DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 99–19]

William D. Levitt, D.O.; Revocation of Registration

On February 10, 1999, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to William D. Levitt, D.O. (Respondent) of Albuquerque, New Mexico. The Order to Show Cause notified Respondent of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration BL1242750 pursuant to 21 U.S.C. 824(a)(2), 824(a)(3), and 824(a)(4), and deny any pending applications for renewal of such registration pursuant to 21 U.S.C. 823(f), for reason that he has been convicted of a felony involving controlled substances, he is not authorized to handle controlled substances in New Mexico, and his continued registration is inconsistent with the public interest.

By letter dated March 26, 1999, Respondent, through counsel, filed a request for a hearing and the matter was docketed before Administrative Law Judge Gail A. Randall. On March 31, 1999, Judge Randall issued an Order for Prehearing Statements. In lieu of filing a prehearing statement, the Government filed a Motion for Summary Disposition on April 8, 1999, and on April 26, 1999, Respondent filed his response to the Government's motion.

On May 3, 1999, Judge Randall issued her Opinion and Recommended Decision, finding that Respondent lacks authorization to handle controlled substances in the State of New Mexico; granting the Government's Motion for Summary Disposition; and recommending that Respondent's DEA Certificate of Registration should be revoked if DEA precedent remains viable under the circumstances of this case. Neither party filed exceptions to her opinion, and on June 15, 1999, Judge Randall 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 finds that the Government alleged in its Motion for Summary Disposition that Respondent is currently registered with DEA to handle controlled substances in the State of New Mexico, however he is currently without state authority to handle controlled substances in that state. According to the Government, Respondent's New Mexico controlled substance registration expired on March 31, 1998, and has not been renewed. As a result, the Government contended that DEA cannot maintain Respondent's DEA registration in New Mexico.

In its response to Government's motion, Respondent argued that although his New Mexico controlled substance registration has expired, he has filed a renewal application, but the New Mexico Board has failed to Act upon the application. Respondent asserted that he has filed a civil action in a New Mexico court requesting that the court order the New Mexico Board to act upon his application. Accordingly, Respondent argued that this administrative proceeding should be stayed pending the outcome of the state proceedings. However, Respondent did not deny that he was not currently authorized to handle controlled substances in New Mexico.

As Judge Randall noted, DEA has consistently held that it does not have the statutory authority under the Controlled Substances Act to issue a registration for a practitioner unless that practitioner is authorized by the state in which it practices to handle controlled substances. Pursuant to 21 U.S.C. 823(f), DEA is authorized to register a practitioner to dispense controlled substances only if the applicant is authorized to dispense controlled substances under the laws of the state in which it conducts business. Further, pursuant to 21 U.S.C. 802(21), a practitioner is defined as ''a physician * * * or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to distribute, [or] dispense * * *. controlled substance[s] in the course of professional practice.''

Judge Randall further noted that DEA has also consistently held that a DEA registration may not be maintained if the applicant or registration lacks state authority to dispense controlled substances, even if such lack of state authorization was a result of the expiration of his/her state registration without further action by the state. See, e.g., Mark L. Beck, D.D.S., 64 FR 40899 (1999); Gary D. Benke, M.D., 58 FR 65734 (1993); Carlyle Balgobin, D.D.S., 58 FR 46992 (1993); Charles H. Ryan, M.D., 58 FR 14430 (1993); James H. Nickens, M.D., 57 FR 59847 (1992).

However, Judge Randall expressed concern regarding the Government's reliance on 21 U.S.C. 824(a)(3) to support the summary revocation of a registration if the registrant's state authorization has expired. This section states that:

> A registration pursuant to section 823 of this title to * * * dispense a controlled substance * * * may be suspended or revoked * * * upon a finding that the registration (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 * * * dispensing of controlled substances * * * or has had the suspension, revocation, or denial of his registration recommended by competent State authority.

21 U.S.C. 824(a)(3).

As Judge Randall noted, New Mexico has not suspended, revoked, or denied Respondent's state authority to handle controlled substances, nor is there any evidence that a competent state authority has recommended that such action be taken against Respondent's state authorization. Rather, Respondent's state controlled substance registration has expired, and the state has failed to act upon his renewal application. Judge Randall concluded that ''under these circumstances, the statutory provisions do not seem to be met.''

Therefore, Judge Randall stated that:

> [A]lthough contrary to current DEA precedent, I have difficulty concluding that the Government has triggered section 824(a)(3) under these circumstances. Consistent with the plain language of the statute, the more viable resolution would be to deny the Government's motion due to the state's failure to act in this case, and to order the reinstatement of the Order for Prehearing Statements. In that way, this case would continue to hearing on all alleged bases for revocation. However, such a resolution would be contrary to current DEA precedent. Accordingly, the Deputy Administrator would need to intervene and order such an outcome here.

As a result, Judge Randall found that consistent with DEA precedent, the only relevant issue is whether Respondent is authorized to handle controlled substances in New Mexico; that it is undisputed that Respondent is not currently authorized to handle controlled substances in New Mexico; and that as a result, a Motion for Summary Disposition is properly granted.

