

in which he practices.”). DEA has long held that possession of authority under state law to dispense controlled substances is an essential condition for obtaining and maintaining a DEA registration. *Serenity Café*, 77 FR 35027, 35028 (2012); *David W. Wang*, 72 FR 54297, 54298 (2007); *Sheran Arden Yeates*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci, M.D.*, 58 FR 51104 (1993); *Bobby Watts, M.D.*, 53 FR 11919 (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].” *Roy Chi Lung, M.D.*, 74 FR 20346, 20347 (2009); see also *Scott Sandarg, D.M.D.*, 74 FR 17528, 174529 (2009); *John B. Freitas, D.O.*, 74 FR 17524, 17525 (2009); *Roger A. Rodriguez, M.D.*, 70 FR 33206, 33207 (2005); *Stephen J. Graham, M.D.*, 69 FR 11661 (2004); *Abraham A. Chaplan, M.D.*, 57 FR 55280 (1992); see also *Harrell E. Robinson, M.D.*, 74 FR 61370, 61375 (2009).<sup>1</sup> “[R]evocation is warranted even where a practitioner’s state authority has been summarily suspended and the State has yet to provide the practitioner with a hearing to challenge the State’s action at which he may ultimately prevail.” *Kamal Tiwari, M.D.*, 76 FR 71604, 71606, (2011); see also *Bourne Pharmacy, Inc.*, 72 FR 18273, 18274 (2007); *Anne Lazar Thorn, M.D.*, 62 FR 12847 (1997). Additionally, Agency precedent has established that the existence of other proceedings in which the Respondent is involved is not a basis upon which to justify a stay of DEA administrative enforcement proceedings. *Grider Drug #1 & Grider Drug #2*, 77 FR 44069, 44104 n.97 (2012).

Congress does not intend for administrative agencies to perform meaningless tasks. See *Philip E. Kirk, M.D.*, 48 FR 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 FR 14945 (1997); *Dominick A. Ricci, M.D.*, 58 FR 51104 (1993). Here, the supplied BML Order establishes, and the Respondent does not contest, that the Respondent is currently without authorization to handle controlled substances in Kentucky, 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.” See *Veg-Mix, Inc.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (“an agency may ordinarily dispense with a hearing when no genuine dispute exists”).<sup>2</sup> While not unsympathetic to the procedural issues raised by the Respondent in his state administrative proceedings, under current Agency precedent, the disposition of the Government’s motion is wholly dependent upon a single issue: whether he continues to possess authority under state law to handle controlled substances—which he does not.

At this juncture, no genuine dispute exists over the fact that the Respondent lacks state authority to handle controlled substances in the state of Kentucky. Because the Respondent lacks such state authority, both the plain language of applicable federal statutory provisions and Agency interpretive precedent dictate that he is not entitled to maintain his DEA registration. Simply put, there is no contested factual matter adducible at a hearing that would provide DEA with the authority to allow the Respondent to continue to hold his COR.

Accordingly, I hereby

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

RECOMMEND that the Respondent’s DEA registration be REVOKED

<sup>2</sup> Even assuming, *arguendo*, the possibility that the Respondent’s state controlled substances privileges could be reinstated, summary disposition would still be warranted because under Agency precedent “revocation is also appropriate when a state license has been suspended, but with the possibility of future reinstatement.” *Rodriguez*, 70 FR 33207 (citations omitted), and even where there is a judicial challenge to the state medical board action actively pending in the state courts. *Michael G. Dolin, M.D.*, 65 FR 5661, 5662 (2000).

forthwith<sup>3</sup> and any pending applications for renewal be DENIED. Dated: July 23, 2015. John J. Mulrooney II, Chief Administrative Law Judge.

[FR Doc. 2015–24128 Filed 9–22–15; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 15–23]

#### Brown’s Discount Apothecary, BC, Inc., and Bolling Apothecary, Inc.

On May 18, 2015, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Brown’s Discount Apothecary, BC, Inc. (holder of DEA Certificate of Registration FB3717153), of Jasper, Alabama and Bolling Apothecary, Inc., (holder of DEA Certificate of Registration AB9375456), of Fayette, Alabama. Show Cause Order, at 1. The Show Cause Order proposed the revocation of each pharmacy’s DEA Certificate of Registration, on the ground that on April 7, 2015, the Alabama State Board of Pharmacy issued an Emergency Suspension Order suspending each pharmacy’s Alabama Controlled Substances Permit, and that therefore, each pharmacy is “without authority to handle controlled substances in Alabama, the [S]tate in which each is registered with the DEA.” *Id.* at 1–2.

