



BILLING CODE: 4410-09-P

DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
JOSEPH DELUCA, D.O.
DISMISSAL OF PROCEEDING

On July 16, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Joseph Deluca, D.O. (Registrant), of Coral Springs, Florida. The Show Cause Order proposed the revocation of Registrant's DEA Certificate of Registration as a practitioner and the denial of any pending applications to renew or modify his registration, on the ground that "[a]s a result of action by the Florida Department of Health, Board of Osteopathic Medicine, [he is] without authority to handle controlled substances in the State of Florida, the [S]tate in which [he is] registered with DEA." Show Cause Order at 1.

On July 27, 2010, the Government attempted to serve the Order to Show Cause on Registrant by certified mail, return receipt requested, which was addressed to him at his registered location. However, on August 9, 2010, the mailing was returned to DEA and stamped with the notations: "MOVED, LEFT NO ADDRESS" and "RETURNED TO SENDER." GX 4.

On December 30, 2010, the Government submitted the investigative record and a Request for Final Agency Action to this Office. Therein, the Government stated that: "[t]he Order to Show Cause was delivered via certified mail to the registered location of the Registrant, but was returned unclaimed. The Government has no information on a forwarding address for the Registrant or of his whereabouts." Request for Final Agency Action, at 1.

In its Request, the Government noted that on November 12, 2008, the Florida Department of Health, Board of Osteopathic Medicine (Board), issued an administrative complaint to Registrant. Id. The Government further noted that on March 23, 2010, the Board issued a final order (a copy of which was submitted in the Investigative Record) suspending Registrant's medical license for a period of two years. Id. at 1-2.

In its discussion of the procedural history of the Board proceeding, the Board's Final Order stated that "[o]n October 12, 2009, the Petitioner [Florida Department of Health] received a request from the Respondent for a Hearing Not Involving Disputes Issues of Material Fact or Informal Hearing." GX 6, at 1. The Board's Final Order then noted that the "Petitioner has filed a Motion for Final Order by Hearing Not Involving Disputes Issues of Material Facts," and that "Respondent filed a response to the Motion for Final Order." Id. The Final Order also included a Certificate of Service, which noted that a copy of the order had been mailed to Respondent at an address in Pembroke Pines, Florida. Id. at 8.

DISCUSSION

It is well settled "that due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Jones v. Flowers, 547 U.S. 220, 223 (2006) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Moreover, "'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" Jones, 547 U.S. at 229 (quoting Mullane, 339 U.S. at 315).

In Jones, the Court further noted that its cases “require[] the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” Id. at 230. The Court cited with approval its decision in Robinson v. Hanrahan, 409 U.S. 38 (1972), where it “held that notice of forfeiture proceedings sent to a vehicle owner’s home address was inadequate when the State knew that the property owner was in prison.” Jones, 547 U.S. at 230.¹ See also Robinson, 409 U.S. at 40 (“[T]he State knew that appellant was not at the address to which the notice was mailed . . . since he was at that very time confined in . . . jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was ‘reasonably calculated’ to apprise appellant of the pendency of the . . . proceedings.”); Covey v. Town of Somers, 351 U.S. 141 (1956) (holding that notice by mailing, publication, and posting was inadequate when officials knew that recipient was incompetent).

The Jones Court further explained that “under Robinson and Covey, the government’s knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government’s part to take additional steps to effect notice.” 547 U.S. at 230. The Court also noted that ““a party’s ability to take steps to safeguard its own interests [such as by updating his address] does not relieve the State of its constitutional obligation.”” Id. at 232 (quoting Brief for United States as Amicus Curiae 16 n.5 (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983))). However, the Government is not required to undertake “heroic efforts” to find a registrant. Dusenbery v. United States, 534 U.S. 161, 170 (2002).

¹ The CSA states that “[b]efore taking action pursuant to [21 U.S.C. § 824(a)] . . . the Attorney General shall serve upon the . . . registrant an order to show cause why registration should not be . . . revoked[] or suspended.” 21 U.S.C. § 824(c). In contrast to the schemes challenged in Jones and Robinson, which provided for service to the property owner’s address as listed in state records, neither the CSA nor Agency regulations state that service shall be made at any particular address such as the registered location. In any event, while in most cases, service to a registrant’s registered location provides adequate notice, the Supreme Court’s clear instruction is that the Government cannot ignore “unique information about an intended recipient” when it seeks to serve that person with notice of a proceeding that it is initiating. Jones, 547 U.S. at 230.

Here, it is clear that “[t]he means employed” by the Government were not “such as one desirous of actually informing the [registrant] might reasonably adopt to accomplish it.” Jones, 547 U.S. at 229 (quoting Mullane, 339 U.S. at 315). While in its Request for Final Agency Action, the Government asserts that it “has no information on a forwarding address for the Registrant or of his whereabouts,” the very state board order it relies upon as the basis for this proceeding indicates that the Registrant filed pleadings in that matter and provided an address at which the State served him with its final order. Yet the Government made no attempt to serve the Order to Show Cause on him at that address.

Because the Government clearly has information available to it regarding the whereabouts of Registrant and yet made no attempt to serve him at that address, I conclude that it has not complied with its obligation under the Due Process Clause “to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” Jones, 547 U.S. at 223 (quoting Mullane, 339 U.S. at 314). Accordingly, the Government’s request for a final order revoking Registrant’s registration is denied and the Order to Show Cause is dismissed without prejudice.

It is so ordered.

Dated:
December 23, 2011

Michele M. Leonhart
Administrator

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