

## II. Findings of Fact

### A. Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FE7288497 at the registered address of 3702 S. State Street, Suite 117, Salt Lake City 84115. RFAAX 2 (Certification of Registration History). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II–V as a retail pharmacy. *Id.*

### B. The Status of Registrant's State License

Registrant was previously the holder of a Utah Pharmacy—Class B license. RFAAX 3 (Verification of Utah Licensure). Registrant's Utah pharmacy license expired on September 30, 2019. *Id.* A certified Verification of Utah Licensure dated November 13, 2019, from the State of Utah, Department of Commerce, Division of Occupational and Professional Licensing, shows the status of Registrant's Utah pharmacy license as “Denied.” *Id.*

According to Utah's online records, of which I take official notice, Registrant's pharmacy license status is still listed as “Denied.”<sup>1</sup> <https://secure.utah.gov/llv/search/index.html> (last visited October 27, 2020). Utah's online records further show that Registrant's Controlled Substance License also expired on September 30, 2019, and the license status is also listed as “Denied.” *Id.*

Accordingly, I find that Registrant does not have a valid pharmacy license or controlled substance license in Utah, the state in which Registrant is registered with DEA.

## III. 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 Controlled Substances Act (hereinafter, CSA), “upon a finding that the registrant . . . has had his State license or registration

suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.” A pharmacy is a “practitioner” under the CSA. 21 U.S.C. 802(21). With respect to a practitioner, the DEA has also 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., Palafox Pharmacy*, 84 FR 18,320 (2019); *James L. Hooper, M.D.*, 76 FR 71,371 (2011), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); *Roots Pharmaceuticals, Inc.*, 76 FR 51,430 (2011); *Bourne Pharmacy, Inc.*, 72 FR 18,273 (2007); *Frederick Marsh Blanton, M.D.*, 43 FR 27,616 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term “practitioner” to mean “a physician, . . . pharmacy, . . . 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, the 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 practices. *See, e.g., Palafox Pharmacy*, 84 FR at 18,321; *James L. Hooper*, 76 FR at 71,371–72; *Roots Pharmaceuticals, Inc.*, 76 FR at 51,430; *Bourne Pharmacy, Inc.*, 72 FR at 18,274; *Frederick Marsh Blanton*, 43 FR at 27,617.

As found above, Registrant's state pharmacy and controlled substance licenses have expired, and thus, it no longer holds authority in Utah, the state in which it is registered with DEA, to dispense controlled substances. *See* Utah Code Ann. §§ 58–17b–302(1) (requiring a license to act as a pharmacy); 58–37–6(2)(a)(i) (requiring a license to dispense controlled substances) (West 2020). As such, Registrant is not qualified to dispense

controlled substances as a “practitioner.” I will, therefore, order that Registrant's DEA registration be revoked.

## IV. Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FE7288497 issued to Eco Apothecary, LLC. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Eco Apothecary, LLC to renew or modify this registration, as well as any pending application of Eco Apothecary, LLC for registration in Utah. This Order is applicable December 21, 2020.

**Timothy J. Shea,**

*Acting Administrator.*

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 20–11]

#### Monica Ferguson, F.N.P., R.N.; Decision and Order

On February 20, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Monica Ferguson, F.N.P., R.N., (hereinafter, Respondent) of Lake Oswego, Oregon. OSC, at 1. The OSC proposed the revocation of Respondent's Certificate of Registration No. MF1358298. *Id.* It alleged that Respondent is without “authority to handle controlled substances in Oregon, the state in which [Respondent is] registered with DEA.” *Id.* *See also* 21 U.S.C. 823(f) and 824(a)(3).

Specifically, the OSC alleged that the Oregon State Board of Nursing (hereinafter, Board) revoked Respondent's RN license number 099000287RN and her NP–PP Family license number 200650008NP effective on December 31, 2019. *Id.* This revocation, according to the OSC, demonstrated that Respondent lacks authority to handle controlled substances in Oregon. *Id.* (citing 21 U.S.C. 802(21), 823(f), and 824(a)(3)).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing

<sup>1</sup> Under the Administrative Procedure Act, an agency “may take official notice of facts at any stage in a proceeding—even in the final decision.” United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), “[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.” Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response may be filed and served by email ([dea.addo.attorneys@dea.usdoj.gov](mailto:dea.addo.attorneys@dea.usdoj.gov)).

to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated March 11, 2020, Respondent, *pro se*, timely requested a hearing.<sup>1</sup> Hearing Request, at 1. In the Hearing Request, Respondent requested that DEA defer proceedings on the proposed revocation of her DEA registration until there is a decision from the Oregon Appellate Court on her March 3, 2020, request for an immediate remand or reversal of the Board's revocation of her state licenses. *Id.* at 2. Respondent also requested an extension of time to prepare for the DEA revocation proceedings in light of a number of delineated personal circumstances which Respondent described as "extreme hardship[s]." *Id.* at 1.