On May 20, 2015, a Diversion Investigator from the Birmingham District Office personally served the Order to Show Cause on Bolling Apothecary, Inc. Notice of Service of Order to Show Cause, at 1. According to the Government, on June 2, 2015, an attorney “accepted service by email of the Order to Show Cause on behalf of Brown’s Discount Apothecary and its owner George Bolling, Jr. *Id.*

On June 1, 2015, George R. Bolling, Sr., owner of Respondent Bolling Apothecary, Inc., filed a request for a hearing on behalf of the pharmacy with the Office of Administrative Law Judges

<sup>3</sup> While Agency precedent has held that a stay of DEA administrative proceedings is unlikely ever to be justified by the existence of ancillary proceedings (*Grider Drug #1 & Grider Drug, #2*, 77 FR 44069, 44104 n.97 (2012)), the Agency recently held revocation proceedings in abeyance at the post-hearing adjudication level for a lengthy period pending the resolution of criminal fraud charges and “pending resolution of [a state] Board proceeding.” *Odette L. Campbell, M.D.*, 80 FR 41062, 41064 (2015). However, inasmuch as no stay was sought by the Respondent here, and good cause does not appear to exist in any event, the Government’s motion will be granted and the case forwarded for a final order.

<sup>1</sup> But see 21 U.S.C. 824(a)(3) (2012) (“A registration pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has had his State license or registration suspended, revoked, or denied by competent State authority . . .”) (emphasis added). Thus, notwithstanding the Agency’s extensive body of internal precedent to the contrary, the plain language of section 824(a)(3) provides that loss of state authority constitutes a discretionary—not mandatory—basis for revocation. However, inasmuch as the Agency precedent is clear on the matter, I am without authority or inclination to render a contrary interpretation.

(OALJ). Letter of Bolling Apothecary, Inc., to Hearing Clerk, OALJ (May 23, 2015). Mr. Bolling did not, however, request a hearing on behalf of Brown's Discount Apothecary, and at no point has any person filed a request for a hearing on behalf of Brown's, or in the alternative, filed a written statement in lieu of a hearing. See 21 CFR 1301.43(c) & (d).

Both matters were nonetheless placed on the docket of the OALJ and assigned to Administrative Law Judge (ALJ) Christopher B. McNeil. Recommended Decision, at 2. On June 2, the ALJ issued an "Order For Briefing On Allegations Concerning Respondents' Lack Of State Authority" (hereinafter, Briefing Order).

Therein, the ALJ found that there was "no request for a hearing on behalf of Brown's Discount Apothecary." Briefing Order, at 2. He then provided the parties with the "opportunity to establish whether grounds exist with respect to either [pharmacy] to advance this matter to hearing, or whether the two pharmacy's [sic] DEA . . . Registration[s] should be summarily revoked and any pending application summarily denied, without a hearing." *Id.* The ALJ further ordered that "the Government may provide evidence and arguments to support the allegation that Bolling Apothecary, Inc. lacks state authority to handle controlled substances," and "may also provide evidence and arguments regarding the issue of whether Brown's Discount Apothecary has timely invoked the jurisdiction of the Office of Administrative Law Judges, or the issue of whether [it] lacks state authority to handle controlled substances, or both issues." *Id.* at 2–3. The ALJ's Order also offered Respondent the opportunity to file a response. *Id.* at 3.

Thereafter, the Government filed a Motion for Summary Disposition (hereinafter, Motion). Therein, the Government sought the revocation of each pharmacy's registration on the ground that the Alabama State Board of Pharmacy had issued an Emergency Suspension Order which suspended each pharmacy's Alabama Controlled Substances Permit. Motion, at 2. The Government supported its motion with a copy of the Emergency Suspension Order. *Id.* at Exhibit A, at 7. However, the Government did not address whether, given the failure of Brown's Discount Apothecary to file a hearing request, the ALJ had jurisdiction to adjudicate the allegations with respect to it. See generally Motion, at 2–4.

While Bolling Apothecary had requested a hearing, it did not file a response to the Government's motion. Nor did Brown's file a response.

