

Respondent's DEA Certificate of Registration be revoked; and concluding that having granted the Government's Motion for Summary Disposition, it is unnecessary to rule on the Government's Motion to Terminate. Neither party filed exceptions to her opinion, and on June 28, 1999, Judge Bittner transmitted the record of these proceedings to the Deputy Administrator.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts, in full, the Opinion and Recommended Decision of the Administrative Law Judge.

The Deputy Administrator finds that the Commonwealth of Massachusetts, Board of Registration in Medicine suspended Respondent's Massachusetts medical license, effective March 10, 1999. As a result, the Deputy Administrator concludes that Respondent is not currently authorized to practice medicine in the Commonwealth of Massachusetts, and therefore, it is reasonable to infer that he is not currently authorized to handle controlled substances in that state.

The DEA does not have the statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without state authority to handle controlled substances in the state in which he conducts his business. See 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. See *Romeo J. Perez, M.D.*, 62 FR 16,193 (1997); *Demetris A. Green, M.D.*, 61 FR 60,728 (1996); *Dominick A. Ricci, M.D.*, 58 FR 51,104 (1993).

Here it is clear that Respondent is not currently authorized to handle controlled substances in the Commonwealth of Massachusetts, where he is registered with DEA. As a result, he is not entitled to a DEA registration in that state.

In light of the above, Judge Bittner properly granted the Government's Motion for Summary Disposition. The parties did not dispute the fact that Respondent is not currently authorized to handle controlled substances in California. Therefore, it is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial proceeding involving evidence and cross-examination of witnesses is not required. See *Jesus R. Juarez, M.D.*, 62 FR 14945 (1997). The rationale is that Congress does not intend 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 *NLRB v. International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO*, 549 F.2d 634 (9th Cir. 1977).

Since DEA does not have the statutory authority to maintain Respondent's DEA registration because he is not currently authorized to handle controlled substances in Massachusetts, the Deputy Administrator concludes that it is unnecessary to determine whether Respondent's continued registration would be inconsistent with the public interest, as alleged in the Order to Show Cause.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AJ8888806, previously issued to Frank D. Jackson, M.D., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for renewal of such registration, be, and they hereby are, denied. This order is effective October 13, 1999.

Dated: August 24, 1999.

**Donnie R. Marshall,**  
Deputy Administrator.

[FR Doc. 99-23669 Filed 9-10-99; 8:45 am]  
BILLING CODE 4410-09-M

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

#### KK Pharmacy; Revocation of Registration

On April 2, 1999, the Deputy Assistant Administrator, Office of Division Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to KK Pharmacy, of Osage Beach, Missouri, notifying it of an opportunity to show cause as to why DEA should not revoke its DEA Certificate of Registration BK1488104 pursuant to 21 U.S.C. 824(a)(1), 824(a)(4) and 824(a)(5), and deny any pending applications for renewal of such registration pursuant to 21 U.S.C. 823(f), for reason that the pharmacy materially falsified an application for DEA registration, is continued registration would be inconsistent with the public interest, and it has been mandatorily excluded from participation in a program pursuant to 41 U.S.C. 1320a-7(a). The order also notified KK Pharmacy that should no request for a hearing be filed within 30

days of receipt of the Order to Show Cause, its hearing right would be deemed waived.

DEA received a signed receipt indicating that the Order to Show Cause was received on April 10, 1999. No request for a hearing or any other reply was received by DEA from KK Pharmacy or anyone purporting to represent it in this matter. Therefore, the Deputy Administrator, finding that (1) 30 days have passed since the receipt of the Order to Show Cause, and (2) no request for a hearing have been received, concludes that KK Pharmacy is deemed to have waived its hearing right. After considering material from the investigative file in this matter, the Deputy Administrator now enters his final order without a hearing pursuant to 21 CFR 1301.43(d) and (e) and 1301.46.

The Deputy Administrator finds that Daniel J. Vossman is the owner of KK Pharmacy and is also its pharmacist-in-charge. KK Pharmacy is located in Missouri and currently possesses DEA Certificate of Registration BK1488104.

