States v. *BASF Corporation,* D.J. Ref. 90–5–2–1–08255.

The Consent Decree may be examined at the Office of the United States Attorney, 350 Magnolia Avenue, Beaumont, TX 77701, and at U.S. EPA Region 6, 1445 Ross Avenue, Dallas TX 75202. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $9.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–25494 Filed 10–22–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07–6]

Samuel H. Albert, M.D.; Dismissal of Proceeding

On October 25, 2006, the Deputy Assistant Administrator, Office of Diversion Control, issued an Order to Show Cause to Samuel H. Albert, M.D. (Respondent), of Fountain Valley, California. ALJ Ex. 1, at 1. The Show Cause Order proposed the denial of Respondent's ''pending application for a DEA Certificate of Registration'' as a practitioner on the grounds that on this application, which he submitted on March 24, 2006, as well as on multiple previous applications for renewal of his previous registration, Respondent had materially falsified his applications by failing to indicate that the Medical Board of California had imposed disciplinary sanctions on his state medical license, which included a revocation which was stayed, a thirty-day suspension, and the imposition of probationary terms. *Id.* at 1–2 (citing 21 U.S.C. 824(a)(1)). The Show Cause Order further alleged that Respondent's previous registration had expired on June 5, 2005, and that thereafter, Respondent had issued approximately 200 controlled substance prescriptions without being registered. *Id.* at 1–2. (citing 21 U.S.C. 822(a)(2), 841(a)(1), 843(a)(2)).

Respondent requested a hearing on the allegations and the matter was assigned to an Administrative Law Judge (ALJ), who conducted a hearing in Los Angeles, California. ALJ Dec. at 3. At the hearing, both parties elicited testimonial evidence and introduced documentary evidence. *Id.* at 3. Following the hearing, both parties filed briefs containing their proposed findings of fact, conclusion of law, and argument.

Thereafter, the ALJ issued her recommended decision. Neither party filed exceptions. The record was then forwarded to me for final agency action.

Upon reviewing the record, I noted that on May 16, 2006, more than five months prior to the issuance of the Order to Show Cause, Respondent submitted a letter to a DEA Field Office in which he requested to withdraw his application to renew his registration. *See* RX C. Under an Agency regulation, ''[a]n application may be amended or withdrawn *without permission* of the Administrator at any time before the date on which the applicant receives an order to show cause.'' 21 CFR 1301.16(a) (emphasis added). Because this regulation plainly did not require that Respondent obtain permission from the Agency for the withdrawal of his application to be effective and it thus appeared that Respondent did not have an application currently pending before the Agency, I ordered the parties to address whether this proceeding is ripe for adjudication.

Thereafter, only the Government filed a brief. Having considered the Government's arguments, I conclude that there is no application currently pending before the Agency and that this case is not ripe for adjudication. Accordingly, the Order to Show Cause must be dismissed.

Findings

Prior to its expiration on June 30, 2005, Respondent held DEA Certificate of Registration, AA0017473, which authorized him to dispense controlled substances in schedules II through V as a practitioner. GX 7. Respondent did not file a renewal application prior to the expiration of his registration. Rather, on or about March 24, 2006, Respondent filed an application. GX 6. The actual application form is not, however, part of the record.[1]

On May 16, 2006, apparently after a conversation with a DEA Diversion Investigator (DI) regarding the application, Respondent submitted a letter to the DI. RX C. The letter's opening paragraph stated: ''The purpose of this letter is to request withdrawal of my recent attempt to obtain an extension and renewal of [my] DEA certificate.'' *Id.* at 1. Later in the letter, Respondent further wrote: ''I request that you permit me to withdraw the current application for renewal, so that I may in the future submit [a] new application for a different DEA certificate number.'' *Id.* at 2.

On October 25, 2006, the Deputy Assistant Administrator, Office of Diversion Control, issued an Order to Show Cause which proposed the denial of Respondent's ''pending application.'' ALJ Ex. 1. On some date not later than November 22, 2006, Respondent received the Order to Show Cause. ALJ Ex. 2.