On July 6, 2015, the ALJ issued his Recommended Decision. Addressing the issue of whether he had jurisdiction to rule on the matter of Brown's registration, the ALJ explained that he had given "the Government the option of providing evidence and arguments regarding the issue of whether Brown's . . . has timely invoked the jurisdiction of this office or whether Brown's lacks state authority to handle controlled substances." R.D. at 2 n2. The ALJ then noted that "the Government elected to present evidence that Brown's . . . is currently without state authority to handle and dispense controlled substances." *Id.* The ALJ then proceeded to exercise jurisdiction over the matters involving both Brown's and Bolling, but provided no explanation as to why he was doing so with respect to Brown's. Moreover, the ALJ did not make the requisite finding as to the registration status of either Brown's or Bolling. See *Sharad C. Patel*, 80 FR 28,693, 28,694 n.3 (2015).

While the ALJ noted that neither Brown's nor Bolling had filed a response to the Government's motion, he addressed the arguments raised by Bolling Pharmacy in its Hearing Request. R.D. at 3–4. The ALJ noted that George R. Bolling, Sr. (Bolling Apothecary's owner) had filed a renewal application with the State Board the day after he bought the store and included a copy of a warranty deed executing a transfer of the store to him from one George R. Bolling, Jr. *Id.* at 3–4. The ALJ found, however, that "nowhere in the request for hearing does either of the Respondents provide any evidence contradicting the Government's position that both Bolling and Brown[s] lack state authority to handle and dispense controlled substances." R.D. at 4.<sup>1</sup> The ALJ thus concluded that the "Respondents do not have authority to handle and dispense controlled substances in the State of Alabama, the jurisdiction where each is licensed by the DEA to handle and dispense such substances." *Id.* at 4. The ALJ then granted the Government's Motion for Summary Disposition and "recommended that Respondents' DEA Certificate of Registration . . . be revoked and that any pending application . . . be denied." *Id.* at 5.

<sup>1</sup> The ALJ also rejected the contention of Bolling's owner that the pharmacy "ha[d] authority" until either his state license or his DEA registration was physically removed by a person identified only as the supervisor of a DEA Diversion Investigator. R.D. at 4 (quoting Bolling Pharmacy Request for Hearing, at 1). As the ALJ correctly explained, it is the Board of Pharmacy's Emergency Suspension Order "and not the presence or absence of the physical license that supports the Government's motion." *Id.*

Neither party filed exceptions to the Recommended Decision. Thereafter, on August 3, 2015, the ALJ forwarded the record to this Office for Final Agency Action.

Having reviewed the record, I adopt the ALJ's Recommended Decision only with respect to Bolling Apothecary. With respect to Brown's, I find that the Government did not establish that it properly served the Show Cause Order. Moreover, even if the Government had established service, I would reject the ALJ's decision as to Brown's, because in the absence of a hearing request, the ALJ had no authority to rule on the issue of whether its registration should be revoked.

As for whether service was proper, 21 U.S.C. 824(c) provides that "[b]efore taking action pursuant to this section . . . the Attorney General shall serve upon the . . . registrant an order to show cause why registration should not be . . . revoked[] or suspended." (emphasis added). According to the Government's Notice of Service, the Government did not serve the Show Cause Order "upon the . . . [R]egistrant," *id.*, but rather on an attorney, who according to the Government "accepted service by email of the Order to Show Cause on behalf of Brown's . . . and its owner George Bolling, Jr. on June 2, 2015." Notice of Service, at 1.

However, "[n]umerous Federal Courts have held that '[t]he mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service.'" *Harbinson v. Commonwealth of Virginia*, 2010 WL 3655980, at \*9 (E.D. Va. Aug. 11, 2010) (quoting *Davies v. Jobs & Adverts Online, GmbH*, 94 F.Supp.2d 719, 722 (E.D. Va. 2000)). See also *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997); *Grandbouche v. Lovell*, 913 F.2d 835, 837 (10th Cir. 1990); *Ransom v. Brennan*, 437 F.2d 5134, 518–19 (5th Cir. 1971). "Rather, the party seeking to establish the agency relationship must show "that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service." " *Harbinson*, 2010 WL 3655980, at \*9 (quoting *Davies*, 94 F.Supp.2d at 722 (quoting *Ziegler*, 111 F.3d at 881)).

While an attorney's authority to act as an agent for the acceptance of process "may be implied from surrounding circumstances indicating the intent of" his client, *In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004) (other citation and internal quotations omitted), "an agent's authority to act cannot be established solely from the agent's actions." *Id.* at 1084. "Rather,

the authority must be established by *an act of the principal*.” *Id.* (citing *FDIC v. Oaklawn Apartments*, 959 F.2d 170, 175 (10th Cir. 1992) (emphasis added)).

