2) the allegations of the Order to Show Cause; (3) the Adverse Action Report that Respondent's privileges had been suspended by a local hospital; (4) the state Pharmacy Board's report that Respondent had prescribed Suboxone on numerous occasions without holding the requisite endorsement to his DEA registration; and (5) that Respondent had told the Board's Executive Secretary of his intent to seek the removal of certain conditions of his release which were imposed by the Federal District Court. According to the Wyoming Board of Medicine Web site, Respondent's state license remains suspended.

Under the CSA, a practitioner must be currently authorized to handle 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 holding a DEA registration.

Accordingly, the Agency has held repeatedly that the CSA requires the revocation of a registration issued to a practitioner whose state license has been suspended or revoked. *David 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 the 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''). Moreover, because the statutory text makes plain that a practitioner must have current authority to handle controlled substances under state law in order to maintain his CSA registration, the Agency has also held that revocation is warranted even when a practitioner's state authority has only been suspended and there remains a possibility that the authority will be restored following a state proceeding. *See Bourne Pharmacy, Inc.*, 72 FR 18273, 18274 (2007).

Here, there is no dispute that Respondent does not have current authority under state law to dispense controlled substances. Respondent, however, maintains that the Agency's revocation of his registration based on the State's suspension of his medical license would violate his right to Due Process because the State's action was based on my Order which immediately suspended his registration.

Respondent ignores, however, that the State's suspension order did not rely solely on my Order. Rather, the State Board also relied on Respondent's indictment by a federal grand jury, which represents the judgment of an independent body of citizens that probable cause exists to believe that Respondent had committed six felony counts of unlawful distribution of controlled substances. *See, e.g., FDIC* v. *Mallen*, 486 U.S. 230, 241 (1988) (where ''[a] grand jury ha[s] determined that there was probable cause that [bank officer] had committed a felony,'' the finding supported suspension followed by a hearing).

Moreover, the State Board also relied on the Board of Pharmacy's Report that Respondent had violated the law in prescribing Suboxone, the report from the National Practitioner Bank that a local hospital had suspended his privileges, and Respondent's own statements to the Board's Executive Secretary that he was seeking to remove the District Court's requirement that another physician directly supervise his practice. In short, in concluding that Respondent posed ''an immediate threat to the public health, safety or welfare of the people of * * * Wyoming,'' GX B at 3–4, the Board clearly conducted its own independent evaluation of the evidence against him and did not simply piggyback on my Order of Immediate Suspension. *See Oakland Medical Pharmacy*, 71 FR 50100, 50102 (2006) (rejecting the contention that it is circular for DEA to rely on a state suspension order to revoke a registration

where the State did not rely solely on the DEA order in suspending a practitioner's state license).

Respondent also apparently argues that revoking his registration would violate his right to Due Process because he has invoked his Fifth Amendment privilege and is ''unable'' to address the allegations. This argument would be unpersuasive even if the Agency was still seeking to revoke based on the allegations that he unlawfully distributed controlled substances.[3]

Moreover, Respondent ignores that under the CSA, the loss of state authority provides an independent ground to revoke and that the only issue now in dispute is whether Respondent holds state authority. Respondent was provided with a meaningful opportunity to refute the Government's evidence by showing that his state license had not been (or was no longer) suspended; such a showing would not require his testimony. That there is no such evidence (because the State's suspension order remains in effect) likewise does not deprive Respondent of Due Process.

Because Respondent remains without authority to dispense controlled substances under the laws of the State in which he practices medicine and is registered with the Agency, his registration will be revoked. Moreover, for the same reasons that I ordered the immediate suspension of Respondent's registration, I further hold that this Order be effective immediately.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I hereby order that DEA Certificate of Registration, BB2806480, issued to Joseph Baumstarck, M.D., be, and it hereby is, revoked. I further order that any pending application of Joseph Baumstarck, M.D., for renewal or modification of his registration be, and it hereby is, denied. This order is effective immediately.