It is well settled that where there is no material question of fact involved, or when the facts are agreed upon, there is no need for a plenary, administrative hearing. Congress did not intend for administrative agencies to perform meaningless tasks. See Gilbert Ross, M.D., 61 FR 8664 (1996); Dominick A. Ricci, M.D., 58 FR 51104 (1993); Philip E. Kirk, M.D., 48 FR 32887 (1983), aff'd

sub nom Kirk v. Mullen, 749 F.2d 297 (6th Cir. 1984).

Consequently, Judge Randall recommended that if the Deputy Administrator determines that the DEA precedent remains viable, Respondent's DEA Certificate of Registration should be revoked.

The Deputy Administrator agrees with Judge Randall that the plain language of U.S.C. 824(a)(3) states that a DEA registration may be revoked if a registrant's state authorization is revoked, suspended, or denied by competent state authority. However, this leaves DEA in a dilemma since pursuant to 21 U.S.C. 823(f), DEA can only register a practitioner if he is authorized by the state to handle controlled substances, and there is no provision in the statute to deal with situations where a practitioner is no longer authorized by the state, yet his state registration was not revoked, suspended, or denied.

Since state authorization was clearly intended to be a prerequisite to DEA registration, Congress could not have intended for DEA to maintain a registration if a registrant is no longer authorized by the state in which he practices to handle controlled substances due to the expiration of his state license. Therefore, it is reasonable for DEA to interpret that 21 U.S.C. 824(a)(3) would allow for the revocation of a DEA Certificate of Registration where, as here, a registrant's state authorization has expired.

Therefore, the Deputy Administrator concludes that Respondent is not currently authorized to handle controlled substances in New Mexico, and that consistent with DEA precedent, DEA cannot maintain his registration in that state.

Since DEA does not have the authority to maintain Respondent's DEA registration because he is not currently authorized to handle controlled substances in New Mexico, the Deputy Administrator concludes that it is unnecessary to determine whether Respondent's DEA registration should be revoked based upon the other grounds 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 BL 1242750, previously issued to William D. Levitt, D.O., 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 14, 1999.

Dated: August 24, 1999.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 99–23668 Filed 9–13–99; 8:45 am]

BILLING CODE 4410–09–M

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 2:30 p.m., Thursday, September 16, 1999.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, Virginia 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Proposed Amendment to IRPS 99–1: Establishing Low-Income Member Service Requirement.
2. Two (2) Requests from Federal Credit Unions to Convert to Community Charters.
3. Request from a Corporate Federal Credit Union for a National Field of Membership Amendment.
4. Request for a Merger of Two Corporate Federal Credit Unions.
5. Proposed Rule: Amendment to Part 701, NCUA's Rules and Regulations, Share Overdraft Accounts.
6. Proposed Rule: Amendments to Parts 724 and 745, NCUA's Rules and Regulations, Individual Retirement Accounts in Puerto Rico Federal Credit Unions.
7. Board Resolution to Clarify Board Policy and Agency Procedures on Community Charter Conversions as per IRPS 99–1.

RECESS: 3:45 p.m.

TIME AND DATE: 4:00 p.m., Thursday, September 16, 1999.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, Virginia 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Administrative Action under Part 704 of NCUA's Rules and Regulations. Closed pursuant to exemption (8).
2. Two (2) Personnel Matters. Closed pursuant to exemptions (2) and (6).

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (703) 518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 99–24036 Filed 9–10–99; 1:01 pm]

BILLING CODE 7535–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–7580]

Notice of Consideration of Amendment Request for Construction of a Containment Cell at Fansteel Facility in Muskogee, Oklahoma and Opportunity for Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of consideration of amendment request for construction of a containment cell at Fansteel Facility in Muskogee, Oklahoma and opportunity for hearing.

The U.S. Nuclear Regulatory Commission (the NRC) is considering an amendment to Source Material License No. SMB–911, issued to Fansteel, Inc. (the licensee), for construction of a low-level, radioactive waste (LLW) disposal cell (containment cell) onsite at Fansteel's facility in Muskogee, Oklahoma. The containment cell would be used for permanent disposal of Fansteel's own LLW, i.e., contaminated soil and soil-like materials, generated from past and current metal recovery operations at the Muskogee, Oklahoma facility. The licensee requested the amendment in a letter dated August 13, 1999.

The Fansteel site is in active operation for the recovery of tantalum, niobium, scandium, uranium, thorium, and other metals of commercial value from process waste residues. Process waste residues and contaminated soil at the Fansteel site are the result of past operations involving acid digestion of foreign and domestic ores and slags containing natural uranium and thorium. The licensee is not scheduled to terminate License SMB–911 until after 10 to 12 years of additional waste residue reprocessing.

The contaminated soil onsite consists of over 0.68 million cubic feet of soil and soil-like material, e.g., building rubble, that are contaminated with natural uranium and thorium. Metal recovery operations are not feasible on this large volume of dilute, contaminated soil; therefore, these materials require disposal at an appropriate LLW disposal facility. The licensee has proposed to construct a containment cell, located at the southwest of the Fansteel property for disposal of its LLW. In accordance with the NRC's criteria for license termination (10 CFR 20.1403), the containment cell area would, after completion of disposal, be released for restricted use and be subject to long-