maintained a principal place of professional practice at the Winter Springs pain clinic. Because the evidence further shows that during this period, Applicant was not registered at this location, or any other location in the State of Florida, I conclude that Applicant violated the CSA's separate registration requirement. 21 U.S.C. 822(e).[10]

The CSA further provides that ''[e]very registrant . . . shall be required to report any change of professional or business address in such manner as the Attorney General shall by regulation require.'' 21 U.S.C. 827(g). Under a DEA regulation, ''[a]ny registrant may apply to modify his/her registration . . . to change his/her name or address, by submitting a letter of request to the Registration Unit, Drug Enforcement Administration.'' 21 CFR 1301.51. Of consequence, this regulation further provides that ''[t]he request for modification shall be handled in the same manner as an application for registration.'' *Id.* Moreover, under 21 CFR 1301.13(a), ''[n]o person required to be registered shall engage in any activity for which registration is required until the application for registration is granted and a Certificate of Registration is issued by the Administrator to such person.''

Because section 827(g) clearly creates a substantive obligation on the part of a registrant to notify the Agency if he changes his professional address, the regulation's use of the words ''may apply to modify'' cannot alter (and cannot reasonably be read as altering) the binding nature of a registrant's obligation to notify the Agency. *Cf. Chevron, U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 842–43& n.9 (1984); *see also United States* v. *Marte,* 356 F.3d 1336, 1341 (11th Cir. 2004) (''When a regulation implements a statute, the regulation must be construed in light of the statute[.]'') (citation omitted). Indeed, because the regulation itself further states that a modification is ''handled in the same manner as an application for registration,'' and thus, a registrant may ''not engage in any activity for which registration is required until the application . . . is granted and a . . .[r]egistration is issued,'' 21 CFR 1301.13(a), the regulation is also properly construed as imposing, on a registrant who changes his professional address, the binding obligations to both: 1) Notify the Agency, and 2) refrain from dispensing activities until his request is approved. Accordingly, I also conclude that Respondent violated the CSA and DEA regulations when he failed to notify the Agency of the change of his professional address and yet proceeded to dispense controlled substances at his new practice location. *See* 21 U.S.C. § 827(g); 21 CFR 1301.13(a) and 1301.51. These findings, particularly when considered in light of the extent of the Applicant's violations, support the conclusion that granting Applicant's application ''would be inconsistent with the public interest.'' *Id.* § 823(f).

B. The Applicant's Issuance of Prescriptions After His DEA Registration Expired

Under the CSA, it is unlawful for a practitioner to ''knowingly or intentionally . . . use in the course of the distribution[] or dispensing of a controlled substance, . . . a registration number which is . . . expired.'' 21 U.S.C. 843(a)(2); *see also* 21 CFR 1306.03(a) (''A prescription for a controlled substance may be issued only by an individual practitioner who is . . . registered . . . .''). Notably, a DEA Certificate of Registration states on its face the date it expires; with respect to Applicant, his registration stated that it expired on May 31, 2011. *See* GX 2. Moreover, other evidence submitted by the Government shows that the Agency sent notices (on March 25 and April 10, 2011) to Applicant notifying him of the impending expiration of his registration. GX 3, at 2.

Here, the evidence shows that while Applicant's registration expired on May 31, 2011, he nonetheless proceeded to use the registration to issue several hundred controlled-substance prescriptions for drugs such as oxycodone 30mg. and Valium 10mg. *See* GX 13. In the absence of any evidence to the contrary, I further find that Applicant knew that his registration had expired and thus violated the CSA and DEA regulations when he continued to use it to issue the prescriptions. 21 U.S.C. 843(a)(2); 21 CFR 1306.03(a).

Here again, the extent of Applicant's misconduct in using an expired registration to issue prescriptions provides reason to deny his application. *See Larry E. Davenport, M.D.,* 68 FR 70534, 70537–38 (2003), *pet. for rev. denied Davenport* v. *U.S. Dep't of Justice,* 122 F. App'x 224 (6th Cir. 2005); *James C. LaJevic, D.M.D.,* 64 FR 55962, 55964 (1999). These violations, coupled with the thousands of violations Applicant committed in issuing prescriptions at the Winter Springs pain clinic without being registered at this location, strongly support the conclusion that granting Respondent's application for a new registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). Accordingly, I will order that Applicant's application be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Anthony E. Wicks, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This Order is effective immediately.

Dated: September 30, 2013.

Thomas M. Harrigan,

Deputy Administrator.