[3] Due Process only requires that the Government provide a meaningful opportunity to test the Government's proof and respond to the allegations; a litigant's unwillingness to testify in a civil matter, because he fears incriminating himself, does not render a hearing opportunity unmeaningful in the constitutional sense. *Ohio Adult Parole Authority* v. *Woodward*, 523 U.S. at 272, 286 (1998). Indeed, the Supreme Court has even upheld the drawing of an adverse inference based on a respondent's refusal to testify in an administrative proceeding. *See Woodward*, 523 U.S. at (1998) (citing *Baxter* v. *Palmigiano*, 425 U.S. 308, 316–18 (1976)); *see also INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1043–44 (1984).

Dated: April 3, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–8612 Filed 4–14–09; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–10]

Scott Sandarg, D.M.D.; Revocation of Registration

On July 25, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Scott Sandarg, D.M.D. (Respondent), of Irvine, California. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BS6026525, which authorizes him to dispense controlled substances in schedules II through V as a practitioner, and the denial of any pending applications to renew or modify the registration, on the ground that Respondent had committed numerous acts which were inconsistent with the public interest. Show Cause Order at 1.

The Show Cause Order specifically alleged that Respondent had unlawfully obtained controlled substances for his own use which included illicit methamphetamine, anabolic steroids, drugs containing hydrocodone, and several benzodiazepines including alprazolam, through various means including by engaging in prescription fraud and by obtaining the controlled substances over the internet from practitioners with whom he did not establish a valid doctor-patient relationship. *Id.* at 1–3. The Order also alleged that on two separate occasions, Respondent had been arrested; that the police found various controlled substances in his possession during lawful searches of his property; and that Respondent had subsequently pled guilty to various offenses under California law including one felony count of unlawful possession of a controlled substance in violation of Cal. Health & Safety Code § 11377(a), one misdemeanor count of unlawfully being under the influence of a controlled substance in violation of Cal. Health & Safety Code section 11550(a), and two misdemeanor counts related to firearms violations under Cal. Penal Code section 17(b). Show Cause Order at 2–3.

On September 11, 2007, a DEA Diversion Investigator attempted to serve the Order to Show Cause on Respondent by faxing it to him. On November 9, 2007, Respondent requested a hearing on the allegations of the Show Cause Order, and the matter was assigned to an Administrative Law Judge (ALJ). Thereafter, the Government moved to terminate the proceeding on the ground that Respondent's request was out of time. Respondent opposed the motion, submitting the declarations of himself and his office manager, both of which asserted that the fax had included the cover sheet but not the Show Cause Order. Thereafter, the Government submitted a DI's declaration which maintained that Respondent's office manager had informed him that she had received the entire fax.

The ALJ denied the Government's motion reasoning that there was a factual dispute as to when Respondent had received the Show Cause Order. The ALJ then allowed the Government to file an interlocutory appeal. On May 12, 2008, I denied the appeal because there was a clear factual dispute as to whether Respondent had actually received the Show Cause Order on September 11, 2007, and the dispute could not be resolved without assessing the credibility of each party's witnesses.[1]

Thereafter, the Government moved to terminate the proceeding on the ground that on December 19, 2007, the California Board of Dental Examiners had adopted the proposed decision of a State Administrative Law Judge and revoked Respondent's State Dental Certificate with an effective date of January 21, 2008. Gov. Mot. for Summary Judgment 2–3. The Government argued that because Respondent is not authorized to handle controlled substances in the State in which he is registered with this Agency, he is not entitled to maintain his registration. *Id.*

Respondent's counsel opposed the motion arguing that he had filed for a writ of administrative mandamus in State court challenging the Board's order. Respondent's Resp. to ALJ's May 21, 2008 Memorandum to Counsel at 1. According to Respondent's counsel, the writ raised multiple claims of error on the part of the State ALJ, and were the court to find any of the claims meritorious, Respondent's license could be restored. *Id.* Respondent's counsel further argued that DEA's decision be stayed until the State proceeding was resolved. *Id.* The Government opposed Respondent's motion on the ground that it was speculative whether the State court would grant any relief, and that

[1] Respondent did not, however, dispute that he had subsequently been properly served.