performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for its actions and demonstrate that it will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Trong Tran,* 63 FR 64280, 62483 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

As the ALJ observed, both of Respondent's owners invoked their Fifth Amendment privilege when called to testify by the Government and refused to answer any questions. ALJ at 24. I therefore find that Respondent (and its owners) have failed to accept responsibility for their misconduct. This alone provides reason to hold that Respondent has not rebutted the Government's *prima facie* showing that issuing it a new registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f).

In its Exceptions, Respondent nonetheless contends that ''even though the [Liddy's] invoked their Fifth Amendment Privilege, the record * * * demonstrate[s] that the complained of conduct was no longer present'' and that it had ceased the offending conduct prior to the execution of the search warrant in July 2007. Exceptions at 1–2. Respondent thus asserts that it has changed its practices and that its then–existing registration should not be revoked. *Id.* at 2. However, the evidence shows that at some time in either 2005 or 2006, a DEA Investigator had visited Respondent and interviewed Respondent's owners. Tr. 82.

While the record does not establish the precise subject matter that was discussed, it is not everyday that the DEA comes knocking at one's door, and it is reasonable to infer that the Investigator's visit had something to do with the illegality of Respondent's activities in dispensing the internet prescriptions. Accordingly, even were I to ignore the failure of Respondent's owners to acknowledge their illegal behavior (which I decline to do), the weight to be given Respondent's cessation of its unlawful practices is substantially diminished by the fact that this followed, rather than preceded, its owners becoming aware that they were under investigation. Moreover, as the ALJ noted, Respondent put on no evidence as to what steps it has undertaken to reform its practices. ALJ at 24.

I therefore concur with the ALJ's conclusion that Respondent's ''extensive record of unlawful conduct * * *, its callous disregard for the serious responsibility of a DEA registrant, and its failure to present any evidence to show how it has corrected these practices outweigh'' the fact that the State Pharmacy Board has taken no action against its license (factor one) and the absence of any criminal convictions (factor three). *Id.* at 25. I further adopt the ALJ's conclusion that ''it would be inconsistent with the public interest to allow * * * Respondent to maintain its registration.'' *Id.* at 24. Accordingly, Respondent's pending renewal application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I deny the Government's motion to terminate the proceeding as moot. I further order that the application of Liddy's Pharmacy, L.L.C., for a DEA Certificate of Registration be, and it hereby is, denied. This Order is effective September 8, 2011.

Dated: August 2, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–20055 Filed 8–8–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–70]

Sheryl Lavender, D.O. Decision and Order

On October 28, 2010, Administrative Law Judge (ALJ) Timothy D. Wing, issued the attached recommended decision. The Respondent did not file exceptions to the decision.

Having reviewed the record in its entirety [1] including the ALJ's recommended decision, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended Order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 21 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, BL1667596, issued to Sheryl Lavender, D.O., be, and it hereby is, revoked. I further order that any pending application of Sheryl Lavender, D.O., to renew or modify her registration, be, and it hereby is, denied. This Order is effective immediately.

Dated: July 27, 2011.

Michele M. Leonhart,

Administrator.

Brian Bayly, Esq.,

for the Government.

Shawn B. McKamey, Esq.,

for the Respondent.

Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

Timothy D. Wing, Administrative Law Judge. On July 26, 2010, the Deputy Administrator, DEA, issued an Order to Show Cause and Immediate Suspension (OSC/IS) of DEA COR BL1667596, dated July 26, 2010, and served on Respondent on August 2, 2010. The OCS/IS alleged that Respondent's continued registration constitutes an imminent danger to the public health and safety. The OSC/IS also provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR BL1667596 pursuant to 21 U.S.C. 824(a)(4), on the grounds that Respondent lacks authority to handle controlled substances in Florida, the state in which she maintains her DEA registration, and on the grounds that Respondent's continued registration would be inconsistent with the public interest under 21 U.S.C. 823(f). On August 31, 2010, Respondent, acting *pro se,* in a letter dated August 23, 2010, timely requested a hearing with the DEA Office of Administrative Law Judges (OALJ).

I issued an Order for Prehearing Statements on September 8, 2010. On the same date, OALJ sent Respondent a letter informing her of her right to representation under 21 CFR 1316.50.

On September 10, 2010, the Government filed a Motion for Summary Judgment. On September 13, 2010, I issued an order directing Respondent to reply to the Government's motion by September 20, 2010. On September 17, 2010, Respondent, through counsel, filed Respondent's Unopposed Motion for Extension of Time to Allow Respondent to Answer Motion for Summary Judgment, seeking an extension of time so that Respondent might obtain

[1] I note that the Government also cited 21 U.S.C. 824(a)(3) in both the Order to Show Cause and its Motion for Summary Judgment as authority for revoking Respondent's registration. *See* Order to Show Cause, at 2; Mot. for Summ. Judg., at 2–3.

permanent counsel.[1] I granted that motion on September 17, 2010, and granted Respondent until October 12, 2010, to respond to the Government's motion.

On October 12, 2010, having secured permanent counsel,[2] Respondent filed a second unopposed motion requesting additional time to respond. I granted that motion on October 13, 2010, and granted Respondent until October 15, 2010, to respond to the Government's Motion for Summary Judgment.

On October 15, 2010, Respondent timely filed her response to the Government's Motion for Summary Judgment.