[FR Doc. 2013–24694 Filed 10–21–13; 8:45 am]

BILLING CODE 4410–09–P

[10] As support for its contention that, ''[u]nder DEA regulations, a practitioner is required to report a change of registered address to DEA,'' the Government cites 21 CFR 823(f)(2). Request for Final Agency Action, at 6. However, a review of the Code of Federal Regulations reveals that the provision cited by the Government does not even exist, and to the extent the Government mistakenly cited to the Code of Federal Regulations rather than the United States Code, 21 U.S.C. 823(f)(2) provides no support for its contention because it is simply a factor to be considered in determining the public interest and is not an independent requirement for registration. *See Penick Corp., Inc.,* v. *DEA,* 491 F.3d 483, 490 (D.C. Cir. 2007) (citation omitted). Indeed, the text of factor two simply directs the Agency to consider ''[t]he applicant's experience in dispensing . . . controlled substances'' and imposes (unlike numerous other provisions of the CSA) no substantive obligation on an applicant or registrant.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 13–17]

Morris W. Cochran, M.D.; Decision and Order

On July 9, 2013, Administrative Law Judge Gail A. Randall (hereinafter, ALJ) issued the attached Recommended Decision. Therein, the ALJ found that there was no dispute over the material fact that Respondent does not hold authority under the laws of the State of Alabama, the State in which he seeks registration with the Agency, to dispense controlled substances. R.D. at 12–13. Applying longstanding agency precedent, which holds that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a prerequisite for obtaining a registration under the Controlled Substances Act (CSA), *id.* at 8–10, the ALJ granted the Government's motion for summary disposition and recommended that I deny Respondent's application for a registration. *Id.* at 13. Neither party filed exceptions to the ALJ's Recommended Decision.

Thereafter, the ALJ forwarded the record to me for Final Agency Action.

Having considered the entire record, I have decided to adopt the ALJ's factual findings, legal conclusions, and recommended order. However, I do not adopt the ALJ's reasoning that ''[w]here the state has suspended or revoked a registrant's license to handle controlled substances, summary disposition of a registrant's case is only appropriate if the registrant is afforded some mechanism to challenge the state action.'' R.D. at 11 (citing *Kamal Tiwari,* 76 FR 76 FR 71604, 71605 (2011)). This is an oversimplification of the Agency's rule. As noted in *Tiwari,* the only case in which the Agency has held that summary disposition based on a registrant's lack of state authority was inappropriate was where the Agency issued a registrant an Immediate Suspension Order (thereby, suspending the practitioner's registration before providing a hearing on the underlying allegations), the State then suspended the Registrant's state authority based solely on the Agency's issuance of the Immediate Suspension Order, and the State's law specifically provided that a hearing was not available to challenge a state suspension when it was based on a finding that the practitioner's federal registration had been suspended. *See* 76 FR at 71606 (discussing unpublished interlocutory order in *Odette Louise Campbell,* No. 09–62; also citing Tex. Health & Safety Code §§ 481.063(e)(3), 481.063(h), 481.066(g), and Tex. Admin. Code § 13.272(h)).

Thus, when the Agency subsequently sought summary disposition on the ground that the practitioner no longer held state authority, the Administrator noted that granting the Government's motion ''would effectively preclude [the practitioner] from ever being able to challenge the basis of the Immediate Suspension order and regain both her [f]ederal and [s]tate registrations were the allegations without merit.'' *Campbell,* Order Remanding for Further Proceedings, at 9. Notwithstanding that much of the reason for that predicament stemmed from Texas law, the Administrator noted that she had no authority to order the State to give the practitioner a hearing and that because the Agency initiated this process when it issued the Immediate Suspension order, it was incumbent on the Agency to provide the practitioner ''with a meaningful opportunity to challenge the allegations which supported the Immediate Suspension.'' [1] *Id.* at 10.

Here, by contrast, DEA previously provided Respondent with a hearing on the merits of the Agency's allegations that he committed various acts which rendered his registration inconsistent with the public interest. *See Morris W. Cochran,* 77 FR 17505 (2012). Following the hearing, which lasted three days, the ALJ issued a recommended decision, which the Administrator adopted in large part. More specifically, the Administrator found that Respondent violated federal law by: (1) Prescribing methadone to treat substance abuse when he was not registered as a narcotic treatment program, *see* 21 U.S.C. 823(g)(1); (2) prescribing methadone to treat substance abuse, *see* 21 CFR 1306.04(c) and 1306.07; (3) prescribing controlled substances without a legitimate medical purpose, *see id.* 1306.04(a); (4) post-dating prescriptions, in violation of 21 CFR 1306.05(a); and (5) prescribing controlled substances when his registration had been suspended, *see* 21 U.S.C. 843(a)(2). *See* 77 FR at 17517–22. Further finding that Respondent had not rebutted the Government's *prima facie* case, the Administrator revoked his registration.

