days following the last day of each quarter.

Respondent and Ms. Santiago-Soto shall notify the DEA Ponce Office of any disciplinary action undertaken against its pharmacy license and Puerto Rico controlled substance registration, as well as any action taken against Ms. Santiago-Soto's pharmacist license, including the initiation of any proceeding by the Commonwealth's authorities to suspend or revoke any of the licenses or registration. Such notification shall occur no later than three business days following service on Respondent or Ms. Santiago-Soto of any document initiating such a proceeding, any interim or emergency order of suspension, and any final order.

The above conditions shall terminate upon Respondent's completion of the period of probation, provided Respondent fully complies with each term of its probation. Any violation of these conditions shall constitute an act inconsistent with the public interest and grounds for the suspension or revocation of Respondent's registration.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the Application of Farmacia Yani be, and it hereby is, held in abeyance for a period of six months to begin on the date of this ORDER. I further order that upon the conclusion of the six-month period, the Application of Farmacia Yani shall be granted or denied as set forth above. I also order that in the event that Ms. Santiago-Soto complies with the condition that she complete a course in controlled substance dispensing and the corresponding responsibility, Farmacia Yani's Application shall be granted subject to the probationary conditions set forth above. This ORDER is effective immediately.

Dated: May 12, 2015.

Michele M. Leonhart,

Administrator.

[FR Doc. 2015–12130 Filed 5–19–15; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–62]

Jana Marjenhoff, D.O.; Decision and Order

On June 24, 2014, Chief Administrative Law Judge (ALJ) John J. Mulrooney, Jr., issued the attached Recommended Decision.[1] Respondent filed Exceptions to the Decision.

Having reviewed the entire record, including Respondent's Exceptions, I have decided to adopt the ALJ's findings of fact,[2] conclusions of law, and recommended order, except as discussed below. A discussion of Respondent's Exceptions follows.

Exception One—Whether Respondent Was Denied Adequate Notice Because the ALJ Relied on Matters That Were Not Raised in the Order To Show Cause

Respondent argues that her rights under the Due Process Clause and the Administrative Procedure Act were violated because in the Show Cause Order, the Government alleged only that Respondent forged eight prescriptions and the ALJ proceeded to rely on ''other matters of fact to support'' his recommendation. Exceptions, at 2. Respondent does not, however, identify the specific facts of which she believes she was denied adequate notice, but rather, simply asserts that ''the matters determined by the ALJ to support findings against Respondent as to factors four and five were not previously raised in the Order to Show Cause.'' *Id.* at 3.

To the extent Respondent takes issue with the ALJ's decision because the Show Cause Order alleged only eight instances of forgery rather than the ten instances that the ALJ found proved (as well as the instance in which Respondent filled the first prescription a second time at a second pharmacy), her argument is not well taken. However, to the extent Respondent takes issue with the ALJ's finding that Respondent engaged in conduct actionable under factor five because she attempted to obstruct the pharmacist who questioned her prescription from contacting PA Francis, her argument is well taken.

One of the fundamental tenets of Due Process is that an Agency must provide a Respondent with notice of those acts which the Agency intends to rely on in seeking the revocation of its registration so as to provide a full and fair opportunity to challenge the factual and legal basis for the Agency's action. *See NLRB* v. *I.W.G., Inc.,* 144 F.3d 685, 688–89 (10th Cir. 1998); *Pergament United Sales, Inc.* v. *NLRB,* 920 F.2d 130, 134 (2d Cir. 1990); *see also* 5 U.S.C. 554(b) (''Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact *and law* asserted.'') (emphasis added).

However, '' '[p]leadings in administrative proceedings are not judged by the standards applied to an indictment at common law.' '' *Aloha Airlines* v. *Civil Aeronautics Bd.,* 598 F.2d 250, 262 (D.C. Cir. 1979) (quoted in *CBS Wholesale Distributors,* 74 FR

[1] All citations to the Recommended Decision (hereinafter, cited as R.D.) are to the slip opinion as issued by the ALJ.

[2] I do not adopt the ALJ's findings that hydrocodone combined with acetaminophen is a schedule III controlled substance. *See, e.g.*, R.D. at 5 n.12; *id.* at 20 n.42. While that was correct at the time of the underlying events, as well as on the date of the issuance of the Recommended Decision, this drug has since been placed in schedule II of the Controlled Substances Act. *See Rescheduling of Hydrocodone Combination Products from Schedule III to Schedule II,* 79 FR 49661 (2014).

I also do not adopt the ALJ's finding that the dispensing event which occurred on March 15, 2011 was based on a hard copy prescription which was dated March 11, 2011, or that the March 11 prescription was presented to different pharmacies on three occasions. *See* R.D. at 22–25. Rather, I find that the March 15 prescription was based on a telephone prescription which was dated March 15, 2014. *See* GX 6, at 3; GX 8, at 5. As for the hard copy prescription which the ALJ cited as the evidence to support this finding, I find the date to be illegible. However, this finding does not alter the disposition of this matter because I adopt the ALJ's finding that PA Francis, whose prescribing authority was used to obtain the prescriptions, credibly denied having issued Respondent any controlled substance prescriptions after the initial controlled substance prescription she issued on February 14, 2011. *See* R.D. at 55.

While I adopt the ALJ's finding that the testimony of Malana Diminovich, who testified that the PA had issued the controlled substance prescriptions, was not credible, as explained in my discussion of Respondent's fourth exception, I do not rely on his reasoning to the extent it is based on the suggested inconsistency between Diminovich's testimony that ''Respondent was never observed to be under the influence of controlled substances during the time the two worked together'' and ''that she was aware that . . . Respondent was receiving controlled substance prescriptions from PA Francis.'' *Id.* at 30–31.

In his decision, the ALJ found that ''the only evidence received on the issue supports the Respondent's claim that she had an objective medical basis that could arguably have supported the prescribing of controlled substances,'' *Id.* at 62. Given the ALJ's findings, it is notable that the record is devoid of evidence as to whether patients who are taking narcotics for legitimate pain would necessarily manifest symptoms consistent with abuse or intoxication.

In any event, the Government's case primarily focused on Respondent's obtaining of controlled substances through fraud or misrepresentation such as by presenting forged prescriptions. Thus, resolution of the allegations does not require proof that Respondent was abusing the controlled substances.

Also, I do not adopt the ALJ's findings related to the dates of the phone call in which Dr. Edmonds confronted Respondent as to whether she was forging prescriptions which were purportedly authorized by PA Francis. In the decision, the ALJ referred to this phone call as occurring in July 2011, following Respondent's positive urinalysis for opiates. *See* R.D. at 39. The evidence is clear, however, that this conversation did not occur in response to the July 2011 drug test, but in September 2011, after a pharmacist had notified PA Francis about the prescriptions and the latter had presented a printout from the State Prescription Monitoring Program to the clinic's Human Resources Manager, who raised it with Dr. Edmonds. *See* Tr. 195–202; 368; 831–32.

36746, 36749 (2009)); *accord Citizens State Bank of Marshfield* v. *FDIC,* 751 F.2d 209, 213 (8th Cir. 1984). Accordingly, ''the failure of the Government to disclose an allegation in the Order to Show Cause is not dispositive and an issue can be litigated if the Government otherwise timely notifies a [r]espondent of its intent to litigate the issue.'' *CBS Wholesale,* 74 FR at 36750. Thus, while the Agency has held that ''the parameters of the hearing are determined by the prehearing statements,'' consistent with numerous court decisions, the Agency has also recognized that even where an allegation was not raised in either the Show Cause Order or the pre-hearing statements, the parties may nonetheless litigate an issue by consent. *See Clair L. Pettinger,* 78 FR 61592, 61596 (2013) (citing *Pergament United Sales, Inc.* v. *NLRB,* 920 F.2d 130, 135–37 (2d Cir. 1990)); *see also Duane* v. *Department of Defense,* 275 F.3d 988, 995 (10th Cir. 2002) (discussing *Facet Enterprises, Inc.,* v. *NLRB,* 907 F.2d 963, 974 (10th Cir. 1990); ''we held that defendant had constructive notice of an alternate theory of liability not described in the formal charge when the agency detailed that theory during its opening argument and at other points during the hearing and when the defendant's conduct revealed that it understood and attempted to defend against that theory'').[3]

''The primary function of notice is to afford [a] respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation that refutes the charge of unlawful behavior.'' *Pergament United Sales,* 920 F.2d at 135 (citation omitted). While the issue of whether an allegation ''has been fully and fairly litigated [by consent] is so peculiarly fact-bound as to make every case unique,'' *id.* at 136, ''the simple presentation of evidence important to an alternative [allegation] does not satisfy the requirement'' that a respondent be afforded with a full and fair opportunity to litigate the alternative allegation. *I.W.G.,* 144 F.3d at 688 (quoting *NLRB* v. *Quality C.A.T.V., Inc.,* 824 F.2d 542, 547 (7th Cir. 1987) (other citation omitted)).

''An agency may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue.'' *Yellow Freight System, Inc.* v. *Martin,* 954 F.2d 353, 358 (6th Cir.1992) (citation omitted). Accordingly, where the Government's case ''focus[es] on another issue and [the] evidence of [an] uncharged violation [is] 'at most incidental,' '' the Government has not satisfied its constitutional obligation to provide a full and fair opportunity to litigate the issue and it cannot rely on the incidental issue as the basis for imposing a sanction. *Pergament,* 920 F.2d at 136 (quoting *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 861–62 (2d Cir. 1966)).

Here, in the Government's initial prehearing statement, Respondent had notice that the Government intended to prove that all of the ''prescriptions purportedly issued by PA Francis . . . after February 14, 2011 were not authorized by'' her. ALJ Ex. 4, a 4. Moreover, in advance of the hearing, the Government provided Respondent with both the prescriptions it alleged were fraudulent as well as the search results from the New Mexico Prescription Monitoring Program, which listed each of the prescriptions which were purportedly issued by PA Francis to Respondent. ALJ Ex. 7, at 2. Furthermore, prior to the hearing, the parties engaged in extensive litigation over the admissibility of Government Exhibit 4, the exhibit containing the alleged fraudulent prescriptions, as well as over the PMP report. Finally, at the hearing, each of the prescriptions was offered into evidence and was the subject of testimony by witnesses for both parties, including Respondent who testified that each of the prescriptions had been authorized by PA Francis.

Thus, Respondent clearly had fair notice that the Government was alleging that she had obtained controlled substances on eleven occasions by presenting the first prescription (which was authorized by PA Francis) for filling at a second pharmacy, and by forging ten other prescriptions which were presented and filled by multiple pharmacies. Nor can Respondent claim that she lacked notice as to the legal basis for the allegations, as the Government alleged and argued that her conduct violated 21 U.S.C. 843(a)(3). *See* ALJ Ex. 1, at 1–2 (Show Cause Order ¶ 3); ALJ Ex. 59, at 24–25 (Govt's Proposed Findings of Fact and Conclusions of Law, hereinafter, Gov. Post-Hrng. Br.).

As noted above, Respondent also took exception to the ALJ's discussion at pages 62–64 of his decision. Therein, the ALJ concluded that Respondent had engaged in actionable misconduct which may threaten public health and safety, *see* 21 U.S.C. 823(f)(5), based on his finding that ''Respondent engaged in significant, intentional efforts to circumvent the efforts of [a pharmacist] in his attempt to execute his corresponding responsibility under the DEA regulations.'' R.D. at 62.

Review of the Government's Prehearing Statement clearly shows that the Government provided Respondent with notice that it intended to elicit testimony from the pharmacist that he had received a faxed hydrocodone prescription for Respondent but that upon submitting the prescription information to Respondent's insurer, the pharmacy ''received an insurance rejection message of 'refill too soon''' and that a pharmacy technician had reported to the pharmacist ''that the same prescription had been filled the day'' before at another pharmacy. ALJ Ex. 4, at 3–4. The Government also provided notice that it intended to elicit testimony from the pharmacist that he ''attempted to call PA Francis to verify the prescription, but the call was intercepted by the Respondent,'' who told the pharmacist that she did not know the prescription had been sent to the other pharmacy and asked him to cancel the prescription. *Id.* at 4. The Government further provided notice that it intended to elicit testimony from the pharmacist that he had contacted the pharmacy which had already filled the prescription and determined that Respondent had picked up the prescription the day before. *Id.* At the hearing, both parties elicited testimony regarding this incident and the ALJ found the pharmacist's account credible.

Thus, Respondent clearly had notice that her conduct related to this incident would be at issue in the proceeding. Moreover, this conduct is clearly probative of the allegation that Respondent engaged in obtaining controlled substances through fraud, and the Government relied on the pharmacist's testimony in support of its contention that Respondent forged the prescriptions issued under the PA's registration. Gov. Post-Hrng. Br. at 26.

However, at no point in the proceeding did the Government contend that this conduct provided an independent basis to support a finding under factor five. Indeed, while in its

[3] *See also Grider Drug #1 & Grider Drug #2,* 77 FR 44070, 44077 n.23 (2012) (holding that while the Government did not provide adequate notice of its intent to litigate an allegation in either the Show Cause Order or its pre-hearing statements, where respondents ''did not object that the allegation was beyond the scope of the proceeding and that they were denied adequate notice of it'' and ''fully litigated the issue,'' the allegation was litigated by consent) (citing *Citizens State Bank,* 751 F.2d at 213; *Kuhn* v. *Civil Aeronautics Bd.,* 183 F.2d 839, 841–42 (D.C. Cir. 1950); and *Yellow Freight System, Inc.* v. *Martin,* 954 F.2d 353, 358 (6th Cir. 1992)).

post-hearing brief, the Government argues that Respondent's ''testimony demonstrated a lack of candor and should weigh against granting Respondent's application,'' it did not argue that Respondent's acts in intercepting the pharmacist's phone calls and making a false statement to the pharmacist was separately actionable as misconduct under factor five. *See id.* at 30.

While I agree with the ALJ that engaging in intentional and significant acts to obstruct a pharmacist who is attempting to verify the validity of a prescription constitutes ''conduct which may threaten public health and safety,'' the Government never advanced this theory in the proceeding. Thus, Respondent was never provided with the opportunity to argue as to why her conduct did not rise to the level of intentional and significant acts such as to warrant sanction under factor five. *See Duane,* 275 F.3d at 995. Accordingly, I hold that Respondent was not provided with fair notice that this conduct would also be considered under factor five.