With respect to Brown’s, even assuming that the attorney it served with the Show Cause Order was in an attorney-client relationship with the pharmacy, the Government has produced no evidence establishing that Brown’s authorized the attorney to accept service of the Order on its behalf. *See David M. Lewis*, 78 FR 36591, 36591 (2013) (holding service on attorney was improper where only evidence offered by Government was that “the attorney requested to take possession of the Order”) (citing *Focus Media*, 387 F.3d at 1084)). Accordingly, I find that the Government did not accomplish service on Brown’s.

Even if I concluded otherwise, under the Agency’s regulations, a hearing request must be submitted by the applicant/registrant to vest jurisdiction over the matter in the Office of Administrative Law Judges. *See* 21 CFR 1301.42 (“If requested by a person entitled to a hearing, the Administrator shall hold a hearing for the purpose of receiving factual evidence regarding the issues involved in the denial, revocation or suspension of any registration.”); *id.* § 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 in the form prescribed . . . .”); *id.* § 1301.43(d) (“If any person entitled to a hearing . . . fails to file a request for a hearing . . . such person shall be deemed to have waived the opportunity for a hearing . . . unless such person shows good cause for such failure.”). Because in contrast to Bolling, Brown’s never filed a hearing request, the ALJ had no authority to offer “the Government the option of providing evidence and arguments regarding the issue of . . . whether Brown’s lacks state authority to handle controlled substances,” R.D. 2, at n.2; and he had no authority to rule on the issue.<sup>2</sup>

As for Bolling Discount Apothecary, its owner attached a copy of its registration with his Request for Hearing, which shows that his registration does not expire until July

<sup>2</sup> According to the Show Cause Order, Brown’s registration was due to expire on July 31, 2015, and the registration records of the Agency, of which I take Official Notice, *see* 5 U.S.C. 556(e), show that Brown’s allowed its registration to expire on July 31, 2015 (before the ALJ forwarded the record) and has not filed a renewal application. *See Patel*, 80 FR at 28,694 n.3. In any event, because the Government did not serve Brown’s, the matter of its registration is not before me.

31, 2017, thus rendering a remand to establish jurisdiction unnecessary. Having reviewed the Board’s Emergency Suspension Order, I adopt the ALJ’s finding that the pharmacy does not have authority to dispense controlled substances in Alabama, the State in which it is registered with DEA, and that therefore, it no longer meets the statutory definition of a practitioner. *See* 21 U.S.C. 802(21) (“The term ‘practitioner’ means a . . . pharmacy . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which [it] practices . . . to . . . dispense . . . a controlled substance in the course of professional practice[.]”). *See also* 21 U.S.C. 823(f). Accordingly, I will order that Respondent Bolling Discount Pharmacy’s registration be revoked and that any pending application to renew or modify its registration be denied. *See* 21 U.S.C. 824(a)(3); *see also* R.D. at 4 n.10 (collecting cases).

#### Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a) and 28 CFR 0.100(b), I order that DEA Certificate of Registration AB9375456 issued to Bolling Apothecary be, and it hereby is, revoked. I further order that any application of Bolling Apothecary to renew or modify its registration be, and it hereby is, denied. This Order is effective immediately.<sup>3</sup>

Dated: September 15, 2015.

**Chuck Rosenberg,**

*Acting Administrator.*

[FR Doc. 2015–24126 Filed 9–22–15; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Underground Retorts

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, “Underground Retorts,” to the Office of Management and Budget (OMB) for review and approval for continued use, without

<sup>3</sup> For the same reasons that led the Board to order the emergency suspension of Respondent’s pharmacy license (*i.e.*, the extensive allegations that it was diverting controlled substances), I find that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before October 23, 2015.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201507-1219-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201507-1219-002) (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor–OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

#### FOR FURTHER INFORMATION CONTACT:

Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Underground Retorts information collection. Regulations 30 CFR 57.22401 sets forth the safety requirements for using a retort to extract oil from shale in an underground metal or nonmetal I–A and I–B mine that operates in a combustible ore and either liberates methane or has the potential to liberate methane based on the history of the mine or the geological area in which the mine is located. This presently applies only to underground oil shale mines. The standard requires that, prior to ignition of an underground retort, the mine operator must submit a written ignition operation plan to the