



BILLING CODE: 4410-09-P

**DEPARTMENT OF JUSTICE
Drug Enforcement Administration**

[Docket No. 15-11]

Karen S. Dunning, N.P.; Decision and Order

On January 9, 2015, I, the Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Karen S. Dunning, N.P. (hereinafter, Respondent) of Kouts, Indiana. The Order to Show Cause and Immediate Suspension of Registration proposed the revocation of Respondent's DEA Certificate of Registration MD2249161, pursuant to which she was authorized to dispense controlled substances in schedules II through V as a practitioner, and the denial of any application to renew or modify her registration, on the ground that she has committed acts which render her "continued registration inconsistent with the public interest." Show Cause Order, at 1.

More specifically, the Order alleged that Respondent, who is an Advanced Practice Nurse licensed by the Indiana State Board of Nursing, is not authorized under state law "to prescribe controlled substances in Schedules III and IV for the purpose of weight reduction or to control obesity." Show Cause Order, at 1. The Order then alleged that "between August 2007 and March 2014," Respondent issued prescriptions, "on multiple occasions," for phendimetrazine, a schedule III controlled substance, and phentermine, a schedule IV controlled substance, for "the purpose of weight loss or to control obesity, in violation of state and federal law." *Id.* at 2 (citing Ind. Code §§ 35-48-3-11; 25-22.5-8-2(a); 21 CFR 1306.03 & 1306.04(a)). The order then set

forth specific allegations regarding Respondent's prescribing of the aforesaid controlled substances to nine patients. Id. at 2-4.

The Order also alleged that "beginning in February 2014 and for several months thereafter," Respondent had violated federal law by issuing controlled substance prescriptions for weight loss medications that had been pre-signed by her collaborating physician, as well as that between February and August 2014, she issued controlled substance prescriptions "without a collaborative agreement" having been filed with the Indiana Board of Nursing. Id. at 4 (citing 21 CFR 1306.05 and 1306.03(a)(1); 848 Ind. Admin. Code § 5-1-1(a)(7)). The Order further alleged that Respondent had dispensed Bontril (phendimetrazine) to a patient at an unregistered location. Id. Finally, the Order alleged that Respondent had failed to keep various records as required by DEA regulations. Id. at 5. Based on the totality of Respondent's misconduct, I concluded that her continued registration during the pendency of the proceeding "would constitute an imminent danger to the public health and safety" and therefore ordered that her registration be immediately suspended. Id. at 6-7.

Following service of the Order, Respondent timely requested a hearing on the allegations. The matter was placed on the docket of the Office of Administrative Law Judges and assigned to Administrative Law Judge (ALJ) Christopher B. McNeil, who proceeded to conduct pre-hearing procedures.

However, the next day, the Government moved for summary disposition and to stay the proceeding, asserting that the Indiana State Board of Nursing had ordered the emergency suspension of Respondent's nursing license and advanced practice nurse prescriptive authority, and that she was without authority to dispense controlled substances and to possess a DEA registration in the State. Mot. For Summ. Disp., at 1-3. As support for its Motion, the

Government attached a printout from a license verification webpage maintained by the State of Indiana. See id. at Attachment A. The printout showed that Respondent's Indiana Advanced Practice Nurse Prescriptive Authority license was the subject of an emergency suspension.¹ Id.

Upon review of the Government's Motions, the ALJ issued an Order for Stay and for Respondent's Response to Allegations Concerning Respondent's Lack of State Authority. R.D. at 2. Thereafter, Respondent timely filed her Response, in which she did not dispute that her license was suspended but asserted that section 824(a)(3) "authorizes suspension or revocation of a DEA registration based on the loss of State privileges" and thus "gives a choice of remedies and clearly contemplates the exercise of administrative discretion." Respondent's Response, at 1.

Respondent contends that the Nursing Board has only suspended her license and advanced practice nurse prescriptive authority for ninety (90) days. Id. at 3. She further argues that the prior cases in which the Agency revoked a practitioner's registration based on a state's suspension of prescribing authority involved suspensions that "were of indefinite rather than, as here, for a finite, definite, and limited time" and that "[t]his indefiniteness was the gravamen of the decisions holding revocation to be the appropriate remedy." Id. (citing Anne Lazar Thorn, 62 FR 12847, 12848 (1997)).

Respondent also argues that the temporary suspension of her license "does not render her 'no longer authorized by State law' to dispense controlled substances. It only temporarily restrains her from dispensing controlled substances." Id. And she further argues that suspending

¹ Subsequently, the Government also filed a copy of the Summary Suspension Order issued to Respondent by the Indiana State Board of Nursing. See Notice of Filing of Written Suspension Order (Exhibit A).