However, in light of the extensive evidence that Respondent obtained controlled substances by fraud or deception on eleven occasions and the ALJ's finding that she has not accepted responsibility for her misconduct, *see* R.D. at 66, my rejection of his conclusion that Respondent engaged in actionable misconduct under factor five when she attempted to circumvent the pharmacist's effort to verify the prescription does not alter the ultimate disposition of this matter. [4]

Exception Two—The ALJ Erred When He Found That Twelve Dispensing Events Had Occurred

Respondent also takes exception to the ALJ's findings that the prescriptions had resulted in the occurrence of twelve dispensing events, ''each signif[ying] an episode wherein Respondent actually obtained prescription narcotics.'' Exceptions, at 3 (citing R.D. at 20–28). According to Respondent, this finding is not supported by the record because ''there was *no* evidence as to [the] actual 'dispensing' of any prescriptions.'' *Id.* In support of this contention, Respondent further notes that ''a clear distinction was made during testimony between *filling* a prescription (*i.e.*[,] processing it for dispensing to a patient) and actually *dispensing* it to an individual'' and that the Government never presented the evidence necessary to show that the prescriptions were actually dispensed, *i.e.,* the signature logs maintained by the pharmacy. *Id.*

This argument is not persuasive. While it is true that a pharmacy's creation of a dispensing label for a filled prescription, as well as its inputting of data which was then submitted to the State's Prescription Monitoring Program, does not establish that the prescription was actually dispensed, Respondent testified that either she or members of her family picked up at least ten of the prescriptions before she attempted to change her story. Tr. 901–03, 921. Moreover, when asked by her counsel if she knew whether ''there are some prescriptions waiting for you at some place,'' she answered: ''No, I don't think so, but.'' *Id.* at 920. Respondent's testimony on this issue seems to go well beyond that of a faulty recollection induced by the passage of time and into the realm of being intentionally misleading.

Indeed, her attempt to deny that the prescriptions were picked up defies logic, given that at the hearing she maintained that all of the prescriptions had been authorized by the PA (Tr. 822, 899, 910) and were issued to treat a legitimate medical condition (Tr. 903, 922). Nor does it makes sense that having previously presented a prescription, she would, in the absence of having been told that the pharmacy had declined to fill it, then present a further prescription to another pharmacy without first picking up the already filled prescription.

In any event, even if Respondent (or her family) did not actually pick up any of the prescriptions, the evidence would still support a finding that she violated federal law. Here, the ALJ found that Respondent forged the PA's signature on the prescriptions and both the dispensing labels and the PMP report establish that the prescriptions were presented to the pharmacies. Thus, even if Respondent or her family members never picked up any of filled prescriptions, her conduct is still actionable as an attempt to obtain controlled substances by fraud or deception. *See* 21 U.S.C. 843(a)(3) & 846.

Exception Three—The ALJ Failed To Consider Evidence That Another Person Committed the Acts

Respondent argues that the ALJ abused his discretion because he failed to consider evidence that two persons ''had access to the necessary process and information to perform the alleged acts in [her] name without her knowledge and/or agreement.'' Exceptions, at 9, 11. Respondent identifies these two persons as her husband, who was also taking hydrocodone, and Ms. Diminovich, Respondent's medical assistant at the clinic. *Id.* at 9–10.[5]

I reject the exception. Even ignoring the fundamental inconsistency between Respondent's contention and her testimony that the prescriptions were lawfully prescribed to her by PA Francis, the exception is unsupported by anything bordering on substantial evidence.

As for whether Respondent's husband was actually forging the prescriptions, even assuming that he had received hydrocodone prescriptions from PA Francis, no evidence was put forward that he had access to either the electronic medical records system (which included software for creating and printing a prescription) or to PA Francis's prescription pads. Thus, Respondent's theory is pure conjecture.

As for whether Ms. Diminovich was forging the prescriptions, it is true that she had access to the clinic's electronic medical records system. Moreover, it seems possible that she could have had access to the PA's prescription pad. However, while Respondent called Ms. Diminovich as a witness, Diminovich was never asked if she had forged any of the prescriptions; nor was any other evidence put forward that Dimonovich was forging prescriptions and using Respondent's name as the patient. Indeed, consistent with her theory that the prescriptions were authorized by PA Francis, Respondent elicited testimony from Ms. Diminovich that PA Francis ''would fill out the script for [Respondent] personally'' and either hand it to Respondent or leave it on her desk. Tr. 732. Respondents' theory that Ms. Diminovich was forging and filling the prescriptions and filling them in the former's name is thus not supported by anything more than the evidence that she had access to the clinic's prescribing

[4] I do not adopt the ALJ's finding that the explanation Respondent provided on her DEA application lacked candor because she failed to include various information. R.D. at 68. At no point in this proceeding has the Government alleged that her explanation on the application was at issue in the proceeding, and at no point has it argued that her explanation lacked candor. In short, there is no basis for concluding that Respondent had fair notice that her explanation on the application would be at issue. Nor is there any basis for concluding that the parties consented to the litigation of the issue.

[5] Respondent also maintains that PA Francis had prescribed hydrocodone to her husband. Exceptions, at 10. PA Francis testified that while she had written prescriptions for Respondent's husband, which possibly included pain medication, she did not recall if these included narcotics. Tr. 249.

software.[6] Accordingly, I reject the exception.[7]

Exception Four—The ALJ's Credibility Determinations Were Arbitrary

Finally, Respondent argues that the ALJ arbitrarily discounted the testimony of Ms. Diminovich and that he ignored ''the context'' of her testimony. Exceptions, at 11. Respondent also contends that the Government's witnesses, who had ''the exact same 'issues' in their testimony, were called completely credible by the ALJ provided they blamed'' her. *Id.*

Respondent does not, however, take exception to the ALJ's findings as to her own testimony. Of note, the ALJ found that ''Respondent's testimony throughout this hearing was punctuated by internal inconsistencies, implausibility, and chronic equivocation.'' R.D. at 46. The ALJ further found that ''there were several times where her answers seemed to evolve with objective evidence and dates she was confronted with.'' *Id.*

As for Respondent's contention that the ALJ arbitrarily discounted Ms. Diminovich's testimony, the argument is based largely on her testimony that she observed animosity between Respondent and Dr. Edmond (the co-owner of the clinic), PA Francis, and the clinic's human resources manager. Exceptions, at 11–12. To be sure, in explaining why he gave less weight to Ms. Diminovich's testimony, the ALJ relied on her failure to testify as to whether the animosity pre-dated or post-dated the discovery of the prescriptions at issue. *See* R.D. at 30. Nor was this the only reason the ALJ gave for giving less weight to her testimony. *See id.* at 30–31 (discussing Ms. Diminovich's testimony that she never observed Respondent being under the influence of controlled substances).[8]

However, I need not decide whether these two reasons provide a sufficient basis to support the ALJ's credibility determination because the ALJ also explained that ''much of Ms. Diminovich's testimony was too vague and lacking in detail to stand up against other record evidence.'' R.D. at 31. As the ALJ further explained, while Ms. Diminovich testified that ''she saw PA Francis prescribe controlled substances to the Respondent and hand the scripts over, [she] never sa[id] when or how often, and [did] not provide details about a single such event she recalls.'' *Id.* at 31. So too, based on Ms. Diminovich's testimony that she had left the clinic after five years because she had been accused by a clinic employee of forging some undisclosed document, the ALJ concluded that she could not be viewed ''as a completely impartial witness.'' *Id.*

In short, to resolve the factual dispute as to whether PA Francis had authorized the prescriptions or Respondent was forging them, the ALJ was required to make credibility determinations with respect to the testimony presented by the witnesses for the Government and those for Respondent. Notably, with regard to the testimony of the Government's witnesses, Respondent makes only the conclusory assertion that their testimony raised ''the exact same issues'' as her witnesses, Exceptions at 11, and fails to cite to any specific portions of their testimony which she asserts lacked credibility. The ALJ was, however, in the best position to observe the demeanor of the witnesses, and having considered the ''consistency and inherent probability of the testimony,'' I find no reason to reject the ALJ's credibility determinations and findings of fact. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951).

Accordingly, I reject the exception. I further adopt the ALJ's findings of fact and legal conclusions that with the exception of the February 14, 2011 prescription (which she filled that same day), Respondent violated 21 U.S.C. 843(a)(3) on eleven separate occasions by presenting the already-dispensed February 14, 2011 prescription to a second pharmacy for filling, as well as by forging the ten other prescriptions (or presenting the forged prescription to a second pharmacy). *See* R.D. at 52–55 (citing 21 U.S.C. 843(a)(3); 21 CFR 1306.04(a)). Moreover, while I adopt the ALJ's factual finding and legal conclusions that Respondent unlawfully obtained controlled substances pursuant to the aforesaid prescriptions, *see* R.D. at 55, even if Respondent did not obtain possession of the controlled substances in each instance, her misconduct is still actionable as an attempt to obtain controlled substances by fraud or misrepresentation. *See* 21 U.S.C. 846. So too, I adopt the ALJ's legal conclusions with respect to the findings of the Iowa Board. *See* R.D. at 59–60.

I therefore adopt the ALJ's conclusion of law that the Government has established a *prima facie* case to deny Respondent's application.[9] R.D. at 65. Finally, because I agree with the ALJ's findings and conclusion of law that Respondent has not acknowledged her misconduct nor demonstrated that she had undertaken sufficient remedial steps to rebut the Government's *prima facie* case, as well as his finding that Respondent's actions were especially egregious, I will adopt his recommendation that I deny her application.

Order

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

Dated: May 6, 2015.

Michele M. Leonhart,

Administrator.

Anthony S. Yim, Esq., for the Government

Billy R. Blackburn, Esq., for the Respondent

[6] While Ms. Diminovich testified that she had left the clinic after she was accused of forging a document, the record does not establish the nature of the document she allegedly forged. As for her testimony that PA Francis had written the prescriptions, as discussed under Exception Four, the ALJ did not find Ms. Diminovich's testimony credible when considered against the testimony of the Government's witnesses.

[7] The Government notes the testimony of the pharmacist who questioned Respondent's prescription to the effect that ''in order to pick up a controlled substance prescription, an individual would need to provide picture identification, which is then recorded in the[] pharmacy computer system.'' Gov. Response to Respondent's Exceptions, at 9. While the Government attempted to introduce various documents which it represented as being pharmacy pick-up logs, it did not succeed. Moreover, the Executive Director of the New Mexico Pharmacy Board testified that while a ''person picking up the controlled substance prescription must be identified with a government-issued photo ID,'' the person need not be the actual patient. Tr. 446–7.

[8] I acknowledge that it is plausible that Ms. Diminovich may never have observed Respondent being under the influence of narcotics while at the clinic. Respondent may have developed tolerance to the medication or she may have been diverting the narcotics to others. However, I need not adopt each of the ALJ's reasons for giving less weight to her testimony to adopt the ALJ's factual findings, which give no weight to her testimony that PA Francis wrote narcotic prescriptions for Respondent on ''multiple'' occasions. Tr. 733.

[9] I do not adopt the ALJ's discussion of factor two to the extent it states that the factor manifests Congress's ''acknowledgement that the . . . quantitative volume in which an applicant has engaged in the dispensing of controlled substances may be [a] significant factor[] to be evaluated in'' the public interest determination. R.D. at 51. So too, I decline to publish the ALJ's discussion of the substantial evidence test, the degree of deference owed the ALJ's findings, and the scope of the Agency's discretion. *See Michael A. White,* 79 FR 62957, 62957 n.2 (2014). It suffices to say that the Agency adheres to the principles set forth in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951).

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

Chief Administrative Law Judge John J. Mulrooney, II. On July 13, 2012, the Deputy-Assistant Administrator of the Drug Enforcement Administration (DEA) issued an Order to Show Cause (OSC) proposing to deny the application [1] of Jana Marjenhoff, D.O. (Respondent), for a DEA Certificate of Registration (COR). In its OSC, the Government avers that the Respondent's application should be denied because the granting of a COR to the Respondent would be inconsistent with the public interest as that term is defined under the Controlled Substances Act (CSA). 21 U.S.C. 823(f) (2012). On August 20, 2012, the Respondent, representing herself *pro se,* filed a timely request for a hearing.[2]

A hearing was originally conducted in this matter on February 5, 2013, in Arlington, Virginia (First Hearing). However, because the Administrative Law Judge presiding over that hearing unexpectedly retired before issuing a recommended decision, this case was reassigned to another Administrative Law Judge (Second Administrative Law Judge), who conducted a supplemental hearing on April 10, 2013, in Albuquerque, New Mexico (Supplemental Hearing). The Second Administrative Law Judge certified the record and forwarded a recommended decision to the Administrator.

The Administrator reviewed, reversed, and remanded the recommended decision issued by the Second Administrative Law Judge. In an order dated December 12, 2013 (Remand Order), the Administrator remanded the case for a new hearing to be conducted by another Administrative Law Judge,[3] and I designated myself to preside at the remanded proceedings.

At a January 14, 2014 on-the-record status hearing conducted in Albuquerque, New Mexico, the Respondent, representing herself *pro se,*[4] signaled her intent to proceed with a new hearing. Current counsel filed a notice of appearance on February 10, 2014, and a request on his part for additional time to prepare was granted. ALJ Ex. 37, at 1 n.1. On April 22–23, 2014, a hearing was conducted in this matter in Albuquerque, New Mexico (Hearing on Remand).

The issue ultimately to be adjudicated by the Administrator in these remanded proceedings, with the assistance of this recommended decision, is whether the record as a whole establishes by substantial evidence that the Respondent's application for registration with the DEA should be denied on the grounds alleged by the Government.