The Office of Administrative Law Judges put the matter on the docket and assigned it to Administrative Law Judge Mark M. Dowd (hereinafter, ALJ). The ALJ issued a Briefing Schedule for Lack of State Authority Allegations, dated March 16, 2020. The Government timely complied with the Briefing Schedule by filing a Motion for Summary Disposition on March 20, 2020, (hereinafter, Government Motion or Govt Motion). Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Recommended Decision of the Administrative Law Judge, dated May 5, 2020, (hereinafter, Summary Disposition or SD), at 3. In its Motion, the Government submitted evidence that Respondent's Oregon nurse practitioner licenses had been revoked and that she therefore lacked authority to handle controlled substances in Oregon, the state in which she is registered with DEA. Govt Motion, at 1; SD, at 3. In light of these facts, the Government argued that DEA must revoke her registration. Govt Motion, at 3.

On March 22, 2020, Respondent, asked that the Government Motion be denied, requested that the parties have a hearing, and referenced her Hearing Request, wherein she requested a deferral of proceedings or additional time to prepare evidence. See Email from Respondent, dated March 22, 2020; March 23, 2020 Order Granting Respondent Extension to File Response to Government's Motion for Summary Disposition (hereinafter, March 23, 2020

Order), at 1. In the March 23, 2020 Order, the ALJ denied Respondent's request to defer or stay proceedings. March 23, 2020 Order, at 3. The ALJ then granted Respondent an extension of time to respond to the Government Motion. *Id.* at 5. The March 23, 2020 Order also clearly explained to Respondent that the proceeding was focused on "whether Respondent has lost her state authority to handle controlled substances," and that "[t]he underlying merits of the Respondent's loss of state licensure are irrelevant." *Id.* at 2.

On April 12, 2020, Respondent again asked for an extension of time to respond to the Government Motion. See Email from Respondent dated April 12, 2020. On April 13, 2020, the ALJ granted Respondent another extension of time to respond and referred back to the March 23, 2020 Order outlining the relevant issues in dispute. Order Granting Respondent's Second Extension to File Response to Government's Motion for Summary Disposition, at 1. On May 4, 2020, Respondent timely filed her "Response to Motion for Summary Disposition" (hereinafter, Respondent's Response or Resp Response). In her Response, Respondent challenged the method of investigation and the merits of the underlying state action, and requested a stay of DEA's proceedings while she appealed the state action. See generally Resp Response; SD, at 4. Regarding the relevant issue—whether or not Respondent had state authority to handle controlled substances—Respondent explicitly admitted that she did not. Resp Response, at 8. Respondent "agree[d] that she lacks the authority to handle controlled substance[s]" and further "acknowledge[d] that [her] license has been revoked."<sup>2</sup> *Id.* at 8, 9.

In the Summary Disposition, the ALJ again denied the Respondent's request to stay DEA's proceedings.<sup>3</sup> SD, at 5–6. The ALJ noted that, even though the Respondent was actively engaged in negotiating or appealing a State Board decision, "[i]t is not DEA's policy to stay [administrative] proceedings . . . while registrants litigate in other forums." SD, at 5 (citing *Newcare Home Health Servs.*, 72 FR 42,126, 42,127 n.2 (2007)). The ALJ then went on to grant the Government Motion. *Id.* The ALJ found that "no dispute exists over the

fact that the Respondent currently lacks state authority to handle controlled substances in the State of Oregon, . . . so there is no contested factual matter that could be introduced at a hearing that would, in the Agency's view, provide authority to allow the Respondent to continue to hold her DEA [registration]." SD, at 8–9. By letter dated June 15, 2020, the ALJ certified and transmitted the record to me for final Agency action. In that letter, the ALJ advised that neither party filed exceptions. I find that the time period to file exceptions has expired. See 21 CFR 1316.66.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

### Findings of Fact

#### *Respondent's DEA Registration*

Respondent is the holder of DEA Certificate of Registration No. MF1358298 at the registered address of 18238 Tamaway Drive, Lake Oswego, Oregon, 97034. Govt Motion Exhibit (hereinafter, GX) 1, at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a "MLP–NURSE PRACTITIONER–DW/30." *Id.* Respondent's registration expired on September 30, 2020.<sup>4</sup> *Id.*

#### *The Status of Respondent's State License*

On December 31, 2019, the Oregon State Board of Nursing issued a Final Order revoking Respondent's Nurse Practitioner's Certificate and Registered Nurse License. GX 2, at 33. According to the Final Order, Respondent "engaged in fraud or deceit in the practice of nursing," "fraud or deceit in the admission to [the practice of nursing]," "gross incompetence . . . [or] gross negligence with regard to patient care," and "no less than six separate instances of conduct derogatory to the standards of nursing." *Id.* Examples of the misconduct that gave rise to these findings include, but are not limited to, Respondent operating a vehicle while impaired by prescription narcotics and possessing controlled substances that were stored in unlabeled bottles and that were not prescribed to her. *Id.* at 3–4, 10–12, 17.

According to Oregon's online records, of which I take official notice,

<sup>1</sup> The Hearing Request was deemed filed on March 16, 2020. Briefing Schedule for Lack of State Authority Allegations dated March 16, 2020, at 1. I, thus, find that the Government's service of the OSC was adequate.