Respondent nonetheless maintains that both DEA and the State ''will continue to deny [him] access to prescribing medications based on the other's actions,'' and that ''[t]his is an unjust an [sic] inequitable situation as [he] fully complied with all the requirements set forth by the Medical Licensure Commission [MLC] after the charges were first brought against him.'' Resp. to Govt's Mot. for Summ. Disp. at 4. However, as explained in the ALJ's decision (*see* R.D. at 8–9), the CSA makes the possession of state authority a prerequisite for obtaining and maintaining a DEA practitioner's registration. *See also* 21 U.S.C. 823(f) (''[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances in schedules II, III, IV, or V . . . *if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.''*) (emphasis added); *id.* § 802(21) (''The term 'practitioner' means a physician, dentist, veterinarian, scientific investigator . . . or other person *licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense,* conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.'') (emphasis added); *see also Hooper* v. *Holder,* 2012 WL 2020079, at *2 (4th Cir. 2012) (unpublished) (''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 [Administrator's] decision to construe § 824(a)(3) as mandating revocation upon suspension of a state license is not an unreasonable interpretation of the CSA.'').[2]

As for whether this Agency has placed Respondent in an unjust position, Respondent ignores that in the previous DEA proceeding, he had a full and fair opportunity to contest the allegations, as well as to put on evidence (including his evidence that he had fully complied with the requirements of the MLC's order) to refute the Government's contention that his continued registration is inconsistent with the public interest. *See* 77 FR at 17522. Notably, Respondent did not seek review of the Agency's decision.

And as for whether the MLC has placed him in an unjust position (or has acted arbitrarily or capriciously), because notwithstanding his compliance with its order, it proceeded to revoke his state authority based on the Administrator's order, this is a matter for the Alabama courts to decide.[3] However, until such time as the State grants him a new Alabama Controlled Substances Certificate, Respondent remains without authority

[1] The Agency assumed that, if, following the hearing, the Immediate Suspension was vacated, the State would also vacate its suspension. However, in the event the State declined to vacate its suspension, the CSA's requirement that a practitioner must possess state authority in order to be registered with DEA, *see* 21 U.S.C. 802(21) & 823(f), would still have precluded the Agency from issuing a registration to the practitioner and the practitioner's sole remedy would have been to challenge the State's order in the state courts.

[2] *See also* 21 U.S.C. 824(a)(3) (authorizing the suspension or revocation of a registration ''upon a finding that the registrant . . . 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'').

[3] It is noted that the Board of Medical Examiners' regulations for the Conduct of Hearings In Contested Cases provide that:

After the Board has reached a determination, from consideration of all of the evidence on the question of guilt or innocence of the registrant with respect to the grounds specified in the complaint, and before the Board determines the appropriate penalty, if any, to be imposed, the Board may, but is not required to, receive and consider all prior actions of the Board with respect to the registrant's certificate of registration and any matters in mitigation or extenuation which the registrant desires to submit.

Ala. Admin. Code r.540–x–6–.02(2). It is further noted that under the Board's regulations, the Board had available to it a range of sanctions, including sanctions short of revocation or outright suspension, yet chose to revoke Respondent's state registration. *See id.* r. 540–X–6–.04(9).

to prescribe controlled substances under the laws of the State in which he engages in professional practice. Because the possession of state authority to dispense controlled substances is a prerequisite for obtaining a registration under the CSA, I hold that the ALJ properly granted the Government's motion for summary disposition and will therefore deny Respondent's application.[4]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) and 0.104, I order that the application of Morris W. Cochran, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This Order is effective immediately.

Dated: September 26, 2013.

Thomas M. Harrigan,

Deputy Administrator.

Brian Bayly, Esq., for the Government
Mark W. Lee, Esq., for the Respondent

Recommended Rulings, Findings of Fact, Conclusions of Law, And Decision of the Administrative Law Judge

Gail A. Randall, Administrative Law Judge:

I. Facts

The Deputy Assistant Administrator, Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause (''Order'') dated January 11, 2013,[1] proposing to deny the DEA Certificate of Registration (''COR'') application, of Morris W. Cochran, M.D. (''Dr. Cochran'' or ''Respondent''), as a practitioner, pursuant to 21 U.S.C. 823(f) and 824(a)(3) (2011), because Respondent does not ''have authority to practice medicine or handle controlled substances in the [s]tate of Alabama'' and because the Respondent's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). [Order, at 1].

The Order specifically alleged that, on February 12, 2012, Respondent's Schedule II and IIN state registration for controlled substances had been revoked by the Alabama Board of Medical Examiners and Respondent was prohibited from treating patients for pain management or drug addiction. [*Id.* at 2]. The Government further alleged that, on October 9, 2012, Respondent's state controlled substance license was revoked in its entirety.[2] [*Id.*]. As a result, the Government concluded that Respondent is currently without state authority to handle controlled substances in Alabama, the state in which Respondent is registered with the DEA. [*Id.*]. The Government requested that I recommend to the Administrator the denial of Respondent's pending application for a DEA COR. [*Id.* at 3].

On February 11, 2013, the Respondent, through counsel, filed a timely request for hearing in the above-captioned matter.