After carefully considering the testimony elicited at the Hearing on Remand, the admitted exhibits, the arguments of the parties,[5] and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.[6]

The Allegations

In its OSC and subsequent prehearing statements, the Government alleges that the COR application filed by the Respondent should be denied as inconsistent with the public interest. In support of the denial it seeks based on the public interest, the Government avers that the Respondent, ''from February 2011 through January 2012, . . . forged approximately eight prescriptions for [herself] by using another individual's DEA registration number . . . without that person's knowledge, permission, or consent'' in order to obtain controlled substances.[7] The Government alleged that the Respondent did so in violation of 21 U.S.C. 843(a)(3), 21 CFR 1306.04 (2013), and N.M. Stat. Ann. § 30–31–23 (West 2013).[8]

The Stipulations of Fact

The Government and the Respondent have entered into stipulations regarding the following matters:

(1) Respondent's prior DEA Certificate of Registration was BM1443681. In the absence of any renewal application, it expired by its own terms on January 31, 2006.

(2) Respondent does not currently possess a DEA Certificate of Registration.

(3) On January 17, 2011,[9] the Respondent applied for a DEA Certificate of Registration in Schedules II through V.

(4) Respondent is licensed as an osteopathic physician in the State of New Mexico pursuant to license number A–1590–10. This license is active.[10]

(5) All medications described in Government Exhibit 6 as being

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[1] A printed copy of the Respondent's on-line application was received into the record. Gov't Ex. 1.

[2] In her brief, the Respondent points to the Agency's ''extreme delay'' in issuing an OSC almost a year and a half after her application for a DEA COR. ALJ Ex. 60, at 1. In this regard, it is worthy of note that the charges of misconduct that constitute the body of the Government's allegations in this matter relative to the Respondent's time practicing in New Mexico commenced a month *after* she submitted this application to receive a COR in New Mexico.

[3] The Administrative Law Judge presiding at the Supplemental Hearing found that the Respondent's exit from the hearing room, based on a medical emergency that resulted in her departure from the courthouse via ambulance and an attendant hospital stay, constituted an implied waiver of her right to be present at her hearing. Consequently, the Supplemental Hearing was conducted entirely *in absentia.* The (unarguably regrettable) decision by the Second Administrative Law Judge to proceed *in absentia* (not surprisingly) formed a significant basis (although clearly not the only basis) for the Administrator's decision to remand the case for a new hearing (ALJ Ex. 9, slip op. at 6) by a different Administrative Law Judge and, unfortunately, resulted in a significant additional delay in the adjudication of this matter. On the positive side, as a result of the Administrator's Remand Order, the Respondent, who represented herself at the First and Second Hearings, was the beneficiary of skilled, diligent counsel at the Hearing on Remand, where any perceived due process issues ascribed to the hearing *in absentia* could be and were addressed and cured.

[4] From the outset and repeatedly throughout the course of these protracted proceedings, the Respondent was advised of her right to procure counsel. 21 CFR 1316.50 (2013). While she did retain counsel for a short period of time during the prehearing procedures prior to the First Hearing, that counsel withdrew from the case, and she opted to represent herself *pro se* for a relatively large swath of time during the pendency of the proceedings. The Respondent's fluctuating representation status also resulted in additional adjudication delays. During the course of the Supplemental Hearing, the Respondent initially sought to be represented by her (non-attorney) spouse under the theory that he falls within the regulatory definition of her employee within the meaning of 21 CFR 1316.50. The Administrator's Remand Order cites an absence of required findings associated with the Second Administrative Law Judge's denial of this request as an additional basis to justify remanding the case. ALJ Ex. 9, slip op. 5. During the course of the remanded proceedings, the Respondent withdrew her request to be represented by her husband at an on-the-record Status Hearing conducted on January 14, 2014, and, during the time afforded to her to do so, procured the representation of a qualified attorney.

[5] The due date that was set for the submission of closing briefs incorporated additional time that was requested by the Government. Tr. 976–79.

[6] Because the December 12, 2013 Remand Order directed that a ''new hearing'' be conducted in this matter (ALJ Ex. 9, slip. op. 7), the testimony and evidence gathered in the previous hearings in this case, to the extent they were not re-introduced and received into the record, were not considered for purposes of deciding on the merits on remand. ALJ Ex. 29, at 4. Both parties were given the opportunity to file supplemental prehearing statements and to present evidence at the Hearing on Remand. *Id.* at 3–4. The testimony from the previous hearings (ALJ Ex. 8) was made available to the parties for purposes of cross-examination. ALJ Ex. 29, at 4.

[7] ALJ Ex. 1, at 1.

[8] *Id.* at 2.

[9] While the parties stipulated to an application date of January 17, 2011, the record evidence reflects an application date of January 14, 2011. Tr. 631–32; Gov't Ex. 1, at 1; Gov't Ex. 2, at 1. The 3-day variance regarding the application date presents no impediment to an adjudication of this matter on the merits.

[10] Although this stipulation by the parties originally contained the additional phrase ''and set to expire by its own terms on July 1, 2013,'' the fact that this date expired well before the commencement of the Hearing on Remand renders the relevance of this portion of the stipulation obsolete.

prescribed to the Respondent are Schedule III controlled substances.[11]

The Evidence

The Government's Evidence

The Government's Witnesses

The Government's case-in-chief rested on the testimony of five witnesses: Physician's Assistant Raphaela Francis, John Alvis, the pharmacist-in-charge (PIC) of a Walmart Pharmacy located in Edgewood, New Mexico, Dr. Jeremy Edmonds, D.O., New Mexico Pharmacy Board (NM Pharmacy Board) Executive Director (Exec. Dir.) Larry Loring, and DEA Diversion Investigator (DI) Randall Bencomo.

Raphaela Francis testified that she is a physician's assistant (PA) who is currently licensed and practicing in New Britain, Connecticut, but that she had previously worked as a PA at the McLeod Medical Center (McLeod Medical) in Moriarty, New Mexico from 2008 until August 2012. Tr. 173–74, 215–16. PA Francis testified that, while working at McLeod Medical, she maintained a DEA COR, and she knew and worked with the Respondent. Tr. 174.

PA Francis stated that her working relationship with the Respondent at the time they worked together at McLeod was a good one, that the Respondent, who ''had lots more medical experience,'' was a mentor to her, and that Francis never observed behavior that she would classify as drug-seeking, impaired, or erratic from the Respondent at work. Tr. 219, 261. According to PA Francis, on February 14, 2011, the Respondent approached her at work and asked to be placed on her schedule for chronic neck pain. Tr. 175. The Respondent told Francis that she had made arrangements to see a pain management specialist in Albuquerque, but because the pain specialist, Dr. Pamela Black, could not see her for several weeks, she needed a single prescription for pain medication to tide her over for one month. Tr. 175–77, 182–84, 221–22. PA Francis testified that, consistent with McLeod Medical procedures, before she saw the Respondent as a patient, Leilani, the medical assistant assigned to Francis, took an initial medical history on a patient questionnaire, and that the Respondent, who had brought her own x-rays, was added onto Francis's patient schedule for the end of the day. Tr. 178–81, 219. Equipped with the completed patient questionnaire, PA Francis took her own history from the Respondent and reviewed the x-ray films. Tr. 181. Francis testified that she recalled that the x-ray imaging showed that the Respondent's neck had signs of prior surgery. Tr. 181–82, 220. She also remembered that the Respondent was complaining of headaches. Tr. 182. Francis recalled that, in response to her inquiry, the Respondent told her that hydrocodone had been effective for her in the past. Tr. 184. PA Francis's opinion was that, under the circumstances, the hydrocodone requested by the Respondent was appropriate as a short-term (not long-term) measure, so she prepared a prescription and handed it to the Respondent.[12] Tr. 184–85, 188, 227; Gov't Ex. 3. Francis was initially unambiguous in stating that this scrip was ''the one and only prescription'' she wrote for the Respondent. Tr. 185; *accord* Tr. 202, 240. When pressed, however, she recalled that she may have also treated the Respondent on another occasion for nausea with a non-controlled substance administered by injection in the office. Tr. 241, 243–44.

According to PA Francis, the Respondent called off work two days after Francis saw her as a patient, telling Dr. Edmonds, the office supervising doctor/facility co-owner, that she had been to a hospital emergency room experiencing abdominal pain that was likely a reaction to the hydrocodone prescribed by Francis. Tr. 189–90, 193. Shortly after his conversation with the Respondent, Dr. Edmonds questioned PA Francis about the prescription and told her that, from that point forward, McLeod Medical employees were no longer permitted to write narcotic prescriptions for other employees. Tr. 192, 239. PA Francis testified that she complied with the new policy from the time it was conveyed to her. Tr. 194.

PA Francis had no more cause to consider her prescription to the Respondent until September 2, 2011, when she received a call from a pharmacist in Moriarty, New Mexico, informing her that a Walmart pharmacist named John Alvis needed to speak with her. Tr. 195–96. When Francis returned the call, Alvis told her he came upon some scrips purportedly written by Francis for the Respondent that he felt were likely forgeries. Tr. 197–99. Alvis went on to say that he was forced to utilize an intermediary pharmacist to contact Francis because multiple telephonic attempts to do so had been intercepted by the Respondent, and he advised Francis to secure a state prescription monitoring program (PMP) report on the Respondent and to contact the NM Pharmacy Board. Tr. 199–200, 202. When Francis queried the PMP system, she was surprised to learn that, although she had written only one controlled substance prescription for the Respondent, the system reflected that twelve had been dispensed. Tr. 200–02.

PA Francis testified that she brought the PMP report to the McLeod Medical human resources (HR) director who, in turn, notified Dr. Edmonds. Tr. 202–03.

Upon reviewing copies of the scrips listed in the PMP report and issued over her name and COR number after the single February 14, 2011 scrip she did write, PA Francis testified that not a single one bore her true signature and that all were forgeries. Tr. 205–06, 261. The witness indicated that she did not personally see anyone create these scrips, but she did know that they were not signed by her. Tr. 261.

Francis explained that, during the time she worked at McLeod Medical, scrips could be generated by hand-writing them on scrip pads or by producing them electronically (e-scrip) from the system that maintained the office medical records. Tr. 207. The e-scrip would be printed out on blue security paper loaded into a printer designated for that purpose and hand-signed by the prescriber. Tr. 207, 211, 226. Through the use of a drop-down list, the medical record system allowed any McLeod Medical employee with prescriber access to create an e-scrip for any patient in the practice over the name of any authorized prescriber in the practice who has seen that patient. Tr. 208, 215, 253–57, 260. Access to the system for prescribing controlled substances is password-protected, but as a McLeod Medical provider, the Respondent had complete access to the system, as did Francis, Dr. Edmonds, and a part-time nurse practitioner named Linda Agnes. Tr. 208–13, 217. The controlled substance scrip can be hand-carried by the patient, faxed to a pharmacy by a McLeod staff member,[13] or a staff member can even phone in a prescription to a pharmacy so long as there is a hard-copy follow-up scrip. Tr. 228–30.

There is no indication that PA Francis has anything to gain or lose by the outcome of this adjudication. In light of

[11] The parties reached this stipulation during the course of the hearing in this matter. Tr. 747–48.

[12] During her testimony, PA Francis mistakenly characterized this medication as being listed under Schedule II (Tr. 230), when, in fact, it is a Schedule III controlled substance. Stipulation 5.

[13] Francis testified that McLeod Medical office policy on the disposition of hard copies of faxed prescriptions was inconsistent. When a scrip was faxed, sometimes the hard copy would also be handed to the patient, sometimes it would be shredded, and other times it would be retained in the patient's chart. Tr. 233–35.

the fact that Francis currently works for a different employer in a different state and no longer answers to Dr. Edmonds or McLeod Medical, the Respondent's argument that her credibility was suspect because she was somehow ''in fear of her career'' because she had been reprimanded [14] for writing a controlled substance prescription for the Respondent, and/or continued to do so after being directed not to is not supported in the record by anything beyond conjecture, and is simply unpersuasive. Her hearing testimony, much of which was corroborated by other witnesses, was sufficiently objective, detailed, plausible, and internally consistent to be considered fully credible in this recommended decision.

The Government also elicited the testimony of John Alvis, the pharmacist-in-charge (PIC) at the Walmart Pharmacy in Edgewood, New Mexico (Walmart Pharmacy Edgewood), where he has worked as a pharmacist for the last twenty-nine years. Tr. 264–65. PIC Alvis testified that he was familiar with the Respondent because she was a local practitioner with whom he had professional contact, and because she and her family had been customers of his pharmacy. Tr. 265–67. In the early afternoon of August 31, 2011, PIC Alvis received a phone call from the Respondent who stated that her daughters were coming by the pharmacy to pick up prescriptions for themselves, and that she hoped to have them also pick up a prescription for her during the same visit. Tr. 266–67. The Respondent explained to Alvis that she would contact PA Francis to ''get that [prescription] faxed in right away.'' Tr. 267. Alvis also recalled that the Respondent told him that she was having trouble with her insurance and requested that the pharmacy bill her for the prescription in cash, without submitting a claim through her insurance carrier. Tr. 268–69. PIC Alvis testified that, while a request to have several medications picked up at once was not particularly out of the ordinary, a request to refrain from processing a scrip through a customer's insurance company where Medicare billing was not involved was not typical. Tr. 268–70. Alvis described such a request, even regarding Medicare billing, as ''fairly rare.'' Tr. 270.

Although Alvis apparently voiced no objection to the Respondent's request to process the scrip for cash, owing to the work volume of the day and the speed at which the faxed prescription reached the pharmacy, a staff member allowed the prescription to be electronically submitted as a claim to the Respondent's insurance company. Tr. 270–71. The Respondent's insurance company rejected the claim after determining that the refill was too early, based on medication that had already been dispensed to the patient. Tr. 270, 272. PIC Alvis testified that once he learned from the insurance company notice that the Respondent was attempting to fill a prescription for the same controlled substance too early, he had an obligation to investigate the issue. Tr. 279–80. At PIC Alvis's direction, the pharmacy staff member contacted [15] the Respondent's insurance company and was informed that the coverage rejection was based on the fact that the same medication had been dispensed to the Respondent at May Pharmacy the previous day. Tr. 275–76. Based on the information he had at that moment, PIC Alvis directed his staff member to reach out to PA Francis at McLeod Medical, the prescriber depicted on the scrip. Tr. 281. A McLeod Medical staff member indicated that Francis was unavailable and took a message to have Francis return the call to the pharmacy. Tr. 281–82.