In 1980, Mr. Vossman was the vice president of a corporation which owned several pharmacies and a wholesale distributor in Kansas. In June of 1980, Mr. Vossman admitted to the Kansas Pharmacy Board (Kansas Board) that on paper, he had been transferring the controlled substance Eskatrol from the distributor to one of the pharmacies, but in fact, he had been giving the drug to his wife for her personal use without a physician's authorization. According to Mr. Vossman, he diverted approximately 1,300 dosage units of the drug this way. A subsequent audit revealed a shortage of 1,300 dosage units of the drug this way. A subsequent audit revealed a shortage of 1,897 dosage units of Eskatrol from the pharmacy and 150 dosage units from the distributor. A later investigation revealed that prescriptions could not be found for many Schedule II prescription numbers and many Schedule II prescriptions that were on hand were unsigned. In addition, an audit covering the period January 1, 1977 to August 25, 1980, revealed discrepancies for a number of Schedule II controlled substances, including a shortage of 2,207 dosage units of Eskatrol or 53.2% for which it was accountable.

As a result, on December 3, 1980, the Kansas Board issued an Order effective October 1, 1980, which suspended Mr. Vossman's pharmacist registration for 90 days, 60 days of which were suspended, and then placed his registration on probation for one year. In addition, the wholesale distributor's registration was limited to non-

controlled substances only. Since the wholesale distributor was not longer authorized to handle controlled substances by the state, Mr. Vossman surrendered the wholesale distributor's DEA Certificate of Registration on January 12, 1981.

On December 5, 1990, Mr. Vossman filed an application to review KK Pharmacy's DEA Certificate of Registration BK1488104. Mr. Vossman answered "No" to the question on the application (hereinafter referred to as the liability question) which asks, "If the applicant is a \* \* \* pharmacy, has any officer, partner, stockholder or proprietor \* \* \* ever surrendered or had a Federal controlled substance registration revoked, suspended, restricted or denied, or ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?"

Between July 22, 1988 and December 16, 1997, the Missouri Board of Pharmacy (Missouri Board) conducted ten inspections of KK Pharmacy. Throughout these inspections, various repeated violations of state and federal controlled substance laws were noted, such as controlled substances were dispensed on a number of occasions without a physician's authorization, required information was missing from prescriptions, prescriptions were missing from the pharmacy's files, and a photocopied prescription for a Schedule II controlled substance was filled by the pharmacy. As a result of these inspections, the Missouri regulatory authorities took action on several occasions against KK Pharmacy's state permits.

On August 17, 1993, the Missouri Board issued a Stipulation and Agreement which placed the pharmacy permit of KK Pharmacy on probation from August 27, 1993 through August 26, 1998. This agreement was declared null and void in November 1996.

Mr. Vossman submitted another renewal application for his DEA Certificate of Registration on November 28, 1993. Again, Mr. Vossman Answered "No" to the liability question, and also answered "No" to another liability question which asks whether, "the applicant [has] ever \* \* \* had a State professional license or controlled substance registration revoked, suspended, restricted or denied or ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or place on probation?"

On February 2, 1994, KK Pharmacy entered into a Memorandum of Understanding with the Missouri

Bureau of Narcotics and Dangerous Drugs (Missouri BNDD). Mr. Vossman agreed that for five years he would provide the Missouri BNDD with prescription and refill information on a quarterly basis; permit access to pharmacy records by the Missouri Board and the Missouri BNDD; and meet all conditions set forth in the Stipulation and Agreement with the Missouri Board.

KK Pharmacy failed to provide the Missouri BNDD with prescription information as required by the Memorandum of Understanding, and failed to renew its Missouri controlled substance registration. As a result, on February 16, 1995, KK Pharmacy entered into a second Memorandum of Understanding with the Missouri BNDD, in which Mr. Vossman agreed to take a completed and accurate inventory by hand of all controlled substances upon the signing of the Memorandum. In addition, Mr. Vossman agreed that for seven years he would, among other things, take an exact count of all controlled substances on hand every six months; maintain a perpetual inventory of all controlled substances; provide the Missouri BNDD with prescription and refill information on a quarterly basis; maintain all records in accordance with state and federal laws; maintain Schedule II order forms in accordance with federal law; not dispense Schedule II controlled substances without a signed prescription; not partially fill Schedule II prescriptions; and meet annually with the Missouri BNDD.

On November 15, 1996, a 29-count felony information was filed against Mr. Vossman in the Circuit Court of Camden County, Missouri alleging that Mr. Vossman, d/b/a KK Pharmacy made false statements to receive health care payments. Two of these counts involved controlled substances. On October 1, 1997, Mr. Vossman pled guilty to one count of the information, and was sentenced to probation for five years.