Later, on February 11, 2013, this Court issued an Order for Prehearing Statements in which the Government was directed to file its Prehearing Statement on or before February 25, 2013, and the Respondent was directed to file his Prehearing Statement on or before March 4, 2013.

On February 25, 2013, the Government filed its Motion for Summary Judgment and Motion to Stay the Proceedings (''Government's Motion''). Therein, the Government moved this Court to summarily dispose of the above-captioned matter and stay the proceedings while the Government's Motion was pending. [Gov't Mot. I, at 1].

Specifically, the Government argued that ''summary judgment'' is warranted in this case because the Respondent currently lacks authority to handle controlled substances in the state of Alabama and thus, the Respondent's application for a DEA COR should be denied. [*Id.* at 4–8]. Additionally, the Government contended that ''summary judgment'' is appropriate because the Respondent had adequate opportunity to challenge the state revocation of his controlled substance registration in Alabama. [*Id.* at 4–7]. To this point, the Government added that the Respondent was afforded due process under Alabama state law because he had a hearing before the state medical board regarding the revocation of his state controlled substances registration. [*Id.* at 6–7]. Therefore, the Government requested this Court grant its motion for ''summary judgment'' and recommended that the Respondent's ''application for a DEA registration . . . be summarily denied. . . .'' [*Id.* at 8]. The Government further requested that ''the ALJ stay the proceedings until an order and recommended decision is issued based on this summary judgment motion.'' [*Id.*].

On March 4, 2013, Government counsel filed its Second Motion to Stay the Proceedings while Respondent's Request to Withdraw his Application is Pending (''Government's Second Motion''). Therein, Government requested that the Court stay the above-captioned matter because Dr. Cochran submitted a request to withdraw his pending application. [Gov't Mot. II, at 1; *see also* Gov't Mot. II, Attachment at 1]. The Government requested the stay of these proceedings pending the Deputy Assistant Administrator's decision on the Respondent's request to withdraw his application for a DEA registration, pursuant to 21 CFR 1301.16(a) (2012). [*Id.*]. This Court granted Government's Motion on March 5, 2013.

On March 20, 2013, this Court ordered the parties to file a Joint Status Report on or before April 15, 2013, regarding Respondent's request to withdraw his application.

On April 12, 2013, the Respondent filed his Status Update (''Respondent's Status Report I''). Therein, he explained to this Court that he had not yet been ''informed as to the DEA's decision on his request to withdraw the application.'' [Resp't Status Report I, at 1]. Accordingly, the Respondent requested ''that the ALJ continue to stay this action until the DEA reaches a decision on Dr. Cochran's request to withdraw his application.'' [*Id.*].

On April 15, 2013, the Government filed its Status Report (''Government's Status Report I''). Therein, the Government informed this Court that the Government had sent the Respondent's request to withdraw his application to the Deputy Assistant Administrator, Office of Diversion Control, but had not yet received a decision from him. [Gov't Status Report I, at 1–2].

On April 16, 2013, this Court ordered the parties to file a second Joint Status Report on or before April 29, 2013.

On April 29, 2013, the Respondent filed his Status Update (''Respondent's

[4] Before the ALJ, Respondent also argued that the Agency ''has acted in an arbitrary and unreasonable manner'' because when he sought to withdraw his application, the relevant Agency official would only accept his request if he agreed not to reapply for five years. Resp. Opp. at 3–4. Respondent should have been provided with a written explanation as to why his request was rejected. *See* 5 U.S.C. 555(e) (''Prompt notice shall be given of the denial in whole or in part of a written application, petitioner or other request of an interested person made in connections with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for the denial.'').

Respondent has not, however, identified how he has been adversely affected by the refusal to grant his request to withdraw his application, and under the rules of the Agency, Respondent can reapply for a new registration at any time. However, because under federal law, the possession of state authority is a prerequisite for obtaining a registration, Respondent is not entitled to be registered, or to challenge the Government's contention that his registration is inconsistent with the public interest, until he obtains state authority. 21 U.S.C. 823(f).

[1] The Order to Show Cause was served on the Respondent on January 22, 2013. [*See* Government's Notice of Service of an Order to Show Cause.].

[2] Government attached to its initial motion for summary disposition (''Government's Motion''), which was filed February 27, 2013, a copy of the state of Alabama's order that revoked Respondent's registration in its entirety. [Gov't Mot. I, Attach. 3, at 1].