Shortly after the phone message was left at McLeod Medical for Francis, the Respondent's daughters (whom Alvis recognized as established customers) arrived at Walmart Pharmacy Edgewood to pick up the Respondent's medication and some other medication. Tr. 282–83. Alvis told the daughters that he needed to check with the prescriber on their mother's prescription, and they left the pharmacy. Tr. 282–84. ''Almost immediately'' after the Marjenhoff daughters exited the pharmacy, PIC Alvis received a call from the Respondent, who informed Alvis that she understood he was trying to contact Dr. Black about her prescription. Tr. 284. PIC Alvis clarified that he was trying to reach PA Francis and that he had not yet heard back from her. Tr. 284. The Respondent explained to Alvis that there was some ''confusion'' because the prescription he was inquiring about was also sent to May Pharmacy without her knowledge, and that Alvis should ''just disregard this prescription.'' Tr. 284–85.

Following Alvis's conversation with the Respondent, a pharmacy staff member received a return call from someone at McLeod Medical, asking if the pharmacy still needed to speak with PA Francis.[16] Tr. 285. When the pharmacy technician told the McLeod Medical staff member that she still needed to speak with Francis, the call was placed on hold, and the Respondent picked up the line and identified herself. Tr. 825. The technician informed the Respondent that she was holding to speak with PA Francis, not with the Respondent. The Respondent told the technician, ''I know it's concerning my prescription. I've already spoken to John [Alvis]. There's some confusion with that. I've told John [Alvis] to cancel that prescription, and so we're good,'' and unilaterally ended the call by hanging up the phone. Tr. 286–88.

PIC Alvis testified that this development deepened his level of concern about the prescription. Tr. 288. Additionally, Alvis compared the faxed scrip with prior, reliable examples on file and concluded that the purported signature of PA Francis on the scrip at issue was not consistent with the signatures found on the prior scrips. Tr. 302–04. The next morning, Alvis telephoned Kenny Romp, the pharmacist at May Pharmacy, who at one time worked for Alvis. Tr. 290–93. Pharmacist Romp indicated that he specifically recalled the prescription in question. He told Alvis that he remembered that the Respondent,

[14] ALJ Ex. 60, at 6, 8, 15. Furthermore, the position that PA Francis was reprimanded at all flies in the face of the Respondent's testimony that no policy regarding the prescribing of controlled substance to other employees was ever put in place at McLeod. Tr. 721, 824.

[15] The pharmacy employee was clearly an individual with no interest in these proceedings. PIC Alvis (a 29-year veteran pharmacist) testified that he was present and listening to his employee as she conducted these telephone inquiries at his direction, that he could hear her responses as the phone call was proceeding, that it is ''standard practice'' to rely upon this type of communication in the pharmacy setting, and that the employee who took the call had a duty to receive and convey this type of information accurately. Tr. 272–76. In short, even over the Respondent's timely objection, there was ample support in the record to find this hearsay evidence sufficiently reliable to rely upon it to a support substantial evidence determination in these administrative proceedings. 5 U.S.C. 556(d). *See Richardson* v. *Perales,* 402 U.S. 389, 402 (1971) (holding that signed reports prepared by licensed physicians were correctly admitted at Social Security disability hearing); *Echostar Comm's Corp. v F.T.C.,* 292 F.3d 749, 753 (D.C. Cir. 2002) (holding hearsay admissible at administrative hearing so long as it bears satisfactory indicia of reliability); *Bennett* v. *NTSB,* 66 F. 3d 1130, 1137 (10th Cir. 1995) (holding hearsay admissible at administrative hearing to the extent it is reliable and probative); *Hoska* v. *Dep't of the Army,* 677 F.2d 131, 138–39 (D.C. Cir. 1982) (holding hearsay admissible at administrative hearing where witness is disinterested, statements are consistent, and access is provided prior to hearing); *Mark P. Koch, D.O.,* 79 FR 18714, 18717 (2014) (finding an affidavit sufficiently reliable to be considered as substantial evidence at a DEA administrative hearing); *Fred Samimi, M.D.,* 79 FR 18698, 18712 (2014) (holding hearsay statements are admissible at DEA administrative proceedings and can constitute substantial evidence so long as they bear sufficient indicia of reliability).

[16] Alvis testified that he was present for the conversation and could even overhear the voice on the phone from McLeod Medical. Tr. 287.

herself, picked up the medication, and that he also recalled it was a partial fill because May Pharmacy did not have the entire amount called for by the prescription in stock. Tr. 293–95. This revelation that the Respondent actually picked up the medication the day before her phone calls to Alvis flew in the face of the Respondent's representations on the phone that she did not know that her prescription had been filled at May Pharmacy, and her assertion that the early refill insurance notification was the result of some sort of an inadvertent mix-up. Tr. 295–96. The fact that the Respondent picked up her medication at May Pharmacy the day before she told Alvis she did not know it had been dropped off there left little doubt that there was more afoot than an innocent mix-up.

Alvis then devised a plan wherein he enlisted the help of a third local pharmacist, Reid Rowe, to reach out to PA Francis and relay a message that Alvis needed to speak to her privately and directly. Tr. 296–97. Alvis's plan was successful, and, the following day, he finally received a call from PA Francis. Tr. 298–99. Francis apologized for not calling back, and related to Alvis that she had actually been standing next to the Respondent when the pharmacy technician called. Francis explained to Alvis that based on what she heard of the call, she assumed that the matter had been resolved as a benign insurance issue. Tr. 301. When PIC Alvis conveyed the details of the current prescription and asked Francis to verify it and indicate whether he had her authorization to dispense, Francis informed him that she had not written a controlled substance prescription for any McLeod Medical employee since February 14, 2011. Tr. 301–02. When PIC Alvis let Francis know that his pharmacy was in possession of other scrips purportedly authorized by her on behalf of the Respondent and that he questioned the validity of the signatures, PA Francis asked him to provide copies. Tr. 304. Alvis faxed copies of some scrips that had been filled by his pharmacy on the Respondent's behalf over PA Francis's purported signature to the McLeod Medical HR manager. Tr. 305–09. The HR manager, in turn, sent PIC Alvis a copy of a corresponding complaint filed by PA Francis with the NM Board of Osteopathic Medical Examiners regarding the incident, which Alvis forwarded through his internal, corporate channels and to the NM Pharmacy Board. Tr. 309–11, 316. The prescription was then deactivated at Walmart Pharmacy Edgewood and not dispensed. Tr. 335.

PIC Alvis is a witness with no stake in the outcome of the case.[17] His testimony, which was largely corroborated by other sources in the record, was enhanced by the professionalism with which he executed his corresponding responsibilities as a pharmacist, and sufficiently objective, detailed, plausible, and internally consistent to be fully credited in this recommended decision.

The Government also presented the testimony of Dr. Jeremy Edmonds, D.O. Although Dr. Edmonds testified that is currently employed at Presbyterian Healthcare Services in Albuquerque, during all times relevant in these proceedings, he served as the medical director and co-owner of McLeod Medical and supervised the Respondent and all other staff members at McLeod. Tr. 358–60. Dr. Edmonds also testified that he is on the New Mexico Board of Osteopathic Medicine. Tr. 387.

Dr. Edmonds recalled that, when the Respondent was hired by McLeod Medical, she did not possess a COR. Tr. 382. According to Edmonds, the work-around for this issue was that the Respondent would see patients and ''draft up'' a controlled substance prescription over her name when necessary, but that Dr. Edmonds or PA Francis would co-sign the scrip and manually fill in their respective COR numbers. Tr. 382–85. Edmonds testified that all providers (including the Respondent) were ''practicing primary care [medicine and] all treated very similar problems.'' Tr. 386. Consistent with the testimony of PA Francis, Dr. Edmonds explained that prescriptions in the office could be generated by writing on a pad or through the e-scrip system, and that, while all employees had a sign-in password, only providers had the e-scrip access required to produce controlled substance scrips off the system. Tr. 415–21. Non-controlled prescriptions could be electronically signed and forwarded to pharmacies for filling, but controlled substance e-scrips required a manual signature by an authorized prescriber.[18] Tr. 424–28.

Dr. Edmonds, who (like PA Francis) characterized his working relationship with the Respondent as ''good,'' [19] recalled that, in February 2011, the Respondent called off work for one or two days, explaining to Edmonds on the phone that she had an adverse reaction to hydrocodone. Tr. 361. When the Respondent told Edmonds that PA Francis had supplied her with the hydrocodone prescription, Dr. Edmonds sat both Francis and the Respondent down and unambiguously informed them, in a conversation that he characterized as ''stern . . . very direct,'' [20] that ''prescribing potentially habit-forming medications to a colleague or staff member'' at McLeod Medical ''is not tolerated and should not persist.'' Tr. 361–62. Dr. Edmonds was precise and forceful in the manner in which he recalled the details of the meeting. In his words:

> [T]he discussion really went as follows. I walked into the room, and Dr. Marjenhoff and Raphaela Francis were both there. And I basically said that—I sat them both down, and I said that, you know, I understand that, Raphaela, you prescribed controlled substance to Dr. Marjenhoff, and I believe it was hydrocodone. And you had an adverse reaction to that. And I said, I want you to know that this is not good practice. I don't want this to continue. Don't let it happen again, and just don't do it. Those were my exact words. Just don't do it.

Tr. 955–56. According to Dr. Edmonds, although his tone at the outset of the meeting was ''one of collegiality,'' he stated that, ''at the end, it was very stern in the tone.'' Tr. 956.

Edmonds clarified that this directive, which applied to all controlled substances, was ''mandatory'' and not optional, and it was disseminated throughout the McLeod Medical staff by the HR manager and was subsequently reduced to writing in the McLeod Medical employee handbook. Tr. 363–64, 393–99, 956–57. Dr. Edmonds

[17] In her brief, the Respondent argues that she and PIC Alvis ''had previously been in strong disagreements . . . in regards to his lack of competence.'' ALJ Ex. 60, at 4. However, the record is unsupportive. The Respondent testified that she ''switched pharmacies, mainly over to May's [Pharmacy] because [she] had a problems with [Alvis], in that on a couple of occasions he prescribed the wrong medication to [her] patients, and [she] reprimanded him.'' Tr. 935. Apart from the reality that pharmacists do not ''prescribe'' medication, the objective evidence of record is that, notwithstanding the multiple pharmacy options available to (and used by) the Respondent, she continued to patronize the Walmart Pharmacy Edgewood that Alvis managed. Additionally, the record demonstrates that the Respondent was not only sufficiently satisfied with Alvis that she selected his pharmacy on one of the occasions where she illegitimately utilized the February 14, 2011 prescription from PA Francis (Gov't Ex. 3, at 1), but she was sufficiently comfortable with her relationship with Alvis to call him on August 31, 2011 to request that his pharmacy refrain from submitting the prescription to her insurance company, and, once again, when Alvis declined to dispense the medication to her daughters. Tr. 268–69, 282. Indeed, the PMP/Marjenhoff Report reflects as many dispensing events through Walmart Pharmacy Edgewood as occurred at May Pharmacy. Gov't Ex. 6, at 2–3, 13–14.

[18] At another point during the proceedings, NM Pharmacy Board Executive Director Larry Loring confirmed that all controlled substance scrips must bear a hard signature to be effective. Tr. 458–61.

[19] Tr. 359.

[20] Tr. 392, 956.

further recalled that, at the time, he encouraged the Respondent to seek out the consultation of a pain and spine physician. Tr. 362.

Dr. Edmonds also testified that, about five months later, on July 21, 2011, he was notified that a random urinalysis sample collected from the Respondent two days earlier registered positive for an opiate. Tr. 364–66, 400. Edmonds recalled that on the day of the urinalysis, when the preliminary, in-office screen-test results indicated the presence of opiates, the Respondent approached him and said she felt she was ''being singled out.'' Tr. 971. Several days later, after receiving the lab confirmation that the Respondent had opiates in her system, Dr. Edmonds sought her out for an explanation. Tr. 963–64, 971. It was at that point (and not before) that the Respondent told Edmonds that she was receiving pain medication from a Dr. Pamela Black, a pain treatment specialist. Tr. 365, 391–92, 963–64, 971. When, in response to Edmonds's request to see the prescription, the Respondent brought him a bottle of morphine with a prescription label dated July 25, 2011 (six days after the urinalysis sample was collected),[21] Dr. Edmonds did not push the matter, extending what he euphemistically characterized as ''professional courtesy.'' Tr. 363–67, 400–01. He extended this courtesy, even in light of the fact that the portion of the form completed by the Respondent at the time she provided the urine sample that could have reflected that she was taking medications did not. Tr. 958, 964, 966–70. Thus, Dr. Edmonds knew that the Respondent could have indicated on the form that she was on controlled substances at the time she provided the sample, and could have told him that she was seeing Dr. Black when the in-office screen test popped positive (instead of indicating that she was being singled out), but did not avail herself of either opportunity.

Two months after the positive urinalysis result, Dr. Edmonds was informed by the McLeod HR manager that personnel at Walmart Pharmacy Edgewood had advised her that the Respondent had attempted to fill, and may have filled, multiple illegitimate narcotic medication prescriptions over PA Francis's name and DEA COR number. Tr. 368–69. After a meeting with PA Francis and the HR manager where the three consulted a PMP report,[22] Edmonds set about attempting to contact officials at the local DEA office. A day or so later, Edmonds telephoned the Respondent at home. Tr. 369–70. In his testimony, Dr. Edmonds was clear that he asked the Respondent three questions: First, did she have a problem with drugs? Second, did she have an addiction problem? And, third, did she forge the prescriptions that Edmonds was inquiring about? Tr. 370, 959. According to Edmonds, the Respondent's answer to the first two inquiries was ''no,'' but, regarding the forgery question, the Respondent replied that she only did that (forged prescriptions) twice. Tr. 370, 959. Edmonds recalled that the Respondent's exact words were ''I only did that twice.'' Tr. 370, 408–09, 959. Although, in her hearing testimony, the Respondent indicated that she replied ''twice'' when asked how many times Francis prescribed controlled substances to her, Dr. Edmonds was clear, persuasive, and credible in relating his detailed recollection that he had no reason to ask the Respondent about the number of times Francis prescribed controlled substances to her, and that he did not ask that question. Tr. 959. Indeed, in the face of the six to eight scrips that Francis presented to Edmonds at that time as forged,[23] it would have made little sense for Edmonds to ask the Respondent such a question, and less sense for the Respondent (who claims that Francis was regularly and appropriately prescribing controlled substances to her) to answer ''twice.'' Additionally, to the extent that the Respondent believed that Dr. Edmonds's meeting on employee-to-employee controlled substance prescribing yielded only optional guidance, the answer ''twice'' and even the question would have made little sense. In this regard, Dr. Edmonds's recollection of events is more plausible and will be credited in this recommended decision.