On November 22, 1996, Mr. Vossman submitted an application to renew KK Pharmacy's DEA Certificate of Registration. On this application, Mr. Vossman answered "Yes" to the liability questions. In his explanation accompanying the application, Mr. Vossman indicated that he had been charged with making a false statement to receive a health care benefit, and that he had signed a Memorandum of Understanding with the Missouri BNDD on February 16, 1995, but that this Memorandum was being contested in the Circuit Court of Cole County, Missouri. However, Mr. Vossman failed to mention the 1980 suspension and probation of his license to practice

pharmacy in Kansas, his surrender in 1981 of the wholesale distributor's DEA registration, or the 1994 Memorandum of Understanding with the Missouri BNDD.

By letter dated August 16, 1996, the Missouri Department of Health proposed the denial of KK Pharmacy's application for renewal of its controlled substance registration. The letter stated that Mr. Vossman has failed to provide satisfactory proof that the managing officers of KK Pharmacy are of good moral character. The letter further stated that registration of KK Pharmacy is inconsistent with the public interest because the pharmacy has not maintained effective controls against the diversion of controlled substances, has not operated in compliance with applicable state and federal law and has provided false or fraudulent material information on its application for registration.

Ultimately, by letter dated December 3, 1996, Mr. Vossman was advised that KK Pharmacy's application for a state controlled substance registration was denied and that he had 30 days to request a hearing. The letter listed as reasons for the denial that Mr. Vossman made a false statement on an application for a Missouri controlled substance registration; between June 1994 and August 1995, KK Pharmacy filled or refilled 81 controlled substance prescriptions without a physician's authorization; the pharmacy did not maintain 25 controlled substance prescriptions on file for a period of two years; it filled two Schedule II prescriptions in excess of a 30-day supply without a physician's written justification; it filled four Schedule II prescriptions for which there was no signed prescription order; and it filled two Schedule II prescriptions without the dispenser's signature. Mr. Vossman requested a hearing on the denial.

On July 16, 1997, Mr. Vossman and the Missouri BNDD filed a 'Joint Stipulation of Facts, With Proposed AHC [Administrative Hearing Committee] Conclusions of Law and Proposed AHC Order and with Joint Agreement and Terms of Discipline,' hereinafter referred to as the Joint Agreement. In this filing the parties stipulated that KK Pharmacy's Missouri controlled substance registration expired on July 31, 1994 and was not renewed until February 16, 1995, yet the pharmacy continued to dispense controlled substances. The parties also stipulated that KK Pharmacy furnished false information to the Missouri BNDD on three applications and dispensed 27 refills of generic Darvocet N-100 to a

customer in 1992 and 1993 without a physician's knowledge or authorization.

As a result of this Joint Agreement, KK Pharmacy was issued a Missouri controlled substance registration which was placed on probation for five years subject to various terms and conditions, including that KK Pharmacy will maintain a perpetual inventory for all controlled substances using the Pharmacy's computer, conduct background checks on all current and future pharmacist employees; maintain records showing the dates and times each pharmacy employee works; employ a consulting pharmacist to review the pharmacy's controlled substance handling; provide the Missouri BNDD with prescription and refill information on a quarterly basis; not accept any Schedule II telephone prescription; verify that all information on controlled substance prescriptions is complete and accurate; and verify on a daily basis a printout of prescription data for that day.

On November 20, 1997, the consulting pharmacist filed her first report with the Missouri BNDD noting that KK Pharmacy seemed to be making efforts to comply with the Joint Agreement, however she was still finding problems with the Schedule III through V perpetual inventory resulting in an ability to reconcile the drugs. The consulting pharmacist submitted her second report on March 10, 1998, in which she noted a decline in KK Pharmacy's compliance with the Joint Agreement and many violations of pharmacy law. The consulting pharmacist stated in her report that "I must also say that over the last three months I have felt that there have been attempts to hide or cover missing information needed by me to make an accurate assessment of the pharmacy's compliance with the agreement." The consulting pharmacist further "found it to be virtually impossible to reconcile the inventory in this pharmacy because there have been so many errors and corrections that there is no way to trace [the drugs.]" The consulting pharmacist concluded that "[o]ver the last three months I have felt that Mr. Vossman has not taken the initiative to be responsible for the pharmacy, but has expected that I or the technicians would come in and do the job for him[.]" and that "I am not sure that Mr. Vossman has the incentive or the skills needed to comply with the terms of this agreement."

By letter dated February 27, 1998, Mr. Vossman was notified by the Department of Health and Human Services that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health

Services Block Grant and Block Grants to States for Social Services programs for a period of five years pursuant to 42 U.S.C. 1320a-7(a).