Status Report II''). Therein, the Respondent explained to the Court that ''[t]o date, Dr. Cochran has not been informed as to the DEA's decision on his request to withdraw the application.'' [Resp't Status Report II, at 1]. Accordingly, the Respondent ''request[ed] that the ALJ continue to stay this action until the DEA reaches a decision on Dr. Cochran's request to withdraw his application.'' [*Id.*]

Later, on April 29, 2013, the Government filed its Status Report and Second Request to Stay Proceedings while Respondent's Request to Withdraw his Application is Pending with the Deputy Assistant Administrator's Office (''Government's Status Report II''). Therein, the Government confirmed that the ''Deputy Assistant Administrator still has this matter and [Government counsel] has been informed that a decision will come shortly.'' [Gov't Status Report II, at 1]. Accordingly, the Government requests ''that the proceedings be stayed until the Deputy Assistant Administrator issues a decision.'' [*Id.*]

On April 30, 2013, this Court ordered the parties to file a third Joint Status Report no later than May 13, 2013 regarding Respondent's request to withdraw his application for a DEA registration.

On May 6, 2013, Respondent filed a Status Update, wherein the Respondent indicated that he, once again, ''has not been informed as to the DEA's decision on his request to withdraw the application.'' [Resp't Status Report III, at 1]. Respondent requested that the ALJ continue this action until the DEA reaches a decision on Respondent's withdrawal request. [*Id.*].

On May 14, 2013, Government filed a Status Report, Third Request to Stay Proceedings While Respondent's Request to Withdraw His Application is Pending with the Deputy Assistant Administrator's Office, and Request to Accept this Status Report One Day Late. Government confirmed that the Deputy Assistant Administrator had not yet made a decision on Respondent's withdrawal request. [Gov't Status Report III, at 1]. Government's untimely filing was the result of waiting until late afternoon for a response from the Deputy Assistant Administrator's office about this matter. [*Id.*]. Government requested that I stay the proceedings until a decision is reached. [*Id.*].

On May 17, 2013, this Court continued the stay on the above-captioned matter and ordered the parties to file a fourth Joint Status Report no later than June 13, 2013.

On June 11, 2013, Government filed a Status Report (''Government's Status Report IV'') indicating that on ''May 17, 2012 (sic), the Deputy Assistant Administrator's office notified [Government Counsel] that DEA' (sic) Office of Diversion will let Dr. Cochran withdraw his application 'only on the condition that [Dr.] Cochran not re-apply for a period of five years.''' [Gov't Status Report IV, at 2]. Government's Status Report IV did not, however, indicate whether Respondent had accepted the offer. [*See id.*]. Government also renewed its request that I ''grant the Government's Motion for Summary Judgment and issue a Recommendation that Respondent's DEA registration be revoked.'' [3] [*Id.*].

On June 12, 2013, this Court ordered Respondent to respond to Government's Status Report IV, which contained the Deputy Assistant Administrator's offer for Respondent's withdrawal of his application. Specifically, I asked the Respondent to address the Deputy Assistant Administrator's withdrawal offer and the current status of his authority to handle controlled substances in the state of Alabama.

Later, on June 12, 2013, the Respondent, through counsel, filed a Response to Government's Status Report IV. [Resp't Resp., at 1]. Respondent noted that the Government's most recent filing ''was the first time that the [Respondent had] been notified that the DEA Office of Diversion would only allow Dr. Cochran to withdraw his application for DEA registration if he waited five years before he applied again.'' [*Id.*]. Additionally, Respondent requested documentation of the DEA Office of Diversion's offer, which was allegedly provided to the Government counsel on May 17, 2013.[4] [*Id.*].

On June 14, 2013, I held a telephonic conference with the parties. The parties represented their positions on the issue of Respondent's request to withdraw his application, including whether I should order the disclosure of the email from the Deputy Assistant Administrator that contained the withdrawal offer.

On June 24, 2013, the Respondent, through counsel, filed a Response to Government's Motion for Summary Judgment. [Resp't Resp. II, at 1]. Respondent explained that on January 25, 2012, Respondent appeared before the Alabama Medical Licensure Commission (''AMLC'') concerning the same actions that resulted in the suspension of Respondent's former DEA COR on September 22, 2010. [*Id.*]. AMLC initially permitted Respondent to maintain his state registration for Schedules III–V, subject to several conditions, with which Respondent said he complied. [*Id.*]. However, Respondent indicated that DEA subsequently revoked his registration, which prompted the AMLC to move to revoke Respondent's state registration. [*Id.* at 2]. Respondent explained that his state registration was revoked October 19, 2012.[5] [*Id.*]. Thus, when DEA reviewed his new application for registration, which was filed September 27, 2012, the Agency instituted action to deny it based on Respondent's lack of state authority to handle controlled substances. [*Id.*].

Respondent also contended that he has ''been placed in an indefinite back and forth between the DEA and the Alabama Board of Medical Examiners.'' [*Id.* at 3]. Furthermore, Respondent said he appealed the ALMC's ''decision to revoke his prescribing authority'' in the Alabama Court of Civil Appeals. [*Id.* at 4]. Respondent requested I deny the Government's motion for summary disposition, or in the alternative, order the Government to accept Respondent's request for withdrawal without any restrictions on his reapplication. [*Id.*].