Dr. Edmonds put the Respondent on administrative leave and placed two conditions on the Respondent's continued employment at McLeod Medical. First, she was to enroll in the New Mexico Monitored Treatment Program (MTP), a drug treatment monitoring program designed to evaluate, treat, and monitor physicians and healthcare providers.[24] Second, the Respondent was required to ''mend the relationship that she had broken with [PA] Francis.'' Tr. 370, 409–11. According to Dr. Edmonds, he discussed these conditions both orally and in writing with the Respondent, and she agreed to both. Tr. 371–72. It took a few weeks for the Respondent to affiliate with MTP,[25] but after she was in the program, MTP notified Edmonds that a treatment plan had been developed and that, at least in MTP's view, she could return to a work environment. Tr. 372–73. Shortly thereafter, however, Dr. Edmonds terminated her based on his determination she was not sufficiently committed to repairing her professional relationship with PA Francis. In Dr. Edmonds's words:

> I fired [the Respondent] because she created a hostile work environment and eroded the trust between herself and her subordinate, Physician's Assistant Raphaela Francis.

Tr. 962. According to Dr. Edmonds, the Respondent's sole effort directed at relationship repair was an email she sent to Francis, wherein the former explained to the latter that she was sorry she chose her as her provider. Tr. 373–77, 414. Apparently, the tenor of the Respondent's email was just not what Edmonds was looking for in the repair of a professional relationship torn atwain by one coworker forging another coworker's name on controlled substance prescriptions, and, on October 24, 2011, approximately six weeks after she was placed on administrative leave, the Respondent was let go. Tr. 378–79, 415.

Dr. Edmonds is no longer associated with McLeod Medical. It is clear that he has no stake in the outcome of these proceedings, and his testimony presented as clear, certain, and unequivocal. In this case, the testimony presented by Dr. Edmonds, much of which was corroborated by other testimony in the record, was sufficiently objective, detailed, plausible, and internally consistent to be deemed fully credible in this recommended decision.

NM Pharmacy Board Executive Director (Exec. Dir.) Larry Loring also testified on behalf of the Government at the hearing. Loring testified that, prior to his appointment as the executive director, he had served for twenty-two years as a NM Pharmacy Board inspector. Tr. 440–41. As executive director, his responsibilities at the NM Pharmacy Board include the supervision of the Board's administrative and inspector personnel, as well as the assignment of cases to the inspection staff. Tr. 430–31. Additionally, Exec. Dir. Loring testified that he has been in charge of the New Mexico Prescription Monitoring Program (PMP) since its inception in 2005 until last year, when he hired a

[21] Dr. Edmonds could not recall whether the bottle label reflected an original prescription or a refill. Tr. 366.

[22] Tr. 402.

[23] Tr. 369.

[24] Tr. 374–76, 388–90, 410.

[25] Tr. 378.

manager to administer the program. Tr. 431. Loring explained that the PMP is a computer database maintained by the NM Pharmacy Board that is the repository for information on all controlled substances dispensed in New Mexico. Tr. 432, 434. Information is inputted into the PMP exclusively by the pharmacies across the state. Tr. 433. The pharmacies bear a legal obligation to accurately report dispensing data to the PMP,[26] and, at the time of these events, could do so at upload increments of up to seven days. Tr. 433–34, 444–45.

Exec. Dir. Loring testified that he opened an investigation concerning the Respondent based on a phone call he received from PIC Alvis. Tr. 441, 450. When Alvis advised him that he believed he had identified a forged prescription made out on behalf of the Respondent, Loring ran a PMP report querying all controlled substance prescriptions issued by PA Francis where the Respondent is reflected as a patient for a two-year period commencing on October 12, 2010 (PMP/Marjenhoff Report),[27] and he used this report as a framework to contact pharmacies in furtherance of his investigation. Tr. 441–43, 447–48; Gov't Ex. 6. Exec. Dir. Loring testified that he went to each pharmacy listed on the PMP/Marjenhoff Report and obtained documents related to the transactions listed therein by supplying the prescription transaction numbers from the Report.[28] Tr. 443, 660; Gov't Ex. 8. According to Loring, he eventually turned over the documents he procured from the pharmacies to DEA DI Bencomo. Tr. 443, 661; Gov't Ex. 8.

On the issue of the PMP/Marjenhoff Report, Exec. Dir. Loring did not know why there was no indication of a controlled substance prescription dispensed at May Pharmacy on August 30, 2011 (the day May Pharmacy partially dispensed the same medication the Respondent was seeking to procure from Walmart Pharmacy Edgewood on August 31, 2011).[29] Tr. 455–56, 465–66.

Exec. Dir. Loring presented as a thorough, impartial, methodical state regulator.[30] He has no stake in the outcome of the proceedings, and his testimony was sufficiently objective, detailed, plausible, and internally consistent to be fully credited in this recommended decision.

The Government also presented the testimony of its lead investigator in this matter, Diversion Investigator (DI) Randall Bencomo, a fifteen-year DEA investigator and retired Air Force veteran. Tr. 474. DI Bencomo testified that his contact with this case began with a referral from his supervisor to investigate the Respondent's COR application due to an affirmative response on an application liability question. Tr. 475–77, 632. During the course of his investigation, Bencomo learned that the Respondent had a history of disciplinary action with the Board of Medical Examiners of the State of Iowa (Iowa Medical Board). Tr. 475, 477–78. In August of 2011, DI Bencomo telephonically contacted the Iowa Medical Board and was referred to its Web site (*medicalboard.iowa.gov*) where he located, printed out, and supplied this tribunal with a document styled ''Settlement Agreement and Final Order'' (Iowa Board Order/Settlement Agreement or IBO/SA), which related to an administrative action regarding the Respondent's Iowa medical license, and a corresponding document entitled ''Statement of Charges'' (Iowa Board Charging Document or IBCD), which provides the charges resolved in the IBO/SA. Gov't Ex. 9; Tr. 484, 552–59, 619–22.

DI Bencomo also testified that, in the first full week of September 2011, during his investigation of the Respondent's application, he was contacted by and met with PA Francis. Tr. 478. According to DI Bencomo, Francis indicated that she wished to lodge a complaint against the Respondent for forging her name on controlled substance prescriptions. Tr. 478–80. When Francis and Bencomo met, the former brought the PMP report she generated with her and recounted her experience with the Respondent and her interaction with PIC Alvis. Tr. 478–80. Bencomo recalled that PA Francis explained the machinations Alvis was forced to invent to finally contact her at McLeod Medical. Tr. 480–81.

According to Bencomo, utilizing very much the same approach as Exec. Dir. Loring, he contacted the pharmacies set forth in the PMP/Marjenhoff Report and sought documentation that corresponded to the dispensed prescriptions that Francis described as forged. Tr. 481. Bencomo testified that, as he was interacting with the pharmacies listed on the PMP, he came to learn that Exec. Dir. Loring from the NM Pharmacy Board had been pursuing the same documents from the same establishments, and had been provided with original documents by the pharmacies. Tr. 481–82. Bencomo stated that the pharmacies provided him with copies because the originals had already been provided to Exec. Dir. Loring. Tr. 481, 500, 507. DI Bencomo testified that he subsequently contacted Loring and that the latter transferred the original documents he had procured from the pharmacies into Bencomo's custody. Tr. 482–84, 501, 627–29.

DI Bencomo testified that, about a week after he spoke with PA Francis, he also interviewed PIC Alvis at the Walmart Pharmacy Edgewood. Tr. 484–85. Bencomo recollected that details supplied by Alvis were consistent with the account provided by to him by PA Francis. Tr. 486.

Among the documents presented by Bencomo was a pair of identical controlled substance scrips that he obtained from two different pharmacies and that reflect that both pharmacies filled the single prescription. Tr. 499; Gov't Ex. 3. Also received into the record were two exhibits containing copies of the documents collected by Exec. Dir. Loring and DI Bencomo from the pharmacies listed in the PMP/Marjenhoff Report.[31] Gov't Ex. 4; Gov't Ex. 8.

[26] Exec. Dir. Loring explained that a disclaimer placed at the bottom of each page of reports generated by the PMP alerts the reader that the accuracy of the data perforce depends on the accuracy of the input by the pharmacies, and is not independently confirmed by the NM Pharmacy Board. Tr. 435–36.

[27] Actually, the PMP/Marjenhoff Report introduced by the Government contains two reports generated from two distinct queries. The first query is a ''Prescriber Rx History Report'' wherein PA Francis's DEA COR number is queried and the prescriptions dispensed to the Respondent are culled out (Gov't Ex. 6, at 2–12), and the second is a ''Patient Rx History Report'' wherein the Respondent's name is queried for controlled substance medications dispensed on her behalf as the listed patient. *Id.* at 13–15.

[28] The Respondent's objection to the documents supplied to Exec. Dir. Loring by the pharmacies was sustained to the extent that notations on the documents that lacked an adequate foundation were excluded from consideration. Tr. 679–81.

[29] However, it is worthy of note that the Prescriber Rx History Report (Gov't Ex. 6, at 2–12) of the PMP/Marjenhoff Report admitted into evidence only queried prescriptions issued by PA Francis, not those issued by Dr. Pamela Black, the pain specialist the Respondent indicated she was seeing for pain medication, the prescriber she mentioned to PA Francis during their February 14, 2011 appointment, and the prescriber she asked PIC Alvis about when they spoke on the phone regarding her insurance-rejected prescription. *See* Tr. 183, 221–22, 366, 652–53, 810, 819, 836–40, 924–28, 947–49, 964–66, 973.

[30] Notwithstanding the Government's curious assertion to the contrary (ALJ Ex. 59, at 11), Exec. Dir. Loring was never offered, qualified, or recognized as an expert in these proceedings. In fact, during the course of an extremely limited inquiry regarding whether particular scrip signatures were handwritten or machine generated, the Respondent's counsel decisively declined the opportunity to do so during the hearing, and made it clear that any mention of this witness as an expert ''was just in jest.'' Tr. 706–07, 710; *see also id.* at 459, 703. There was simply nothing unclear about this aspect of the proceedings during the hearing or thereafter.

[31] Although DI Bencomo testified that Government Exhibit 4 is an amalgam of copies of documents he received from Exec. Dir. Loring and

DI Bencomo's testimony was certainly not without its warts. There were points where his testimony lacked clarity in describing the manner in which he procured and maintained important documentation. He initially testified that he obtained documentation from the Iowa Board by implementing a download from its Web site, but was unable to testify about who he spoke with at the Iowa Board, what they said, when the conversation took place, or the Web site address he was referred to. Tr. 553–54, 556–57. Similarly, DI Bencomo testified that he collected documentation from several pharmacies regarding the Respondent's New Mexico prescriptions, but he was initially unable to tease out which documents were obtained by him and which were provided by Exec. Dir. Loring. Tr. 541–42. DI Bencomo was ultimately able to resolve numerous evidentiary issues, but only after being granted leave in the midst of his testimony to do so. Still, DI Bencomo, whose testimony was largely corroborated by other testimony and evidence, presented as an objective, experienced regulator who clearly has no stake in the outcome of the proceedings, and, taken as a whole, his testimony was sufficiently detailed, plausible, and internally consistent enough to merit full credibility here.

The Government's Documentary Evidence

The Government submitted documentary evidence in support of purported misconduct that took place in Iowa (Iowa Misconduct) and New Mexico (New Mexico Misconduct).

Iowa Misconduct Documents

The record contains an affidavit executed by the DEA's Chief of the Registration and Program Support Section, Richard A. Boyd, regarding the history of the Respondent's registration with the DEA (DEA Records Affidavit). Gov't Ex. 2. The DEA Records Affidavit states that the Respondent applied [32] for a DEA COR on January 14, 2011, at the address of 1108 U.S. Route 66 W., P.O. Box 1520, Moriarty, New Mexico 87035, and that, on January 17, 2011, the DEA assigned the Respondent with a COR control number (W11002696C) while her application was pending. *Id.* at 1. The DEA Records Affidavit further provides that the Respondent provided an affirmative answer to the third liability question contained in the COR application, *to wit:* whether she had ''ever surrendered (for cause) or had a state professional license or controlled substance registration, revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?'' [33] *Id.*

The DEA Records Affidavit also contains language provided by the Respondent in her COR application explaining her liability-question response regarding any prior adverse state license history.[34] *Id.* at 1–2. According to the language supplied by the Respondent [35] explaining the facts surrounding her Iowa license surrender:

> Incident Date: 03/15/2000, Incident Location: Corydon, IA, Incident Nature: Patient was on long-term opioids for Antiphospholipid antibody syndrome. Had consults from hematology and pain clinic, who suggested above meds. After 1 yr on meds, unknown person sent complaint to Iowa Board of Medicine that patient was ''addicted to the pain medicine[.''] IA Board did not inform DEA, as no investigation was needed. Incident Result: I voluntarily took CME course on prescribing controlled substances from Vanderbilt University.

Id.