II. The Parties' Contentions

A. The Government

In support of its motion for summary judgment, the Government asserts that on May 7, 2010, the State of Florida, Department of Health, issued an Order of Emergency Suspension of Respondent's osteopathic medical license, and that Respondent consequently lacks authority to possess, dispense or otherwise handle controlled substances in Florida, the jurisdiction in which she maintains her DEA registration. The Government contends that such state authority is a necessary condition for maintaining a DEA COR and therefore asks that I summarily recommend to the Deputy Administrator that Respondent's COR be revoked. In support of its motion, the Government attaches three documents: (1) The Emergency Order of Suspension referred to above; (2) a copy of Respondent's request for a hearing, filed August 31, 2010, in which Respondent denies that the state suspension ''should remain in full force and effect, thereby prohibiting Sheryl Lavender, D.O., from practicing medicine, and prescribing medications to patients'' (Gov't Mot. Sum. J. at 2 ¶(3) (citing Resp't Req. Hg. at 1 ¶(B)(2))); and (3) a printout dated September 9, 2010, from a Web site maintained by the Florida Department of Health indicating that Respondent's suspension remained in effect as of that date.

B. Respondent

Respondent opposes summary judgment and seeks the opportunity to ''discuss the merits of this matter.'' (Resp't Opp'n Gov't Mot. Sum. J. 2 ¶5.) In sum and in substance, Respondent argues that while ''it is technically true Respondent lacks state authorization to practice medicine at this time, this shall soon be remedied and having the DEA registration withdrawn or otherwise revoked would unnecessarily elongate Dr. Lavender's return to medicine * * *.'' (*Id.* at 1 ¶2.) Respondent also seeks to present evidence contesting two assertions: first, that she failed to comply with federal law in prescribing controlled substances; and second, that her continued registration would be a danger to the public. (*Id.* at 2 ¶4.) Finally, Respondent raises an estoppel and detrimental reliance argument, but concedes ''this particular tribunal is not the appropriate forum in which to argue [those] grounds.'' (*Id.* at ¶3.)

III. Discussion

At issue is whether Respondent may maintain her DEA COR given that Florida has suspended her state license to practice medicine.

Under 21 U.S.C. 824(a)(3), a practitioner's loss of state authority to engage in the practice of medicine and to handle controlled substances is grounds to revoke a practitioner's registration. Accordingly, this agency has consistently held that a person may not hold a DEA registration if she is without appropriate authority under the laws of the state in which she does business. *See Scott Sandarg, D.M.D.,* 74 FR 17,528 (DEA 2009); *David W. Wang, M.D.,* 72 FR 54,297 (DEA 2007); *Sheran Arden Yeates, M.D.,* 71 FR 39,130 (DEA 2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104 (DEA 1993); *Bobby Watts M.D.,* 53 FR 11,919 (DEA 1988).

Summary judgment in a DEA suspension case is warranted even if the period of suspension of a Respondent's state medical license is temporary, or even if there is the potential for reinstatement of state authority because ''revocation is also appropriate when a state license had been suspended, but with the possibility of future reinstatement.'' *Stuart A. Bergman, M.D.,* 70 FR 33,193 (DEA 2005); *Roger A. Rodriguez, M.D.,* 70 FR 33,206 (DEA 2005).

It is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, under the rationale that Congress does not intend administrative agencies to perform meaningless tasks. *See Layfe Robert Anthony, M.D.,* 67 FR 35,582 (DEA 2002); *Michael G. Dolin, M.D.,* 65 FR 5661 (DEA 2000); *see also Philip E. Kirk, M.D.,* 48 FR 32,887 (DEA 1983), *aff'd sub nom. Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984); *Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F.3d 600, 605 (1st Cir. 1994).

In the instant case, the Government asserts, and Respondent concedes, that Respondent's Florida medical license is presently suspended. While Respondent disagrees that the state suspension of her Florida medical license ''*should* remain in full force and effect, thereby prohibiting [her] from practicing medicine and prescribing medication to patients,'' (Resp't Req. Hg. at 1 ¶ (B)(2) (emphasis supplied)), she does not deny that the state suspension presently removes the state authority upon which her DEA registration is premised. To the contrary, she admits ''it is technically true Respondent lacks state authorization to practice medicine at this time * * *.'' (Resp't Opp'n Gov't Mot. Sum. J. 1 ¶2.)

I therefore find that there is no genuine dispute as to any material fact, and that substantial evidence shows that Respondent is presently without state authority to handle controlled substances in Florida. Because ''DEA does not have statutory authority under the Controlled Substances Act to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices,'' *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (DEA 2006), I do not reach Respondent's other contentions. Under the circumstances discussed above, I conclude that further delay in ruling on the Government's Motion for Summary Judgment is not warranted.

Recommended Decision

I grant the Government's motion for summary judgment and recommend that Respondent's DEA COR BL1667596 be revoked and any pending applications denied.

Dated: October 28, 2010.

Timothy D. Wing,

Administrative Law Judge.

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[1] In Respondent's first motion for an extension of time, counselor Patrick R. McKamey stated that he represents Respondent in a separate criminal case; that he practices exclusively in criminal litigation; and that he filed a limited appearance in this case only so that Respondent might retain permanent counsel for these administrative proceedings.

[2] Shawn B. McKamey, Esq., filed his notice of appearance on October 13, 2010.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Robert Leigh Kale, M.D., Decision and Order

On September 9, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Robert Leigh Kale, M.D. (Registrant), of Fort Smith, Arkansas.