Later, on June 24, 2013, I issued a Memorandum and Order (''MO'') addressing the statutory and regulatory basis for withdrawing an application for a DEA COR. [MO, at 4–6]. I also explained that it would not be appropriate in this case to permit Respondent to file an interlocutory appeal with the Administrator for review of the withdrawal offer terms. [*Id.* at 6]. I then ordered Respondent to notify this Court no later than Friday, June 28, 2013 of whether he wants to move forward with this administrative proceeding or accept the Deputy Assistant Administrator's offer for withdrawal. [*Id.* at 7].

Respondent has failed to notify this Court of his decision as to how he plans to proceed with his case. I interpret Respondent's silence to indicate that he has waived his opportunity to accept the Deputy Assistant Administrator's withdrawal offer. I further interpret his silence to mean that he plans to pursue his case through the administrative process. As a result, I will now address Government's motion for summary disposition, which was contained in the February 25, 2013 motion and renewed

[3] Government counsel must have intended to recommend that I deny Respondent's application for a DEA COR, instead of revoke Respondent's registration. [*See* Order, at 2 ¶ 4].

[4] Government counsel acknowledged on June 14, 2013, during a telephonic conference with the parties, that he had intended to write *May 17, 2013,* rather than May 17, 2012, in the filing. [Gov't Status Report IV, at 2].

[5] The actual date of the revocation was October 9, 2012, as evidenced by the order itself. [Gov't Mot I., Attach. 3, at 1].

in the June 11, 2013 status report. [Gov't Mot. I, at 1; Gov't Status Report IV, at 2]. I will also consider the arguments Respondent raised in his Response to Government's motion for summary disposition. [*See generally* Resp't Resp. II].

II. Discussion

A. State Authority To Handle Controlled Substances

The Controlled Substances Act (''CSA'') and long-standing agency precedent provide that having state authority to handle controlled substances is a prerequisite to obtaining a DEA registration. *See* 21 U.S.C. 823(f) (''the Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices''); 21 U.S.C. 802(21) (2011) (defining ''practitioner'' as ''a physician . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice''); *see also Romeo J. Perez, M.D.,* 62 FR 16,193, 16,193 (DEA 1997); *Demetris A. Green, M.D.,* 61 FR 60,728, 60, 729 (DEA 1996); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (DEA 1993).

Therefore, the DEA does not have statutory authority under the CSA to grant the application of a practitioner, who lacks state authority to handle controlled substances. *Graham Travers Schuler, M.D.,* 65 FR 50,570, 50,571 (DEA 2000); *see also* 21 U.S.C. 823(f); 21 U.S.C. 824(a)(3) (stating a registration may be suspended or revoked by the Attorney General upon a finding that the registrant ''has had his State license or registration suspended, revoked or denied by competent State authority''); *Joseph Baumstarck,* 74 FR 17,525, 17,527 (DEA 2009) (stating that the ''ALJ applied the Agency's long-settled ruled (sic) that a practitioner may not maintain [a] DEA registration if he lacks authority to handle controlled substances under the laws of the state in which he practices'').

Consequently, the Deputy Administrator has found that denial of an application for registration through summary disposition is appropriate where a respondent lacks state authority to handle controlled substances. *George Thomas, PA–C,* 64 FR 15,811, 15,812 (DEA 1999) (denying Respondent's application for registration upon finding that the ALJ properly granted Government's motion for summary disposition because Respondent was without state authority to handle controlled substances in the state where he sought DEA registration); *Robert G. Crummie, M.D.,* 76 FR 71,369, 71,369–70 (DEA 2011) (denying any pending applications for registration upon adopting the ALJ's recommended decision, which granted Government's motion for summary disposition on the basis that Respondent lacked state authority to handle controlled substances).

Here, the Respondent does not dispute that he currently lacks state authority to handle controlled substances. Respondent indicated that his state registration was revoked October 19, 2012.[6] [Resp't Resp. II, at 2]. According to agency precedent, even though Respondent is appealing the AMLC decision in state court, he currently lacks state authority to handle controlled substances for the purpose of obtaining a DEA registration. Therefore, I find that summary disposition, which recommends denial of Respondent's application, is appropriate.

B. Right to Hearing and Due Process Rights

With the central issue of state authority resolved, I turn to Respondent's additional argument that he has ''been placed in an indefinite back and forth between the DEA and the Alabama Board of Medical Examiners.'' [Resp't Resp. II, at 2]. Although not explicitly styled as a due process argument, I find that Respondent is impliedly arguing that his inability to obtain a state registration without a DEA registration, and vice versa, is a denial of his due process rights. *See Kamal Tiwari, M.D.,* 76 FR 71,604, 71,605 (DEA 2011).