Discussion

Under a DEA regulation, ''[a]n application may be amended or withdrawn *without permission of the Administrator* at any time before the date on which the applicant receives an order to show cause pursuant to § 1301.37.'' 21 CFR 1301.16(a) (emphasis added). The same regulation further provides that ''[a]n application may be amended or withdrawn with permission of the Administrator at any time where good cause is shown by the applicant or where the amendment or withdrawal is in the public interest.'' *Id.*

As the regulation makes plain, an applicant's receipt of an Order to Show Cause is the operative event in determining whether he must obtain the Agency's permission to withdraw his application. When an applicant seeks to withdraw an application prior to his receipt of the Order to Show Cause, he is entitled to do so as a matter of right.

Respondent's May 2006 letter provides a clear and manifest expression of his intent to withdraw his application. Indeed, it is hard to imagine how Respondent could have made his intent to withdraw any clearer. *See* RX C, at 1 (''The purpose of this letter is to request withdrawal''); *id.* at 2 (''I request that you permit me to withdraw the current application for renewal''). Moreover, because at the time he requested to withdraw, Respondent had not been served with

[1] It appears that Respondent filed the form for a renewal application and not the form for a new application.

the Show Cause Order (and would not be served with the Order for at least another five months), he did not need the Agency's permission to do so. That he erroneously believed he needed the Agency's permission to withdraw does not make his intent to do so any less clear.

The Government nonetheless attempts to create ambiguity out of clarity. In its brief, the Government contends that ''[f]rom the context of [his] letter and the testimony, it is clear that Respondent did not intend his letter to be a withdrawal of his new application.'' Gov. Br. at 3. The Government maintains that this is so because ''[t]he letter was written in response to a request from [the] DI to explain the answers in [Respondent's] past renewal application and his new application.'' *Id.* The Government further contends that Respondent prepared the letter ''under the mistaken belief that the new application was a renewal application and that he needed to file a new application in place of the 'renewal' application.'' *Id.*

The Government also argues that because his counsel requested a hearing on the allegations of the Show Cause Order, ''Respondent has constructively acknowledged that the letter was not a withdrawal of his pending new application for a DEA registration.'' *Id.* The Government further contends that Respondent should ''have moved to clarify his position by clearly asking to withdraw his application.'' *Id.*

The Government's arguments are not persuasive. As for its contention that Respondent testified that he submitted the letter in the mistaken belief that he had submitted the wrong application form, thus implying that Respondent would not have submitted the letter if he had only recognized that he had submitted the correct form, the argument misreads the evidence. Respondent's May 2006 letter made clear enough that the reason he sought to withdraw the application (whether it was filed on the correct form or not) was not because it was filed on the wrong form, but because it contained an ''inadvertent error'' which he sought to correct. RX C, at 1–2. Moreover, even in his testimony on cross-examination, Respondent never asserted that he did not intend to withdraw.[2]

No more persuasive is the Government's contention that because Respondent requested a hearing on the allegations, he constructively acknowledged that the letter was not a withdrawal. The Government ignores that this act occurred approximately six months after Respondent submitted his letter and is hardly indicative of his intent in sending the letter. Moreover, the Government fails to acknowledge that it was the party that filed the Show Cause Order, which proposed to deny what it asserted was his ''pending application'' before the Agency. ALJ 1, at 1. Having been notified by the Government that it was proceeding to adjudicate his still ''pending application,'' and that he had a right to be heard on the allegations, it was reasonable for Respondent to have requested a hearing to defend himself. Respondent's act in requesting a hearing therefore does not negate the clear intent of his letter.

It is true, of course, that Respondent is charged with knowledge of the Agency's regulation. *See Federal Crop. Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–85 (1947). But so, too, are the Government's personnel including its Investigator (who received the letter), its Counsel, and the ALJ. Moreover, Respondent's withdrawal of his application goes to the subject matter jurisdiction of the Agency, an issue which can and should be raised *sua sponte.* In short, because Respondent withdrew his application, there is nothing to adjudicate. *See, e.g., Ronald J. Riegel,* 63 FR 67132, 67133 (1998).