I take official notice of the registration records of this Agency, which establish that Respondent's registration will not expire until June 30, 2016. See 21 CFR 1316.59(e). Respondent may refute this fact by filing a properly supported motion for reconsideration no later than ten (10) business days from the date of issuance of this Decision and Order.

her registration “mean[s] that she is not holding a DEA Registration and would fully satisfy statutory requirements.” Id. She thus contends that revoking her registration would be “arbitrary, capricious, a clear abuse of discretion and not in accordance with the law.” Id. at 4.

The ALJ correctly rejected these contentions, explaining that the CSA defines the term “practitioner” to “mean[] a physician, dentist, veterinarian . . . or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which [s]he practices to distribute [or] dispense a controlled substance in the course of professional practice,” 21 U.S.C. § 802(21), and that under section 823(f), only a person who is authorized to dispense controlled substances and is therefore a practitioner within the meaning of the Act can be registered. R.D., at 3; see also 21 U.S.C. § 823(f) (“The Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the States in which he practices.”).

Respondent contends, however, that the decision in Anne Lazar Thorn, M.D., 62 FR 12847 (1997), stands for the proposition that the Agency’s consistent practice of revoking registrations based on a loss of state authority “rests on the indefinite nature of a State suspension.” Respondent’s Resp., at 2-3. Respondent quotes the following passage from Thorn:

[T]he Acting Deputy Administrator recognizes that he has discretionary authority to either revoke or suspend a DEA registration. However, given the indefinite nature of the suspension of Respondent’s state license to practice medicine, the Acting Deputy Administrator agrees with [the ALJ] that revocation is appropriate in this case.

Id. at 3 (quoting 62 FR at 12848).

Notwithstanding the implication of the above passage, no decision of this Agency has held that a suspension (rather than a revocation) is warranted where a State has imposed a suspension of a fixed or certain duration. To the contrary, in the case of practitioners, DEA has

long and consistently interpreted the CSA as mandating the possession of authority under state law to handle controlled substances as a fundamental condition for obtaining and maintaining a registration. See, e.g., Leonard F. Faymore, 48 FR 32886, 32887 (1983) (collecting cases). As the Thorn decision further explained:

DEA has consistently interpreted the Controlled Substances Act to preclude a practitioner from holding a DEA registration if the practitioner is without authority to handle controlled substances in the state in which he/she practices. This prerequisite has been consistently upheld.

* * *

The Acting Deputy Administrator finds that the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather it is whether the Respondent is currently authorized to handle controlled substances in the state. In the instant case, it is undisputed that Respondent is not currently authorized to handle controlled substances in the [state in which she practices medicine]. Therefore . . . Respondent is not currently entitled to a DEA registration.

62 FR at 128438 (citing and quoting 21 U.S.C. §§ 823(f) and 802(21) and collecting cases).

Accordingly, in Thorn, the Agency rejected the Respondent's contention that her registration should be suspended rather than revoked.

As for Respondent's contention that section 824(a) "gives a choice of remedies and clearly contemplates the exercise of administrative discretion," it is acknowledged that the opening sentence of section 824(a) provides that a registration "may be suspended or revoked by the Attorney General" upon the Attorney General's finding that one of the five grounds set forth exists. 21 U.S.C. § 824(a). However, this general grant of authority in imposing a sanction must be reconciled with the CSA's specific provisions which mandate that a practitioner hold authority under state law in order to obtain and maintain a DEA registration. See Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application."); see also Bloate v. United States, 130 S.Ct. 1345, 1354 (2010) (quoting D.

Ginsberg & Sons, Inc., v. Popkin, 285 U.S. 204, 208 (1932) (“General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.”)).

Indeed, Respondent’s argument has previously been tried and rejected. See James L. Hooper, 76 FR 71371 (2011), pet. for rev. denied, Hooper v. Holder, 481 F. App’x 826 (4th Cir. 2012) (unpublished). As the Fourth Circuit explained in Hooper:

Section 824(a) does state that the DA may “suspend or revoke” a registration, but the statute provides for this sanction in five different circumstances, only one of which is loss of a State license. Because § 823(f) and § 802(21) make clear that a practitioner’s registration is dependent upon the practitioner having state authority to dispense controlled substances, the DA’s decision to construe § 824(a)(3) as mandating revocation upon suspension of a state license is not an unreasonable interpretation of the CSA.

Id. at 828.

Moreover, while Respondent points to the fact that the suspension imposed by the Board is “temporary” and only “for ninety (90) days,” Respondent’s Resp. at 3, the Board’s order was non-final. Thus, while Respondent may prevail before the Board, the Board may also impose an additional period of suspension or revoke her license and prescribing authority.