A respondent has a constitutionally protected property interest in his DEA registration. *See Lujan* v. *G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 196 (2001) (finding that a claimant has a right to due process where ''the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation''); *see also Wedgewood Village Pharmacy* v. *Aschcroft,* 293 F. Supp. 2d 462, 469–70 (D. N.J. 2003) (finding that ''[d]epriving [a company] of its rights to dispense and receive controlled drugs without notice and a hearing would violate . . . due process'').

Where the state has suspended or revoked a registrant's license to handle controlled substances, summary disposition of a registrant's case is only appropriate if the registrant is afforded some mechanism to challenge the state action. *Kawal Tiwari, M.D.,* 76 FR at 71,605 (finding summary disposition was appropriate because the ALJ correctly concluded that Respondent had a basis for seeking substantive review of his state suspension under state law, even though Respondent argued he could not request a hearing until the state administrative board issued an order to show cause, which it had not); *Hichman K. Riba, D.D.S.,* 73 FR 75,773, 75,774 (DEA 2008) (finding summary disposition appropriate where Respondent was seeking judicial review of state proceedings); *Bourne Pharmacy, Inc.,* 72 FR 18,273, 18,274 (DEA 2007) (finding summary disposition appropriate where the state revocation was ''pending a final decision on the merits'').

The state of Alabama affords the Respondent due process through a hearing entitlement and opportunity for appellate review. Specifically, the Code of Alabama provides that ''[b]efore denying, suspending, or revoking a registration . . . the certifying boards shall serve upon the applicant or registrant an order to show cause.'' Ala. Code § 20–2–53(a) (2013). The statute indicates that the order to show cause ''call[s] upon the applicant or registrant to appear before the certifying board.'' *Id.* Such proceedings are ''conducted in accordance with the Alabama Administrative Procedure Act. . . .'' *Id.* After a decision is rendered by the state administrative board, an applicant or registrant may then ''obtain judicial review thereof by filing a written petition for review. . . .'' *Id.* § 20–2–53(b). The proper court for appealing such matters is the Alabama Court of Civil Appeals. *Id.* § 34–24–380; *see also Brunson, M.D.* v. *Alabama State Board of Medical Examiners,* 69 So.3d 913, 914 (Ala. Civ. App. 2011).

Here, Respondent had an opportunity to appear before the AMLC during a hearing about his state authority to handle controlled substances. [Resp't Resp. II, at 1; Gov't Mot. I, at 6–7]. Thus, I find that Respondent's due process rights are protected, even if I recommend denial of his application for DEA COR through summary disposition. With regards to Respondent's appeal of the AMLC decision that revoked his state registration, I find that it is within the discretion of the Alabama Court of Civil Appeals to decide whether Respondent's case will be heard or resolved through summary judgment. Finally, I acknowledge that Respondent's Alabama registration was

[6] Documentary evidence provided by the Government indicates that the state order for revocation actually occurred on October 9, 2012. [Gov't Mot. I, Attach. 3, at 1].

revoked in response to DEA's revocation and Respondent alleges he cannot obtain a new state registration without a DEA COR. However, Respondent's due process rights have not been denied because he previously had an opportunity to be heard at a state administrative hearing before the AMLC. Further, the Respondent is actively pursuing his state court appellate right.

C. Material Question of Fact

It is well-settled that when there is no material question of fact involved, or when the facts are agreed upon, there is no need for a plenary, administrative hearing. *See Larry Elbert Perry, M.D.,* 77 FR 67,671 (DEA 2012); *Treasure Coast Specialty Pharmacy,* 76 FR 66,965 (DEA 2011); *Jesus R. Juarez, M.D.,* 62 FR 14,945 (DEA 1997); *Dominick A. Ricci, M.D.,* 58 FR 51,104 (DEA 1993). Congress did not intend for administrative agencies to perform meaningless tasks. *See Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F.3d 600, 604–05 (1st Cir. 1994); *NLRB* v. *Int'l Assoc. of Bridge, Structural & Ornamental Ironworks, AFL–CIO,* 549 F.2d 634 (9th Cir. 1977); *Philip E. Kirk, M.D.,* 48 FR 32,887 (1983), aff'd sub nom. *Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984).

Here, the parties do not dispute that the Respondent lacks state authority to handle controlled substances in Alabama. Thus, there is no material question of fact to be adjudicated.

III. Conclusion, Order, and Recommendation

DEA is bound by federal statute to deny applications for a DEA COR, where an applicant lacks state authority. 21 U.S.C. 823(f), 824(a)(3); *see also Graham Travers Schuler,* 65 FR at 50,571; *George Thomas, PA–C,* 64 FR at 15,812. Here, there is no genuine dispute of material fact that Respondent lacks state authority to handle controlled substances in the state where he seeks to obtain a DEA registration. Furthermore, Respondent's due process rights are protected, since he had an opportunity to be heard by the AMLC regarding his state authority to handle controlled substances. Therefore, summary disposition for the Government is appropriate.[7]

Accordingly, I hereby

Grant the Government's motion for summary disposition.