On March 11, 1998, a Felony Conviction Complaint was filed with the Missouri Board stating that Mr. Vossman's conviction is an offense reasonably related to the qualifications, functions, or duties of a pharmacist or involves moral turpitude, and asking the Missouri Board to conduct a hearing and to impose appropriate discipline. Following a hearing, not attended by Mr. Vossman or a representative, the Missouri Board issued its Findings of Fact, Conclusions of Law, and Order of Discipline (Order) on April 23, 1998, revoking Mr. Vossman's pharmacist license. Thereafter, on April 30, 1998, Mr. Vossman filed a Petition for Review of the Missouri Board's Order stating that he did not attend the disciplinary hearing because he was not aware of it, and even had he been aware of the hearing, he would not have had sufficient time to prepare for it. In addition, Mr. Vossman filed a motion on April 30, 1998, in the Circuit Court of Cole County, Missouri seeking a stay of the Missouri Board's Order pending resolution of the appeal. The Court granted Mr. Vossman's motion for a stay on April 30, 1998.

On June 18, 1998, Mr. Vossman filed a request for rehearing while his petition for review of the Missouri Board's revocation of his pharmacist license was pending. The Missouri Board withdrew its April 23, 1998 Order, and a hearing was held on July 9, 1998. On July 16, 1998, the Missouri Board issued its Findings of Fact, Conclusions of Law, and Order of Discipline (Order) revoking Mr. Vossman's pharmacist license and prohibiting him from applying for reinstatement of his license for three years. Mr. Vossman again filed a petition for review of the Missouri Board's Order on July 24, 1998, in the Circuit Court of Cole County, Missouri. Mr. Vossman also filed a motion in the Circuit Court of Cole County, Missouri, requesting a stay of the Missouri Board's Order pending appeal, which was granted on July 27, 1998. There is no further evidence in the file regarding the disposition of this matter.

The Deputy Administrator may revoke or suspend a DEA Certificate of Registration under 21 U.S.C. 824(a), upon a find that the registrant:

- (1) Has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;
- (2) Has been convicted of a felony under this subchapter or subchapter II

of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance;

(3) Has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or has had the suspension, revocation or denial of his registration recommended by competent State authority;

(4) Has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section; or

(5) Has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a-7(a) or Title 42.

The Deputy Administrator finds that it is well-settled that a pharmacy operates under the control of owners, stockholders, pharmacists or other employees, and therefore the acts of these individuals are relevant in determining whether grounds exist to revoke a pharmacy's DEA Certificate of Registration. See *Rick's Pharmacy, Inc.*, 62 FR 42595 (1997), *Maxicare Pharmacy*, 61 FR 27368 (1996); *Big-T Pharmacy, Inc.* 47 FR 51830 (1982).

Pursuant to 21 U.S.C. 824(a)(1), a registration may be revoked if the registrant has materially falsified an application for registration. DEA has previously held that in finding that there has been a material falsification of an application, it must be determined that the applicant knew or should have known that the response given to the liability question was false. See, *Martha Hernandez, M.D.*, 62 FR 61145 (1997); *Herbert J. Robinson, M.D.* 59 FR 6304 (1994).

On KK Pharmacy's renewal application dated December 5, 1990, Mr. Vossman answered "No" to the liability question, even though his Kansas pharmacist license had been suspended and then placed on probation in 1980, and he surrendered his wholesale distributor's DEA registration in 1981.

Mr. Vossman also falsified KK Pharmacy's renewal application dated November 28, 1993, by again answering "No" to the liability question. Like the 1990 renewal application, Mr. Vossman should have disclosed the action against his Kansas pharmacist license in 1980 and the surrender of his wholesale distributor DEA registration in 1981. In addition, Mr. Vossman should have answered the liability question in the affirmative based upon the Missouri Board's action in August 1993 placing

the pharmacy permit of KK pharmacy on probation for five years. While the Missouri Board's action was ultimately declared null and void in November 1996, it was in effect in November 1993 when Mr. Vossman submitted the renewal application.

Finally, while Mr. Vossman did answer "Yes" to the liability question on KK Pharmacy's renewal application dated November 22, 1996, he failed to note in his explanation for his response that he had entered into a Memorandum of Understanding with the Missouri BNDD in 1994; that his Kansas pharmacist license was suspended and then placed on probation in 1980; and that he surrendered the DEA registration of his wholesale distributor in 1981.