The Government also introduced a copy of the Iowa Board Order/Settlement Agreement entered into by the Respondent and the Iowa Board in 2005, as well as the corresponding IBCD, which set forth the charges. Gov't Ex. 9. The IBO/SA cites the Respondent for ''*inappropriately and repeatedly* prescribing controlled drugs *to numerous patients* in violation of the laws and rules governing the practice of medicine.'' *Id.* at 2 (emphasis added). The IBO/SA reflects that the Respondent became licensed in Iowa on April 5, 2000, which would be the month following the incident date she provided in her application explanation. *Compare* Gov't Ex. 9, at 1 ¶ 2 (memorializing that the Iowa Board and the Respondent agree that her state license was issued on April 5, 2000), *with* Gov't Ex. 2, at 1–2 ¶ 3 (noting that, in her COR application, the Respondent listed the Iowa Board license incident as March 15, 2000). Thus, even a cursory examination of the plain language of the two documents supports either two Iowa Board actions, only one of which is explained in the Respondent's COR application, or one Board action regarding which the Respondent supplied a puzzling date and a markedly incomplete/disingenuous explanation. Confusingly, in her brief, the Respondent clarified that Iowa administrative proceedings were initiated in March 2000 (which, if credited, would mean that proceedings to discipline her license commenced a month prior to the time she was even licensed in Iowa). ALJ Ex. 60, at 2. In their briefs, both parties are in apparent agreement that there was only one Iowa Board disciplinary action.[36] ALJ Ex. 59, at 29; ALJ Ex. 60, at 12.

The Iowa Board Charging Document [37] alleges that the Respondent violated Iowa's pain management rule, Iowa Admin. Code r. 653–13.2, which, *inter alia,* serves ''to minimize the potential for substance abuse and drug diversion.'' Iowa Admin. Code r. 653–13.2(1) (2013). At the DEA hearing, the Respondent adopted the IBO/SA as an accurate account of the events that occurred surrounding the incident, and official notice [38] was taken of the actions of the Iowa Board depicted in the IBO/SA and IBCD.[39] Tr. 625, 764–65.

New Mexico Misconduct Documents

According to the testimony of Exec. Dir. Loring, the investigation he conducted on behalf of the NM Pharmacy Board (and ultimately the Government's case here) is structured from the PMP/Marjenhoff Report he generated from his query on the New Mexico PMP. Tr. 441–43, 447–48; Gov't Ex. 6. The PMP/Marjenhoff Report reflects twelve (12) dispensing events on scrips purportedly authorized by PA Francis that resulted in controlled substances being issued to the Respondent, or members of her family on her behalf, during a two-year period

directly from the pharmacies listed in the PMP/Marjenhoff Report (Tr. 531), as his testimony progressed, it became apparent as he was describing another noticed exhibit that he was not altogether confident as to which documents he collected from the pharmacies and which he received from Loring. *See, e.g.,* Tr. 537–47. That said, Bencomo was consistent in testifying that every document in the exhibit came from one source or the other. To clarify the record, DI Bencomo brought the original documents provided by Exec. Dir. Loring to make them available for examination by the Respondent's counsel and this tribunal. Tr. 614, 627–31, 661–63; Gov't Ex. 8.

[32] Gov't Ex. 1.

[33] DI Bencomo testified that this affirmative answer and explanation was the likely genesis of the referral of the Respondent's application to a DI for in-depth examination. Tr. 476–77.

[34] During her testimony at the hearing, the Respondent attested to the veracity of this explanation and acknowledged that this information was supplied to DEA by her in connection with her application. Tr. 763–64, 937–39.

[35] DI Bencomo testified that this language was taken from the Respondent's COR application, which is the position that the Respondent's counsel took at the hearing, and is consistent with the Respondent's testimony. Tr. 636–37, 639, 643–46, 937–39.

[36] Inasmuch as it is the Government who is the proponent of this evidence and the party that seeks to rely on the Iowa Misconduct to sustain the COR denial it seeks, it was incumbent upon the Government to provide a logical explanation.

[37] Gov't Ex. 9, at 10.

[38] See 5 U.S.C. 556(e).

[39] At the hearing of this matter, the Respondent was afforded until May 28, 2014 (over 30 days) to challenge the factual basis of this official notice and declined to do so.

commencing on October 12, 2010. Gov't Ex. 6. As discussed, *supra,* documents corresponding to the prescription transaction numbers on the PMP/Marjenhoff Report were independently procured from the relevant pharmacies by Exec. Dir. Loring and DI Bencomo. Gov't Ex. 4; Gov't Ex. 8. Exec. Dir. Loring turned over nine original prescription documents to DI Bencomo.[40] Tr. 687; Gov't Ex. 8. DI Bencomo's prescription documents, which appear to be a combination of Loring's documents supplemented with documents he procured independently of Loring,[41] related to twelve transactions. Gov't Ex. 3; Gov't Ex. 4. Each of the twelve dispensing events referenced in the PMP/Marjenhoff Report and its significance is discussed below.

Dispensing Event 1: February 14, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated February 14, 2011 (same date) for Hydrocodone Bitartrate and Acetaminophen 10–500 mg[42] and issued on behalf of the Respondent, was dispensed at the Walmart Pharmacy Edgewood.[43] Gov't Ex. 6, at 3, 14. A copy of a scrip and corresponding dispensing label procured from the Walmart Pharmacy Edgewood by DI Bencomo[44] shares the same transaction number (#4411974), ''issue'' date, medication/dosage description[45] issued under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 3, at 1.

On the present record, it is undisputed that the Respondent validly received this scrip from PA Francis,[46] that it was faxed to the Walmart Pharmacy Edgewood where it was validly dispensed. According to the PMP/Marjenhoff Report, a 30-day supply of medication was dispensed. Gov't Ex. 6, at 3, 14.

Dispensing Event 2: February 16, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated February 14, 2011 for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at the Walgreens Pharmacy[47] in Edgewood, New Mexico (Walgreens Pharmacy). Gov't Ex. 6, at 3, 14. A copy of a scrip and corresponding dispensing label that was procured from the Walgreens Pharmacy by Exec. Dir. Loring shares the same transaction number (#369902), ''issue'' date, medication/dosage description under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 8, at 1; Gov't Ex. 3, at 2.

A comparison of the copy of the scrip presented during the course of this dispensing event to the scrip presented to the Walmart Pharmacy Edgewood in Dispensing Event 1 (two days before Dispensing Event 2) shows that the same scrip was presented in both transactions. *Compare* Gov't Ex. 8, at 1, *and* Gov't Ex. 3, at 2, *with* Gov't Ex. 3, at 1. PA Francis credibly testified that she prepared and personally handed the scrip to the Respondent. Tr. 188. But there was no indication that the scrip was authorized for multiple pharmacy presentations to procure multiple doses of the same medication. On its face, the scrip does not even purport to authorize refills. Gov't Ex. 3. PA Francis also credibly testified that this was the one and only controlled substance prescription that she issued on behalf of the Respondent. Tr. 185, 202.

This dispensing event resulted in the Respondent receiving a 30-day supply of the medication, notwithstanding the fact that only 2 days earlier she had received a 30-day supply of the same medication (Dispensing Event 1). Gov't Ex. 6, at 3, 4. Thus, by presenting the same scrip twice, over the course of 2 days, the Respondent acquired an aggregate amount of medication that should have lasted 60 days.

Dispensing Event 3: March 1, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated February 28, 2011 for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at May Pharmacy[48] in Moriarty, New Mexico (May Pharmacy). Gov't Ex. 6, at 3, 14. A copy of a scrip and corresponding dispensing label obtained from May Pharmacy by Exec. Dir. Loring shares the same transaction number (#9142353), ''issue'' date, medication/dosage description under PA Francis's COR number and purported signature, and patient (the Respondent) as the PMP/Marjenhoff report. Gov't Ex. 8, at 3; Gov't Ex. 4, at 1.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261.

This dispensing event resulted in the Respondent receiving a 23-day supply of the medication, notwithstanding the fact that only 15 days earlier she had received a 30-day supply of the same medication (Dispensing Event 1), and 13 days earlier she had received yet another 30-day provision of the same medication (Dispensing Event 2). Gov't Ex. 6, at 3, 14. Thus, even by the terms of the scrips (one of which was presented twice and the other forged), over the course of the 15 days that elapsed from Dispensing Event 1, the Respondent had received an aggregate amount of medication that should have lasted 60 days (45 extra dosage days) before this prescription was filled.

Dispensing Event 4: March 11, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated March 11, 2011 (same date) for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at the Walgreens Pharmacy. Gov't Ex. 6, at 3, 14. DI Bencomo[49] procured a copy of a scrip[50] from the

[40] Although Exec. Dir. Loring testified that he visited all pharmacies listed in the PMP/Marjenhoff Report and did not recall any of the pharmacies declining or being unable to comply with his documentary requests, he was unable to explain why he only turned over nine sets of prescription documents to DI Bencomo. Tr. 686–90.

[41] DI Bencomo originally testified that his documents were copies collected from the pharmacies. Tr. 501–02. However, the notations on some of these documents are consistent with the notations made by Exec. Dir. Loring recording the location and date the scrips were picked up by him from the pharmacies. Tr. 664. In light of the fact that the Government presented other documents that were an amalgamation of the documents collected by DI Bencomo and Exec. Dir. Loring (Tr. 531), it is safe to assume that these prescriptions presented by DI Bencomo also include copies of documents obtained by Exec. Dir. Loring.

[42] Hydrocodone Bitartrate and Acetaminophen 10–500 mg is a Schedule III controlled substance. Stip. 5; 21 CFR 1308.13(e)(1)(iv).

[43] According to a key included in the PMP/Marjenhoff Report, the pharmacy identification number associated with this dispensing event corresponds to the number assigned to the Walmart Pharmacy Edgewood. Gov't Ex. 6, at 11, 15.

[44] These documents were not among the documents procured by Exec. Dir. Loring. Tr. 689–90.

[45] The scrip reflects a prescription for Lortab 10–500 mg (Gov't Ex. 3, at 1), which is a brand name for Hydrocodone Bitartrate and Acetaminophen 10–500 mg. *Nursing97 Drug Handbook* 351 (1997). The dispensing label reflects a prescription for Hydro/Apap 10–500 mg. Gov't Ex. 3, at 1. ''Apap'' is an abbreviation for Acetaminophen. *Nursing97 Drug Handbook* 315.

[46] Tr. 688–89.

[47] According to a key included in the PMP/Marjenhoff Report, the pharmacy identification number associated with this dispensing event corresponds to the number assigned to the Walgreens Pharmacy. Gov't Ex. 6, at 10, 15.

[48] According to a key included in the PMP/Marjenhoff Report, the pharmacy identification number associated with this dispensing event corresponds to the number assigned to May Pharmacy. Gov't Ex. 6, at 7, 15.

[49] These documents were not among the documents procured by Exec. Dir. Loring. Tr. 689–90.

[50] As initially supplied by the Government, this document was illegible and excluded. Prior to the commencement of the hearing, the Government

Walgreens Pharmacy that shares the same ''issue'' date, medication/dosage description under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 4, at 2. This exhibit does not bear a corresponding dispensing label. *Id.* Upon examination, this scrip was also used to effect Dispensing Events 5 and 6. *Compare* Gov't Ex. 4 at 2, 2a, *with* Gov't Ex. 8, at 5, 7, *and* Gov't Ex. 4, at 4, 4a, 5.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261.

This dispensing event resulted in the Respondent receiving a 15-day supply of the medication, notwithstanding the fact that only 25 days earlier she had received a 30-day supply of the same medication (Dispensing Event 1), 23 days earlier she had received yet another 30-day provision of the same medication (Dispensing Event 2), and 10 days earlier she had received a 23-day supply of the same medication (Dispensing Event 3). Gov't Ex. 6, at 3, 14. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and some of which were forged), over the course of the 25 days that elapsed from Dispensing Event 1, the Respondent had received an aggregate amount of medication that should have lasted 83 days (58 extra dosage days) before this prescription was filled.

Dispensing Event 5: March 15, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated March 15, 2011 for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at the Walmart Pharmacy Edgewood. Gov't Ex. 6, at 3, 14. A physical copy of a document entitled ''Telephonic Prescription,'' completed by hand, with an attached corresponding dispensing label, was procured by Exec. Dir. Loring from the Walmart Pharmacy Edgewood. Gov't Ex. 8, at 5; Gov't Ex. 4, at 3. Loring testified that, based on his over two-dozen years of experience, a pharmacist must (and it must be a pharmacist, not a technician) complete this type of form when a controlled substance prescription is telephoned into the pharmacy. Tr. 672–74, 704–05. Although the prescription must be taken by a pharmacist and reduced to writing at the pharmacy end, the prescriber can have the prescription phoned in by an authorized administrative person. Tr. 704–05. In reviewing the documents associated with this transaction, Exec. Dir. Loring determined that the paperwork reflects that a controlled substance prescription was telephoned into Walmart Pharmacy Edgewood on March 15, 2011, that, the following day, it was followed up by a fax version of the scrip, and that the dispensing sticker indicates that the medication was processed for dispensing.[51] Tr. 674–77.

The record also contains a hard-copy of a scrip, dated March 11, 2011, with a signature placed above PA Francis's name as the prescriber. Gov't Ex. 8, at 5; Gov't Ex. 4, at 4, 4a. The dispensing label affixed to the hard-copy scrip shares the same transaction number (#4412395), medication/dosage [52] description issued under PA Francis's COR number and purported signature, and patient (the Respondent) as the entry in the PMP/Marjenhoff Report. Gov't Ex. 8, at 5; Gov't Ex. 4, at 4, 4a.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261. Further, upon examination, it appears that the March 11 hard-copy scrip, utilized by facsimile to effect this dispensing event, is the same scrip utilized in Dispensing Events 4 (via facsimile) and 6 (via presentation of the original document).[53] A comparison of the copy of this scrip presented to the Walmart Pharmacy Edgewood to the copy of the scrip presented to the Walgreens Pharmacy (in connection to Dispensing Event 4) shows that the same document was presented to both pharmacies, and that the dispensing events were separated by four days. *Compare* Gov't Ex. 8, at 5, *and* Gov't Ex. 4, at 4, *with* Gov't Ex. 4, at 2. Furthermore, this same scrip was presented to, and filled at, another Walmart Pharmacy in Albuquerque six days later (Dispensing Event 6). *Compare* Gov't Ex. 8, at 5, *and* Gov't Ex. 4, at 4, 4a, *with* Gov't Ex. 8, at 7, *and* Gov't Ex. 4, at 5.