Accordingly, consistent with the Agency’s longstanding precedent, revocation remains warranted.² See Gary Alfred Shearer, 78 FR 19009 (2013) (holding that revocation is warranted even where a state order has summarily suspended a practitioner’s controlled substances authority and the state agency’s order remains subject to challenge in either administrative or judicial proceedings); Winfield Drugs, Inc., 52 FR 27070 (1987) (revoking registration based on state emergency suspension order notwithstanding state order was under appeal, noting that the

² As for Respondent’s contention that the temporary suspension of her license “does not render her ‘no longer authorized by State law’ to dispense controlled substances,” under Indiana law, “[a] person who . . . practices nursing during the time the person’s license issued under this chapter . . . is suspended or revoked commits a Class B misdemeanor.” Ind. Code § 25-23-1-27(5). Thus, Respondent is not currently authorized to dispense controlled substances.

“[r]espondent is not currently authorized to handle controlled substances in the [s]tate” and that “[a]s a matter of law, the [DEA] does not have statutory authority . . . to issue or maintain a registration for a practitioner if the applicant or registrant lacks [s]tate authority to dispense controlled substances”).

ORDER

Pursuant to the authority vested in me by 21 U.S.C. § 824 as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration MD2249161 issued to Karen S. Dunning, N.P., be, and it hereby is, revoked. This Order is effectively immediately.³

Dated: May 1, 2015.

Michele M. Leonhart,
Administrator.

³ Based on the same findings that led me to conclude that Respondent’s continued registration during the pendency of the proceeding constitutes an imminent danger to public health and safety, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

Michelle F. Gillice, Esq., Paul A. Dean, Esq., for the Government.

Lakeisha C. Murdaugh, Esq., Scott L. King, Esq., for the Respondent.

ORDER GRANTING THE GOVERNMENT'S MOTION FOR
SUMMARY DISPOSITION

AND

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION OF THE
ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Christopher B. McNeil. On January 9, 2015, the Administrator of the Drug Enforcement Administration issued an Order to Show Cause and Immediate Suspension of Respondent's DEA Certificate of Registration, No. MD2249161. The Order affords Respondent the opportunity to show cause why Respondent's DEA registration should not be revoked pursuant to 21 U.S.C. § 824(a), on the grounds that Respondent's continued registration would be inconsistent with the public interest. The Order also seeks to deny any pending applications for registration, renewal or modification pursuant to 21 U.S.C. § 823(f). In addition, the Administrator immediately suspended Respondent's registration pursuant to 21 U.S.C. § 824(d), upon finding Respondent's continued registration constitutes an imminent danger to the public health and safety.

According to the Government's Notice of Service, Respondent was personally served with the Order to Show Cause on January 14, 2015. On February 18, 2015, the Office of Administrative Law Judges received Respondent's Request for Hearing, dated February 13, 2015. On February 19, 2015, this Office issued an Order for Prehearing Statements and Order Setting the Matter for Hearing.

On February 20, 2015, this office received Government's Motion for Summary Disposition and Motion to Stay Proceedings. The Government asserted that the Indiana State Board of Nursing ordered an emergency suspension of Respondent's nursing license and her advanced practice nurse prescriptive authority, effective immediately. Citing this lack of state authority, the Government requested that the

matter be forwarded to the Administrator for a Final Order and that in the interest of efficiency, I grant a Motion to Stay the Proceedings and continue the deadlines pending the resolution of the Motion for Summary Disposition. In response to the Government's filing, I issued an Order for Stay and for Respondent's Response to Allegations Concerning Respondent's Lack of State Authority. In the Order, I required Respondent to file a response to the Government's Motion for Summary Disposition no later than February 27, 2015. Additionally, I stayed the matter and held all deadlines in abeyance.

On February 27, 2015, I received Respondent's Response to the Government's Motion for Summary Disposition. Respondent first cites 21 U.S.C. §824(a)(3) to demonstrate that the Administrator has the choice of authorizing suspension or revocation of Respondent's registration. Respondent then asks that I consider suspending her registration based on the premise that the 90 day suspension of her advanced practice nurse prescriptive authority is not equivalent to the indefinite suspensions in the case law cited by the Government.