<sup>2</sup> Respondent challenges the date her license was revoked (indicating that it was actually revoked in February 2020) and argues that the matter is still pending because it is being appealed. Resp Response, at 8–9.

<sup>3</sup> I find no error in the ALJ's decision to continue DEA's proceedings.

<sup>4</sup> The fact that Respondent allowed her registration to expire during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.*, 84 FR 68,474 (2019).

Respondent's registered nurse and family nurse practitioner licenses are still revoked.<sup>5</sup> Oregon State Board of Nursing License Verification Search, <http://osbn.oregon.gov/OSBNVerification/default.aspx> (last visited October 27, 2020). The Oregon records show that the end date for each of the license revocations is "Ongoing." *Id.*

Respondent "agrees that she lacks the authority to handle controlled substance[s]" and further "acknowledges that [her] license has been revoked."<sup>6</sup> Resp Response, at 8, 9. Based on the entire record before me, I find that Respondent currently is not licensed to engage in the practice of nursing in Oregon, the State in which Respondent is registered with DEA.

### 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 or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing[7] of controlled substances." With respect to a practitioner, the DEA has also 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, M.D.*, 76 FR 71,371 (2011), *pet. for rev. denied*, 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.*, 43 FR 27,616, 27,617 (1978).

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, the 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 practices. *See, e.g., James L. Hooper*, 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.*, 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.*, 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.*, 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton*, 43 FR at 27,617.

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 state," *Hooper*, 76 FR at 71,371 (quoting *Anne Lazar Thorn*, 62 FR 12,847, 12,848 (1997)), the Agency has also long held that revocation is warranted even where a practitioner is still challenging the underlying action. *Bourne Pharmacy*, 72 F 18,273, 18,274 (2007); *Wingfield Drugs*, 52 FR 27,070, 27,071 (1987). Thus, it is of no consequence that the action is being appealed. What is consequential is my finding that Respondent is no longer currently authorized to dispense controlled substances in Oregon, the state in which she is registered.

According to Oregon's statute, "[a] registered nurse *licensed* as a nurse practitioner is authorized to prescribe drugs for the use of and administration to other persons if approval has been given under [Oregon Revised Statutes] 678.390." Or. Rev. Stat. Ann. § 678.375

(West 2020) (emphasis added). Oregon Revised Statute § 678.390, provides that "[t]he Oregon State Board of Nursing may authorize a *licensed* nurse practitioner or licensed clinical nurse specialist to write prescriptions, including prescriptions for controlled substances listed in schedules II, III, III N, IV and V." Or. Rev. Stat. Ann. § 678.390(1) (West 2020) (emphasis added). The Oregon statute also states that "[t]he authority to write prescriptions or dispense prescription drugs may be denied, suspended or revoked by the Oregon State Board of Nursing upon proof that the authority has been abused."<sup>8</sup> *Id.* Here, it is clear that Respondent is no longer a licensed nurse practitioner and it is thus clear that she is no longer authorized to prescribe, administer, or dispense controlled substances in Oregon.

The undisputed evidence in the record is that Respondent currently lacks authority to practice nursing in Oregon. As already discussed, a nurse practitioner must be a licensed nurse practitioner to prescribe or dispense a controlled substance in Oregon. Thus, because Respondent lacks authority to practice nursing in Oregon and, therefore, is not authorized to handle controlled substances in Oregon, Respondent is not eligible to maintain a DEA registration. Accordingly, I will order that Respondent's DEA registration be revoked.

### Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. MF1358298 issued to Monica Ferguson. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Monica Ferguson to renew or modify this registration, as well as any other application of Monica Ferguson, for additional registration in Oregon. This Order is effective December 21, 2020.

**Timothy J. Shea,**

*Acting Administrator.*

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**BILLING CODE 4410–09–P**

<sup>8</sup> Although it appears that the process for a nurse practitioner to become authorized for prescribing and dispensing controlled substances is distinct from the process of becoming a licensed nurse practitioner, the authorization does not appear to be separately listed on the verification website. However, it is clear from Oregon law that it is a prerequisite of prescribing authority to be licensed as a nurse practitioner.

<sup>5</sup> Under the Administrative Procedure Act, an agency "may take official notice of facts at any stage in a proceeding—even in the final decision." United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Accordingly, Respondent may dispute my finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Respondent files a motion, the Government shall have fifteen calendar days to file a response. Any motion and response shall be filed and served by email to the other party and to the Office of the Administrator at [dea.addo.attorneys@dea.usdoj.gov](mailto:dea.addo.attorneys@dea.usdoj.gov).

<sup>6</sup> Respondent challenges the date her license was revoked (indicating that it was actually revoked in February 2020) and argues that the matter is still pending because it is being appealed. Resp Response, at 8–9. I find these arguments to be irrelevant as Respondent is not currently authorized to dispense controlled substances in Oregon.

<sup>7</sup> "[D]ispense[]" means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance. . . ." 21 CFR 802(10).