Finally, the Government contends that it would ''be a futile act to treat [Respondent's letter] as a withdrawal, only to have [him] re-submit the application and have the matter re-litigated.'' Gov. Br. 4. The Government may, of course, choose to relitigate whether Respondent is entitled to be registered in the event he files a new application. But the Government's predicament is entirely of its own making. Having promulgated the regulation, the Government must abide by it.

Moreover, contrary to the Government's understanding, the relevant judicial authority suggests that the issuance of a final order would also ''be a futile act.'' *Id.* It is well settled that where the federal courts cannot review an agency order because of intervening mootness, the court vacates the agency's order. *See A.L. Mechling Barge Lines, Inc.* v. *United States,* 368 U.S. 324, 329 (1961) (vacating administrative orders which had become unreviewable in federal court); *American Family Life Assurance Co.* v. *FCC,* 129 F.3d 625, 630 (D.C. Cir. 1997) (''Since *Mechling,* we have, as a matter of course, vacated agency orders in cases that have become moot by the time of judicial review.'').

This case does not raise a question of mootness, but rather, one of ripeness (as there is no application before the Agency, and indeed, there was no application at the time the case was commenced). Nonetheless, were Respondent to file a petition for review, because of the Article III limits on the judicial power, the court of appeals would likely hold that the case is not justiciable. *See Ohio Forestry Ass'n, Inc.* v. *Sierra Club,* 523 U.S. 726, 732–33 (1998); *see also DaimlerChrysler Corp.* v. *Cuno,* 547 U.S. 332, 352 (2006) (noting that ripeness doctrine ''originate[s] in Article III's 'case' or 'controversy' language''). Having concluded that the case was not

---

[2] During cross-examination, the following colloquy occurred:

Q. * * * When you wrote the letter, weren't you aware that you were not dealing with a renewal, you're dealing with a new application; is that correct?

A. Well, yes. That's why part of the text of the letter was that [I] realized that what I should do is cancel any application I had, and then make an application for a brand new number, and I thought that the wisest course would be to request permission from the DEA.

Q. But the March 06 was a new application; correct?

A. Well, as it turns out, it was at the time. But I was not thinking quite clearly then.

Q. * * * But by the time you wrote this letter, was your thinking more clear?

A. Well, if you read the last paragraph, you'll see what my thinking was at the time. What I requested was that I wanted to withdraw the application that I wrote down [in the letter] was an application for renewal, although in fact it was an application for a new DEA number. And then I wanted to submit a new application, which shows you that I was not completely aware of what I had done, even when I wrote this letter.

Q. * * * So now you realize that * * * the letter * * * should not have referred to a request for renewal because the March application was a new application?

A. I understand that now.

Tr. 244–45.

Moreover, the Government ignores Respondent's answers to two of the ALJ's questions. When asked ''what is it you think you have pending before the DEA?,'' Respondent answered: ''I believe that what's pending is the DEA's letter to me, which is called an order to show cause, and this I believe is my response to that letter.'' Tr. 269. Noting that her ''question was not very artfully asked,'' the ALJ then asked Respondent: ''[i]n terms of your registration, do you believe you have an application for a new registration pending before the DEA?'' *Id.* Respondent answered:

I do not, and the reason is that I've never received any confirmation from the DEA, that I have any sort of application pending, new or old, or renewal, and therefore I think at the moment, that I do not have a valid DEA number, and I will be trying to obtain one in accordance with whatever techniques there are to obtain them.

Id. at 269–70.

To the extent it is even necessary or appropriate to go beyond the unambiguous text of Respondent's letter in assessing his intent, Respondent's testimony on cross examination fails to establish the Government's contention that he did not intend to withdraw. Moreover, the Government does not explain why Respondent should be deemed to have ''constructively acknowledged'' that his application is still pending when he expressly testified as to his belief that he does not have an application pending before the Agency.

justiciable, the court of appeals would simply vacate the Agency's order. *Cf. Mechling,* 368 U.S. at 329 (applying to unreviewed administrative orders the principle ''that a party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment incorporating that resolution, otherwise available as of right, fails because of intervening mootness * * * [T]hat principle should be implemented by the reviewing court's vacating the unreviewed judgment below.''). Thus, contrary to the Government's understanding, it would be pointless to issue a final order which in all likelihood would be vacated by the court of appeals and which would therefore have no preclusive effect.