The substantial issue raised by the Government rests on an undisputed fact. The Government asserts that Respondent's DEA Certificate of Registration must be revoked because Respondent does not have a nursing license issued by the state in which she practices. Under DEA precedent, a practitioner's DEA Certificate of Registration for controlled substances must be summarily revoked if the applicant is not authorized to handle controlled substances in the state in which she maintains her DEA registration.¹ Pursuant to 21 U.S.C. § 823(f), only a "practitioner" may receive a DEA registration. Under 21 U.S.C. § 802(21), a "practitioner" must be "licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute [or] dispense . . . controlled substance[s]." Given this statutory language, the DEA Administrator does not have the authority under the Controlled

¹ See 21 U.S.C. §§ 801(21), 823(f), 824(a)(3); see also House of Medicine, 79 Fed. Reg. 4959, 4961 (DEA 2014); Deanwood Pharmacy, 68 Fed. Reg. 41662-01 (DEA July 14, 2003); Wayne D. Longmore, M.D., 77 Fed. Reg. 67669-02 (DEA November 13, 2012); Alan H. Olefsky, M.D., 72 Fed. Reg. 42127-01 (DEA August 1, 2007); Layfe Robert Anthony, M.D., 67 Fed. Reg. 15811 (DEA May 20, 2002); George Thomas, PA-C, 64 Fed. Reg. 15811-02 (DEA April 1, 1999); Shahid Musud Siddiqui, M.D., 61 Fed. Reg. 14818-02 (DEA April 4, 1996); Michael D. Lawton, M.D., 59 Fed. Reg. 17792-01 (DEA April 14, 1994); Abraham A. Chaplan, M.D., 57 Fed. Reg. 55280-03 (DEA November 24, 1992). See also Bio Diagnosis Int'l, 78 Fed. Reg. 39327-03, 39331 (DEA July 1, 2013) (distinguishing distributor applicants from other "practitioners" in the context of summary disposition analysis).

Substances Act to maintain a practitioner's registration if that practitioner is not authorized to dispense controlled substances.²

Respondent alternatively asks that I consider suspending her registration instead of revoking her registration. This exact issue was addressed in James L. Hooper, M.D.; Decision and Order.³ Dr. Hooper was subject to a one-year suspension of his state license to practice medicine after which his license would be automatically reinstated.⁴ In comparison to Hooper, Respondent in this case has a less persuasive case as there is no guarantee that her advanced practice nurse prescriptive authority will be restored after 90 days. Dr. Hooper sought a suspension of his DEA Registration for the same time period his medical license was suspended. DEA Administrator Michele M. Leonhart agreed with Chief Administrative Law Judge John J. Mulrooney, II who did not find Dr. Hooper's argument persuasive. Administrator Leonhart, like Respondent in the case at hand, cited to Anne Lazar Thorn, M.D.⁵ Administrator Leonhart cites the Acting Deputy Administrator's statement in Thorn that "the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather, it is whether the Respondent is currently authorized to handle controlled substances in the state."⁶ In Hooper, Administrator Leonhart concludes that "even where a practitioner's state license has been suspended for a period of certain duration, the practitioner no longer meets the statutory definition of a practitioner."⁷ As detailed above, only a "practitioner" may receive a DEA registration. Therefore, I cannot and will not recommend the suspension of Respondent's DEA registration, but will instead recommend the registration be revoked.

**Order Granting the Government's Motion for Summary Disposition
and Recommendation**

² See Abraham A. Chaplan, M.D., 57 Fed. Reg. 55280-03, 55280 (DEA November 24, 1992), and cases cited therein. In Chaplan, DEA Administrator Robert C. Bonner adopts the ALJ's opinion that "the DEA lacks statutory power to register a practitioner unless the practitioner holds state authority to handle controlled substances." Id.

³ James L. Hooper, M.D.; Decision and Order, 76 FR 71371-01, 71371 (DEA Nov. 17, 2011).

⁴ Id.

⁵ Anne Lazar Thorn, Revocation of Registration M.D, 62 FR 12847, 12848 (DEA Mar. 18, 1997).

⁶ Id. at 12848.

⁷ Hooper, 76 FR at 71372.

I find there is no genuine dispute regarding whether Respondent is a “practitioner” as that term is defined by 21 U.S.C. 802(21), and that based on the record the Government has established that Respondent is not a practitioner and is not authorized to dispense controlled substances in the state in which she seeks to practice with a DEA Certificate of Registration. I find no other material facts at issue. Accordingly, I **GRANT** the Government’s Motion for Summary Disposition.

Upon this finding, I **ORDER** that this case be forwarded to the Administrator for final disposition and I recommended that Respondent’s DEA Certificate of Registration should be **REVOKED** and any pending application for the renewal or modification of the same should be **DENIED**.

Dated: March 9, 2015

s/**CHRISTOPHER B. MCNEIL**

Administrative Law Judge

[FR Doc. 2015-12020 Filed: 5/18/2015 08:45 am; Publication Date: 5/19/2015]