[7] This opinion does not reach the other factual issues made in the Order to Show Cause. Rather, this opinion solely addresses the Respondent's loss of his ability to handle controlled substances in the state of Alabama.

I also forward this case to the Deputy Administrator for final disposition. I recommend that the Deputy Administrator deny Respondent's pending application for a DEA COR.

Dated: July 9, 2013.

Gail A. Randall,

Administrative Law Judge.

[FR Doc. 2013–24696 Filed 10–21–13; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–43]

Mark G. Medinnus, D.D.S.; Decision and Order

On October 17, 2012, Administrative Law Judge (ALJ) Gail A. Randall issued the attached Recommended Decision (hereinafter, cited as R.D.[1]). The Government filed Exceptions to the Recommended Decision.

Having reviewed the record in its entirety, I reject the Government's Exceptions and adopt the ALJ's findings of fact and conclusions of law except as discussed below. I also adopt in part, and reject in part, the ALJ's recommended order. A discussion of the Government's Exceptions follows.

The Government's Exceptions

The Unauthorized Purchase Allegation

The Government first takes exception to the ALJ's finding that it failed to prove that Respondent, while serving as the dental director of the Round Valley Indian Health Clinic (RVIHC), made an unauthorized purchase of two controlled substances (hydrocodone and codeine). Exceptions at 2. The contention is not well taken as either a factual or legal matter.

The evidence showed that on November 29, 2010, Respondent prepared a purchase order for various dental supplies, including one bottle of 500 tablets of hydrocodone/acetaminophen and one bottle of 500 tablets of codeine/acetaminophen. GX 10, at 1–3; Tr. 151. The purchase order comprised all of one page and listed a total of eleven items; the order was approved by Jan Scribner, the deputy director of the RVIHC. *Id.;* Tr. 158. The evidence further showed that Ms. Scribner had authority to approve purchase orders in the absence of the RVIHC's executive director. GX 21.

In challenging this finding, the Government takes issue with the ALJ's credibility findings. Citing *Ryan* v. *CFTC,* 145 F.3d 910, 918 (7th Cir. 1998), it argues that I am ''free to discount the weight that the ALJ placed on the testimony when the record would support an alternative finding.'' Exceptions at 1 (also citing *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951)).[2]

More specifically, the Government requests that I reject the ALJ's credibility findings regarding the testimony of both Respondent (whom she found credible on the issue of whether a dental clinic employee had told him that the executive director had approved the purchase order, *see* R.D. at 12, 27) and the clinic employee (whom she found not credible when she testified that the executive director did not think it was a good idea because of Respondent's history of substance abuse, *see id.*). *See* Exceptions at 2–6. While the Government clearly misreads *Ryan,*[3] I conclude that it is not

[1] All citations to the R.D. are to the ALJ's slip opinion.

[2] In the Show Cause Order, the Government alleged both that Respondent made an unauthorized purchase of controlled substances, and that he stored and dispensed controlled substances at the RVIHC's dental clinic in violation of the RVIHC's guidelines for storing and dispensing controlled substances. ALJ Ex. 1, at 2. The ALJ reasoned that because Respondent ''reasonably believed the purchase order was duly approved, the Government's allegation that he failed to abide by RVIHC policies regarding the storage and dispensing of controlled substances, also fails.'' R.D. at 28. It is, however, far from clear why, even if Respondent had authority to order controlled substances, this would necessarily lead to the conclusion that he also had authority to store and dispense controlled substances out of the dental clinic.

In taking exception to the ALJ's findings regarding the purchase, the Government also takes issue with the ALJ's finding that Respondent ''honestly and reasonably believed he possessed the necessary authority to store and dispense controlled substances in [the RVIHC] dental department.'' Exceptions at 2. To the extent the Government has even properly put this finding at issue, I reject its contention, because, by itself, it does not establish a violation of the CSA or state law, or otherwise actionable misconduct under the public interest standard.

[3] At issue in *Ryan* was whether an Agency was required to defer to an ALJ's finding that an applicant for a trader's license ''was fully rehabilitated and not a threat to the integrity of the [commodities] markets,'' which was based on the ALJ having found credible the testimony of the applicant's character witnesses. *See* 145 F.3d at 918. The Commission discredited the testimony because ''almost every one can produce'' a character witness who will testify as to his/her ''belief that the defendant will not repeat his violative conduct,'' and because the ''testimony reflected at most a perfunctory concern with the customers harmed by Ryan's wrongdoing.'' *Id.* (internal citation omitted).

The Seventh Circuit held that the Commission could ''discredit the weight of a witness's testimony without impinging on an ALJ's credibility determinations.'' *Id.* As the court of appeals further explained:

The Commission must attribute significant weight to an ALJ's findings based on a witness's demeanor

Continued