In conclusion, because Respondent's May 2006 letter clearly manifested his intent to withdraw his application, and the Agency's regulation does not require that he obtain its permission to do so, I hold that there is no application currently before the Agency. Accordingly, the Order to Show Cause must be dismissed.

It is so ordered.

Dated: October 15, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–25480 Filed 10–22–09; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (09–092)]

Performance Review Board, Senior Executive Service (SES)

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of Membership of SES Performance Review Board.

SUMMARY: The Civil Service Reform Act of 1978, Public Law 95–454 (Section 405) requires that appointments of individual members to a Performance Review Board (PRB) be published in the **Federal Register**.

The performance review function for the SES in NASA is being performed by the NASA PRB and the NASA Senior Executive Committee. The latter performs this function for senior executives who report directly to the Administrator or the Deputy Administrator and members of the PRB. The following individuals are serving on the Board and the Committee:

Performance Review Board

Chairperson, Associate Administrator, NASA Headquarters.
Executive Secretary, Director, Workforce Management and Development Division, NASA Headquarters.
Associate Deputy Administrator, NASA Headquarters.
Associate Administrator for Exploration Systems Mission Directorate, NASA Headquarters.
Associate Administrator for Space Operations Mission Directorate, NASA Headquarters.
Associate Administrator for Science Mission Directorate, NASA Headquarters.
Associate Administrator for Aeronautics Research Mission Directorate, NASA Headquarters.
Associate Administrator for Institutions and Management, NASA Headquarters.
Assistant Administrator for Diversity and Equal Opportunity, NASA Headquarters.
Assistant Administrator for Human Capital Management, NASA Headquarters.
Associate Administrator for Program Analysis and Evaluation, NASA Headquarters.
Chief Engineer, NASA Headquarters.
General Counsel, NASA Headquarters.
Director, Ames Research Center.
Director, Dryden Flight Research Center.
Director, Glenn Research Center.
Director, Goddard Space Flight Center.
Director, Johnson Space Center.
Director, Kennedy Space Center.
Director, Langley Research Center.
Director, Marshall Space Flight Center.
Director, Stennis Space Center.

Senior Executive Committee

Chairperson, Deputy Administrator, NASA Headquarters.
Chair, Executive Resources Board, NASA Headquarters.
Chair, NASA Performance Review Board, NASA Headquarters.
Chief of Staff, NASA Headquarters.
Associate Deputy Administrator, NASA Headquarters.
Chief, Safety and Mission Assurance, NASA Headquarters.

Charles F. Bolden, Jr.,

Administrator.

[FR Doc. E9–25579 Filed 10–22–09; 8:45 am]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit review of the Materials Research Science and Engineering Center (MRSEC) at The Ohio State University by NSF Division of Materials Research (DMR) #1203.

Date and Time: Friday, November 13, 2009; 8:30 a.m.–4 p.m.

Place: The Ohio State University, Columbus, OH.

Type of Meeting: Part-open.

Contact Person: Dr. Charles Ying, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–8428.

Purpose of Meeting: To provide advice and recommendations concerning progress of the MRSEC at The Ohio State University.

Agenda: Friday, November 13, 2009

8:30 a.m.–2 p.m.
OPEN—Review of Ohio State University, MRSEC.

2 p.m.–4 p.m.
CLOSED—Executive Session.

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: October 20, 2009.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E9–25504 Filed 10–22–09; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Proposal Review Panel for Physics, Stony Brook Site Visit in Physics (#1208).

Date and Time: Thursday, November 19, 2009; 8:30 a.m.–6:30 p.m. Friday, November 20, 2009: 8:30 a.m.–1:00 p.m.

Place: Room 1020, NSF, 4201 Wilson Blvd., Arlington, VA 22230.

Type of Meeting: Partially Closed.

Contact Person: Dr. David Lissauer, Program Director for Elementary Particle Physics, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7061.

Purpose of Meeting: To provide an evaluation concerning the proposal submitted to the National Science Foundation.