The Deputy Administrator concludes that Mr. Vossman materially falsified KK Pharmacy's 1990, 1993 and 1996 renewal applications for its DEA Certificate of Registration, and therefore grounds exists to revoke the pharmacy's DEA registration.

Next, pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator may revoke a DEA Certificate of Registration and deny any pending applications, if he determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered:

- (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
- (2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.
- (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
- (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
- (5) Such other conduct which may threaten the public health and safety.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. See Henry J. Schwarz, Jr., M.D., 54 FR 16422 (1989).

As to factor one, the file is replete with actions against KK Pharmacy and Mr. Vossman by various state licensing agencies. Mr. Vossman's Kansas pharmacist license was suspended in 1980 and then placed on probation. KK Pharmacy entered into a Memorandum of Understanding with the Missouri BNDD in 1994, and again in 1995.

Action was taken by the Missouri BNDD to deny KK Pharmacy's state controlled substance registration in December 1996. The pharmacy was ultimately issued a new state controlled substance registration in July 1997 that was subject to various terms and conditions for five years. Then in 1998, Mr. Vossman's pharmacist permit was revoked by the Missouri Board, but that revocation was stayed pending appeal of the Missouri Board's Order.

Factors two and four, KK Pharmacy's experience in dispensing controlled substances and its compliance with applicable laws, are clearly relevant in determining the public interest. In 1980, Mr. Vossman diverted controlled substances from his then pharmacy and wholesale distributor for his wife's personal use without a physician's authorization. Between 1988 and 1997, the Missouri Board conducted ten inspections of the pharmacy which revealed numerous repeated violations. Particularly noteworthy is that Mr. Vossman continued to dispense controlled substances on a number of occasions without a physician's authorization.

In 1997, Mr. Vossman was given another chance by the Missouri Board to come into compliance. However, the consulting pharmacist hired to review KK Pharmacy's handling of controlled substances reported in March 1998 that, "there have been attempts to hide or cover missing information needed \* \* \* to make an accurate assessment of the pharmacy's compliance with the agreement." The consulting pharmacist concluded that, "Mr. Vossman has not taken the initiative to be responsible for the pharmacy, but has expected that I or the technicians would come in and do the job for him," and that "I am not sure that Mr. Vossman has the incentive or the skills needed to comply with the terms of this agreement."

While there is no evidence under factor three that Mr. Vossman or KK Pharmacy has been convicted of a controlled substance related offense, the Deputy Administrator does find Mr. Vossman's conviction for making a false statement to receive a health care benefit relevant under factor five. A registrant's truthfulness and trustworthiness are appropriately considered in determining the public interest.

The Deputy Administrator concludes that there are serious questions as to whether Mr. Vossman and KK Pharmacy can be trusted to responsibly handle controlled substances. Accordingly, the Deputy Administrator concludes that KK Pharmacy's continued registration would be inconsistent with the public

interest and therefore grounds exist to revoke the pharmacy's DEA Certificate of Registration pursuant to 21 U.S.C. 824(a)(4).

Finally, there is a basis to revoke KK Pharmacy's DEA Certificate of Registration pursuant to 21 U.S.C. 824(a)(5). Mr. Vossman was advised by letter from the Department of Health and Human Services dated February 27, 1998, that pursuant to 42 U.S.C. 1320a-7(a) he was excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of five years. The Deputy Administrator finds that while this exclusion was based upon Mr. Vossman's conviction for a non-controlled substance related offense, DEA has previously held that misconduct which does not involve controlled substances may constitute grounds, under 21 U.S.C. 824(a)(5), for the revocation of a DEA Certificate of Registration. See Stanley Dubin, D.D.S., 61 FR 60727 (1996), George D. Osafo, M.D., 58 FR 37508 (1993); Gilbert L. Franklin, D.D.S., 57 FR 3441 (1992).

Therefore, the Deputy Administrator concludes that grounds exist to revoke KK Pharmacy's DEA Certificate of Registration pursuant to 21 U.S.C. 824(a)(1), (4), and (5). No evidence of explanation or mitigating circumstances was offered by KK Pharmacy, Mr. Vossman, or anyone purporting to represent the pharmacy.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824, and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration BK1488104, previously issued to KK Pharmacy, be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for renewal of such registration, be, and they hereby are, denied. This order is effective October 13, 1999.

Dated: August 24, 1999.

**Donnie R. Marshall,**

*Deputy Administration.*

[FR Doc. 99-23667 Filed 9-10-99; 8:45 am]

BILLING CODE 4410-09-M

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

#### Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 22,