This dispensing event resulted in the Respondent receiving a 15-day supply of the medication, notwithstanding the fact that only 29 days earlier she had received a 30-day supply of the same medication (Dispensing Event 1), 27 days earlier she had received another 30-day provision of the same medication (Dispensing Event 2), 14 days earlier she had received a 23-day supply of the same medication (Dispensing Event 3), and 4 days earlier she had received a 15-day supply of the same medication (Dispensing Event 4). Gov't Ex. 6, at 3, 14. As of the date of this dispensing event, although only 29 days had elapsed since the first scrip was filled (Dispensing Event 1), the Respondent had accumulated an aggregate amount of medication sufficient to last 98 days (69 extra dosage days) before this prescription was filled.

Dispensing Event 6: March 21, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated March 11, 2011 for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at the Walmart Pharmacy [54] in Albuquerque, New Mexico (Walmart Pharmacy Albuquerque). Gov't Ex. 6, at 3, 14. The copies of the scrip and corresponding dispensing label procured by Exec. Dir. Loring from the Walmart Pharmacy Albuquerque share the same transaction number (#4407701), ''issue'' date, medication/dosage description under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 8, at 7–8; Gov't Ex. 4, at 5–6. The scrip copy received into the record is not obscured by the security features that indicate photocopy or facsimile transmission. Gov't Ex. 8, at 7–8; Gov't Ex. 4, at 5–6.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261. In the opinion of Exec. Dir. Loring, the signature on the scrip was manually signed (*i.e.,* not electronically generated). Tr. 706.

Upon examination, it appears that the scrip utilized to effect this dispensing event is the same scrip utilized via facsimile to consummate Dispensing Events 4 and 5. *Compare* Gov't Ex. 8, at 7–8, *and* Gov't Ex. 4, at 5–6, *with* Gov't Ex. 8, at 5, *and* Gov't Ex. 4, at 2, 2a, 4, 4a. Thus, this scrip, which bears the Respondent's name as the patient, was presented three times to three separate pharmacies to procure the controlled substances described therein.

supplied a copy that was sufficiently enhanced through magnification that its content could be somewhat better deciphered and considered.

[51] Exec. Dir. Loring testified that the presence of a dispensing sticker indicates that the medication was processed for dispensing, but not necessarily that it was dispensed. Tr. 676–77.

[52] The telephonic and hard-copy scrip prescribe ''Lortab,'' a brand name for Hydrocodone Bitartrate and Acetaminophen. *Nursing97 Drug Handbook* 351 (1997).

[53] Upon careful examination or the original documents during the hearing, Exec. Dir. Loring opined that the scrip utilized for Dispensing Event 5 was the same scrip utilized for Dispensing Event 6. Tr. 681–85.

[54] According to a key included in the PMP/Marjenhoff Report, the pharmacy identification number associated with this dispensing event corresponds to the number assigned to the Walmart Pharmacy Albuquerque. Gov't Ex. 6, at 12, 15.

This dispensing event resulted in the Respondent receiving a 15-day supply of the medication, notwithstanding the fact that only 20 days earlier she had received a 23-day supply of the same medication (Dispensing Event 3), 10 days earlier she had received a 15-day provision of the same medication (Dispensing Event 4), and 6 days earlier she had received a 15-day supply of the same medication (Dispensing Event 5). Gov't Ex. 6, at 3, 14. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and most of which were forged), over the course of the 35 days that elapsed from the date of Dispensing Event 1 to this dispensing event, the Respondent had received an aggregate number of medication to last 113 days (78 extra dosage days) before this prescription was filled.

Dispensing Event 7: March 31, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated March 31, 2011 (same date) for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at May Pharmacy. Gov't Ex. 6, at 3, 14. Copies of a scrip [55] procured from May Pharmacy by Exec. Dir. Loring and its corresponding dispensing label share the same transaction number (#9145722), ''issue'' date, medication/dosage description under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 8, at 9–10; Gov't Ex. 4, at 7–8.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261.

This dispensing event resulted in the Respondent receiving a 30-day supply of the medication, notwithstanding the fact that 10 days earlier she had received a 15-day supply of the same medication (Dispensing Event 6). Gov't Ex. 6, at 3, 14. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and some of which were forged), over the course of the 45 days that elapsed from the date of Dispensing Event 1 to this dispensing event, the Respondent had received an aggregate number of medication to last 128 days (83 extra dosage days).

[55] As initially supplied by the Government, this document was illegible and excluded. Prior to the commencement of the hearing, the Government supplied a copy that was sufficiently enhanced through magnification that its content could be deciphered and considered.

Dispensing Event 8: April 6, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated April 6, 2011 (same date) for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at the Walmart Pharmacy Albuquerque. Gov't Ex. 6, at 3, 14. A copy of a scrip obtained by Exec. Dir. Loring from the Walmart Pharmacy Albuquerque and its corresponding dispensing label shares the same transaction number (#4407973), ''issue'' date, medication/dosage description under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 8, at 11–12; Gov't Ex. 4, at 9.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261.

This dispensing event resulted in the Respondent receiving a 15-day supply of the medication, notwithstanding the fact that 6 days earlier she had received a 30-day supply of the same medication (Dispensing Event 7). Gov't Ex. 6, at 3, 14. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and most of which were forged), over the course of the 51 days that elapsed from Dispensing Event 1, the Respondent had received an aggregate amount of medication that should have lasted 158 days (107 extra dosage days) before this prescription was filled.

Dispensing Event 9: July 9, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated July 8, 2011 for Hydrocodone Bitartrate and Acetaminophen 10–500 mg and issued on behalf of the Respondent, was dispensed at the Walmart Pharmacy Edgewood. Gov't Ex. 6, at 2, 13. A copy of a scrip, which was procured from the Walmart Pharmacy Edgewood by Exec. Dir. Loring, and corresponding dispensing label share the same transaction number (#4413861), ''issue'' date, medication [56]/dosage description issued under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 8, at 13; Gov't Ex. 4, at 10.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261.

[56] Lortab, which is reflected on the scrip, is a brand name for Hydrocodone Bitartrate and Acetaminophen 10–500 mg. *Nursing97 Drug Handbook* 351 (1997).

This dispensing event resulted in the Respondent receiving a 30-day supply of the medication. Gov't Ex. 6, at 2, 13. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and most of which were forged), over the course of the 145 days that elapsed from Dispensing Event 1, the Respondent had received an aggregate amount of medication that should have lasted 173 days (28 extra dosage days) before this prescription was filled.

Dispensing Event 10: August 4, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated August 4, 2011 (same date) for Hydrocodone Bitartrate and Acetaminophen 10–325 mg and issued on behalf of the Respondent, was dispensed at May Pharmacy. Gov't Ex. 6, at 2, 13. A copy of a scrip and corresponding dispensing label acquired by Exec. Dir. Loring from May Pharmacy shares the same transaction number (#9157693), ''issue'' date, medication [57]/dosage description issued under PA Francis's COR number and purported signature, and patient (the Respondent) as this entry in the PMP/Marjenhoff Report. Gov't Ex. 8, at 15; Gov't Ex. 4, at 11.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261.

This dispensing event resulted in the Respondent receiving a 23-day supply of the medication, notwithstanding the fact that 26 days earlier she had received a 30-day supply of the same medication (Dispensing Event 9). Gov't Ex. 6, at 2, 13. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and most of which were forged), over the course of the 171 days that elapsed from Dispensing Event 1, the Respondent had received an aggregate amount of medication that should have lasted 203 days (32 extra dosage days) before this prescription was filled.

Dispensing Event 11: August 9, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated August 9, 2011 (same date) for Hydrocodone/Apap 10–325 mg and issued on behalf of the Respondent, was dispensed at the Walgreens Pharmacy. Gov't Ex. 6, at 2, 13. A copy of a scrip DI Bencomo [58] procured from Walgreens Pharmacy shares the same ''issue'' date,

[57] The scrip describes the medication as hydrocodone-acetaminophen. Gov't Ex. 8, at 15.

[58] These documents were not among the documents procured by Exec. Dir. Loring. Tr. 687.

medication/dosage description under PA Francis's COR number and purported signature, and patient (the Respondent). Gov't Ex. 4, at 12. No dispensing label is attached to this document. *Id.*

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261.

This dispensing event resulted in the Respondent receiving a 22-day supply of the medication, notwithstanding the fact that 5 days earlier she had received a 23-day supply of the same medication (Dispensing Event 10). Gov't Ex. 6, at 2. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and most of which were forged), over the course of the 176 days that elapsed from Dispensing Event 1, the Respondent had received an aggregate amount of medication that should have lasted 226 days (50 extra dosage days) before this prescription was filled.

Dispensing Event 12: September 10, 2011

The PMP/Marjenhoff Report reflects that, on this date, a prescription, dated September 10, 2011 (same date) for Hydrocodone Bitartrate and Acetaminophen 10–325 mg and issued on behalf of the Respondent, was dispensed at CVS Pharmacy [59] in Albuquerque, New Mexico (CVS Pharmacy). Gov't Ex. 6, at 2, 13. A copy of a scrip procured by Exec. Dir. Loring from CVS Pharmacy reflects that the same prescription was purportedly issued under PA Francis's COR number and purported signature on September 8, 2011 (2 days prior to the ''issue'' date reflected in the PMP/Marjenhoff Report).[60] Gov't Ex. 8, at 17–18; Gov't Ex. 4, at 13–14. A corresponding dispensing label attached to the scrip, bearing the same transaction number as the entry in the PMP/Marjenhoff Report (#0354748), reflects a September 10, 2011 ''issue'' date, which is consistent with the PMP, but inconsistent with the date on the scrip. *Compare* Gov't Ex. 8, at 17–18, *and* Gov't Ex. 4, at 13–14, *with* Gov't Ex. 6, at 2, 13.

At the hearing, PA Francis testified that she neither signed this scrip nor authorized this prescription. Tr. 205–06, 261. Exec. Dir. Loring testified that, in his opinion, the signature on the scrip was handwritten (*i.e,* not computer generated). Tr. 711.

This dispensing event resulted in a 23-day supply of the medication. Gov't Ex. 6, at 2, 13. Thus, even by the terms of the scrips (some of which were presented on multiple occasions and most of which were forged), over the course of the 208 days that elapsed from Dispensing Event 1, the Respondent had received an aggregate amount of medication that should have lasted 248 days (40 extra dosage days) [61] before this prescription was filled.[62]

The Respondent's Evidence

The Respondent's case-in-chief was presented through her own testimony and the testimony of her former medical assistant at McLeod Medical, Malana Diminovich.

Malana Diminovich testified that she has been a certified medical assistant for eleven years, and currently works at the ABQ Health Partners (ABQ) in Albuquerque, New Mexico. Tr. 719–20. Prior to beginning her current position at ABQ, Ms. Diminovich worked as a medical assistant at McLeod Medical for approximately five years, and left when the McLeod Medical HR manager accused her of forgery. Tr. 720–21, 739. Diminovich explained that she worked as the Respondent's medical assistant and that, during the Respondent's tenure at McLeod Medical, there were approximately six providers, each one of whom generally had two assigned medical assistants. Tr. 721, 739. Ms. Diminovich explained that she worked towards the back of the office in a space she shared with the HR manager, PA Francis, and the Respondent. Tr. 721–22. Diminovich testified that she observed some level of tension between the Respondent and the HR manager, PA Francis, and Dr. Edmonds. Tr. 741–42.

Ms. Diminovich stated that, when they worked together, she knew the Respondent's medical record system passcode and that she had sufficient computer access with that passcode to print out a prescription for controlled substances under the Respondent's name. Tr. 727. She testified that the scrips would then be printed out on blue (security-feature) paper by a printer located in Dr. Edmonds's office towards the front of the building. Tr. 724–26. Diminovich believed that Dr. Edmonds and PA Francis handled most of the patients requiring narcotics prescriptions,[63] but on those occasions when the Respondent would need to issue a controlled substance prescription, Ms. Diminovich would log into the computer system, select the Respondent's name as the provider, print out the prescription, and then present it to Dr. Edmonds for his signature. Tr. 730–31.

Diminiovich testified that she was aware that PA Francis was prescribing pain medication for the Respondent, and testified that she even remembered being in the room at times when Francis prepared the scrips. Tr. 732–33. She explained that she would see PA Francis write out a prescription and then either hand it to the Respondent or leave it on her desk. Tr. 732. Diminovich even remembered ''an occasional time'' when, at Francis's direction, she called prescriptions into pharmacies for the Respondent. Tr. 733.

Ms. Diminovich testified that she has been trained as an emergency medical technician (EMT) and that she received training on how to detect when an individual is under the influence of medication. Tr. 735–36. Applying her training as a volunteer EMT to her observations of the Respondent, Diminovich testified that she had no reason to believe that the Respondent was under the influence of narcotics or inappropriately seeking medication. Tr. 733–38.

There are several aspects of Ms. Diminovich's testimony that tend to somewhat diminish the extent to which it can and should be relied upon. Although the witness testified that she observed ''animosity'' between the Respondent and Dr. Edmonds, PA Francis, and the McLeod Medical HR manager, this testimony is not consistent with other credible evidence of record. Francis and Edmonds both described their working relationship

[59] According to a key included in the PMP/Marjenhoff Report, the pharmacy identification number associated with this dispensing event corresponds to the number assigned to the CVS Pharmacy. Gov't Ex. 6, at 11, 15.

[60] This anomaly remains unexplained by any Government witness, but likewise received no attention from the Respondent. In light of the other data in the scrip and dispensing label, which correspond to the data on the PMP/Marjenhoff Report, this discrepancy does not undermine the weight afforded to the exhibit. Still, it would have been helpful for the Government, as the proponent of the exhibit to explain this aspect of the document.

[61] It is worth noting that these amounts do not include whatever controlled substance medication the Respondent was receiving through prescriptions issued by Dr. Black and/or members of Dr. Black's staff.

[62] The Respondent's argument that ''the spacing of prescriptions follows a pattern one would expect to see if a professional was prescribing a controlled substance for a medical reason'' (ALJ Ex. 60, at 11) is completely bereft of any competent opinion of record to support it. No expert testified about the type or quantities of medication that could be appropriate here. On this record, the only comparison that can competently be examined is the dosages of medication set forth on forged, illegitimate scrips, and the Respondent regularly exceeded even those fictitious levels.

[63] Tr. 728–29.

with the Respondent as ''good,'' [64] and the Respondent described Dr. Edmonds as ''a very kind man'' and ''very polite and professional.'' Tr. 825–26. Additionally, the fact that the Respondent chose PA Francis to be her principal medical provider [65] when there were other choices in the office, including the ''very kind'' Dr. Edmonds,[66] tends to undermine any claim of tension between Francis and the Respondent. Furthermore, Diminovich never indicates whether the animosity she perceived predated or postdated the discovery at McLeod that the Respondent was the beneficiary of about a dozen forged controlled substance prescriptions on office scrip stationary. The testimony regarding office tension is vague and not entirely consistent with reliable record evidence.

Similarly, there are issues regarding Diminovich's testimony that, based on her training as an EMT, she is able to competently conclude that the Respondent was never observed to be under the influence of controlled substances during the time the two worked together at McLeod Medical. Tr. 733–34. Diminovich testified to having received some EMT training related to recognizing individuals under the influence of controlled substances. Tr. 735–37. Even if her competence in this area were to be conceded, *arguendo,* it conflicts with the Respondent's own testimony that she was receiving and (presumably) taking controlled substances from PA Francis, Dr. Black, and one of Dr. Black's associates during this time, as well as the Respondent's opiate-positive random urinalysis result. Tr. 364–66, 392, 400. Even the Respondent does not contest the fact that during this time she was taking controlled medications. Tr. 802–03, 810–11, 820–23, 838–39, 907–08, 914, 926. Diminovich's testimony in this regard even stands at some odds with her own testimony that she was aware that the Respondent was receiving controlled substance prescriptions from PA Francis. Tr. 732–33. If Ms. Diminovich's expertise to divine controlled substance use by patients is assumed at face value, and the Respondent's posture that she validly received controlled substances from PA Francis and Dr. Black's office is credited, it raises the issue of where the controlled substances she did receive were going. Put simply, either the Respondent was taking the prescribed medication and Diminovich (not withstanding her purported expertise) was unable to accurately perceive that, or Diminovich was correct, the Respondent had no opiates in her system, and the medication was being diverted for another purpose. A third (more likely) alternative is that Ms. Diminovich has no idea whether there were controlled substances in the Respondent's system, and that she testified in this manner in an effort to help the Respondent defend herself in these proceedings. To the extent that Ms. Diminovich's testimony was offered to establish that the Respondent never appeared to slur her words, sway in her gait, or in other ways appear over-medicated, this issue was never alleged by the Government or raised by the evidence.

Additionally, much of Ms. Diminovich's testimony was too vague and lacking in detail to stand up against other record evidence. She said she saw PA Francis prescribe controlled substances to the Respondent and hand the scrips over, but never says when or how often, and does not provide details about a single such event she recalls. In a similar vein, she says there was animosity, but never provides any timeframe, specific conversations, incidents, or areas of contention. She says that the Respondent did not seem like she was under the influence of medication but disregards the fact that, by every bit of uncontested evidence, the Respondent was receiving powerful controlled medications in significant doses. Additionally, by virtue of the fact that, like the Respondent (by whom she was supervised, and apparently amicably so), Ms. Diminovich left McLeod Medical in the midst of allegations of forgery leveled against her, it would be difficult to view her as a completely impartial witness regarding similar allegations related to her former supervisor during the time when they worked together. Tr. 739. In short, Ms. Diminovich's testimony was lacking in detail, inconsistent with other credible record evidence, and not entirely objective or plausible. While there were certainly credible aspects of her testimony, it must be viewed skeptically to the extent it conflicts with other, more credible record evidence.

The Respondent also testified as a part of her case-in-chief, and, during the course of her testimony, she listed a long and commendable professional history of varied experience in the medical profession, hospital administration, and academia. She explained that she is a licensed doctor of osteopathic medicine (D.O.), and that she is currently employed by the Indian Health Service (IHS) at its Crownpoint, New Mexico facility. Tr. 748–49, 752. Additionally, the Respondent stated that she is also the medical director at Corrections Corporation of America (CCA) in Estancia, New Mexico. Tr. 749.

The Respondent testified that she received her Bachelor of Arts degree in biology and science in 1983 from St. Thomas University in Miami and, in 1987, was awarded her medical degree from Nova Southeastern University, College of Osteopathic Medicine, in Fort Lauderdale. Tr. 750–51. According to the Respondent, she commenced her medical career as a rural health practitioner in Tennessee,[67] and eventually transitioned to solo practices in Indiana and then in Corydon, Iowa. Tr. 753–56. The Respondent related that before leaving Indiana for Iowa in 2000, she was involved in a severe automobile accident,[68] wherein she suffered multiple neck and femur fractures. Tr. 754–55. The Respondent testified that, as a result of the car accident, she was the beneficiary of eight reconstructive surgeries and was unable to work for a year. Tr. 754–55.

The Respondent testified that once she had recovered sufficiently to return to work, she spent four to five years practicing in Corydon, Iowa. Tr. 755–56. Because of restrictions placed on her license by the Iowa Medical Board,[69] and reckoning that she ''was fed up with medicine,'' [70] the Respondent testified that she temporarily left the practice of medicine and took a position as a billing and coding specialist at a hospital in Ganado, Arizona. Tr. 756–58, 764. The Respondent's professional odyssey next took her to Albuquerque, New Mexico, where, prior to her association with McLeod Medical, she joined the faculty of Brookline College as the Dean of Allied Health, a position with both administrative and teaching responsibilities.[71] Tr. 757, 759.

The Respondent explained that the restrictions put upon her by the Iowa Medical Board were the result of a settlement agreement she entered into with the Board, which placed her state medical license on probation while she completed several requirements. Tr. 763–65; Gov't Ex. 9. These requirements included a monetary fine, a series of continuing education courses, and monitoring by a preceptor doctor. Tr. 765. The Respondent testified that she

[64] Tr. 219, 359.

[65] Tr. 805.

[66] Tr. 825.

[67] Tr. 752.

[68] The Respondent testified that the accident occurred while she was driving to attend to a patient who was in labor. Tr. 754.

[69] *See* Gov't Ex. 9.

[70] Tr. 757.

[71] The Respondent testified that she taught courses in coding and billing at times when the college did not have a professor to teach those course offerings. Tr. 759.

fulfilled her obligations, completed a course on issues associated with prescribing controlled substances,[72] and worked (part-time and without compensation) under the supervision of a preceptor-physician [73] (''to keep [her] skills up'' [74]) at an IHS facility while she was working in Ganado. Tr. 766–70. When she began working at Brookline College, the Respondent applied for her state license to practice medicine in New Mexico. Tr. 770–71. In November 2010, one month after the Iowa Medical Board discharged her from her probation,[75] and upon receiving her New Mexico D.O. license,[76] the Respondent went to work at McLeod Medical, a position she held for approximately one year before she was fired. Tr. 760, 770–71.

At the time when she was hired at McLeod Medical, the Respondent no longer had a DEA COR (a previous COR having expired during the time she was ''fed up with medicine'' [77]), and McLeod Medical paid her COR application fee. Tr. 771–73. According to the Respondent, because she could not prescribe controlled substances without a COR, the staff at McLeod attempted to give her only patients that would not likely require prescriptions for controlled substances. Tr. 773–74. By the Respondent's recollection, when she worked at McLeod Medical, Dr. Edmonds and PA Francis bore the bulk of the practice's pain management patients. Tr. 773–75. On occasions, however, where one of her patients required such medication, the Respondent would write a prescription for controlled substances, and either Dr. Edmonds or PA Francis would authorize the prescription. Tr. 775–76. The Respondent testified that, on such occasions, she would write a note on a piece of paper and then hand it to her medical assistant, Ms. Diminovich. Tr. 788. Diminovich, who knew the Respondent's system passcode, would then log onto one of the office computers (sometimes the Respondent's computer) and, using the Respondent's passcode, generate the e-scrip. Tr. 785–86, 788, 796. At one point during her testimony, the Respondent indicated that Ms. Diminovich generated the scrips,[78] and, at another point, she indicated that the scrips would be printed out by Dr. Edmonds or PA Francis. Tr. 788. In both versions of the Respondent's account of things, irrespective of who did the actual printing, the scrip would be signed by Francis [79] or Edmonds. Tr. 788–89. The Respondent described McLeod Medical as a large office, with as many as thirteen to fourteen staff employees working there during the weekdays. Tr. 777, 782. She worked toward the rear of the office in an eight-by-ten foot area along with PA Francis and the HR manager. Tr. 777, 779. Dr. Edmonds's office and the reception area were situated in the front half of the office. Tr. 780. The Respondent said she worked full days at McLeod Medical from Monday through Thursday and a shorter day on Fridays. Tr. 782–83. The Respondent testified that, on Friday afternoons, she worked at the prison in Estancia. Tr. 783. PA Francis would typically arrive and leave an hour earlier than the Respondent, and Dr. Edmonds shared similar hours to the Respondent, with different days off. *Id.*

The Respondent indicated that, contrary to McLeod Medical IT policy, she remained logged onto her computer with her password for an entire day ''a few times.'' Tr. 789–90. When pressed on how frequently this occurred, the ''few times'' morphed into ''maybe once a week'' and, ultimately, to a clarification where she insisted that she had testified to ''one or two times a week.'' Tr. 790, 792. In any event, it seems that the office IT policy regarding password integrity was not strictly enforced, and that the computer on the Respondent's cubicle [80] likely remained for lengthy periods in a signed-in posture several times a week. Inasmuch as the Respondent testified that she regularly tasked Ms. Diminovich with the preparation of scrips and securing the required provider authorization, it is more likely than not that the extended sign-in periods were not ''mistake[s],'' [81] as she had presented, but, rather, done by design borne of convenience. The medical software in use at the time at McLeod did not extend medical assistants, such as Ms. Diminovich, the privilege of preparing controlled substance e-scrips.[82] By leaving the Respondent's computer logged on with the Respondent's password, it allowed the Respondent to regularly task Diminovich with preparing e-scrips from the ''piece of paper in front of the chart'' [83] to be presented for signature by Francis or Edmonds. The Respondent stated as much at another point in her testimony, where she agreed that Ms. Diminovich would sit at her desk and access the computer where the Respondent remained signed in. Tr. 796–97. The Respondent indicated that she ''never got into the controlled substance part [of the medical software program] because, you know, I never had a need for it. I was always asking people to do it for me.'' Tr. 797. However, when asked why Diminovich would be using the Respondent's computer instead of her own or one of the other computers in the office, the Respondent unconvincingly offered that it was ''[b]ecause the medical assistants' computers were like way down the hall, and if we were in a hurry and we were down in the corner there.'' Tr. 797. The Respondent further described Diminovich's computer as being ''at the nurse's station which was . . . a long way down the hall and very inconvenient.'' Tr. 799. This becomes even more confusing in view of the fact that, because the Respondent testified that her cubicle was in the rear of the office,[84] the nurse's station would have to have been closer to the exam rooms where the patients were seen, and that each exam room had its own computer that Diminovich presumably could have used. Tr. 800. In light of the working dynamic that the Respondent had developed with Diminovich, attributing this practice of allowing Diminovich to use her computer while she remained signed in to a ''mistake'' that occurred ''a few times'' [85] is simply not plausible, and the Respondent ultimately conceded as much. Tr. 798–99. Once the point was conceded, the Respondent stated that ''if I wanted [Diminovich] to write a—you know, she could also sign under her password at my computer and write out prescriptions, too.'' Tr. 798. But inasmuch as Diminovich's password did not authorize the preparation of controlled substance prescriptions, this answer is a bit confusing. The equivocation by the Respondent on this otherwise relatively

[72] The Respondent testified that she took a course entitled ''Prescribing Controlled Substance Pitfalls,'' and, subsequently, she has completed 160 hours of pain management training. Tr. 769. The coursework was in compliance of the terms of the IBO/SA. Tr. 770.

[73] The Respondent indicated that practicing with at preceptor was a condition placed upon her by the Iowa Medical Board in the IBO/SA. Tr. 758; Gov't Ex. 9, at 4.

[74] Tr. 768.

[75] Tr. 770.

[76] The Respondent explained that ''[a]nytime there's a doctor who's had any kind of sanctions or anything, it takes a little bit longer to get a [state medical] license, so that's what I was doing, working as a dean in the process of getting my New Mexico license.'' Tr. 771.

[77] Tr. 757.

[78] Tr. 785.

[79] The Respondent testified that because she and Dr. Edmonds had opposite days off and that, because of her close physical proximity in the office to PA Francis, her controlled substance scrips were more often authorized by Francis than by Edmonds. Tr. 788–89.

[80] Tr. 794–96.

[81] Tr. 789.

[82] Tr. 421.

[83] Tr. 788.

[84] Tr. 777.

[85] Tr. 789.

unimportant point regarding this arguably benign business practice borne of convenience says less about the merits of the Respondent's case than it does about her overall credibility.

The Respondent acknowledged that, on February 14, 2011, she asked to be placed on PA Francis's patient schedule.[86] Tr. 801–02, 813. The Respondent testified that while she did not relish the idea of being treated by a colleague in the same office,[87] in order to take advantage of the healthcare insurance provided by McLeod Medical, all employees were required to use McLeod Medical as their primary provider. Tr. 801–02. PA Francis agreed to see the Respondent and, after Francis's assigned medical assistant (Leilani) took a medical history, the Respondent testified that PA Francis asked some questions and conducted a brief examination. Tr. 802. By the Respondent's account, she explained to Francis that she needed a refill on a year's supply of thyroid medication, blood pressure medication, and Cymbalta (a non-controlled medication) for what she described as ''chronic pain.'' [88] Tr. 802–03, 806, 810. The Respondent testified that she also explained to Francis that she had attempted to make an appointment with a pain specialist, Dr. Pamela Black, for chronic pain in her neck, but that the appointment would ''be months down the line.'' Tr. 810. Although the Respondent testified that she could not get in to see Dr. Black for *months,* Francis recalled that the Respondent said it would be several *weeks* and that, on the day of her appointment, the Respondent only sought a one-month supply of medication. Tr. 175. The Respondent remembered telling Francis that ''well you know, I am under so much stress here, and I'm working so many hours, my neck is just killing me and I can't function. And in the past, you know, hydrocodone has worked, and could you write me a scrip for that[?]'' Tr. 810. According to the Respondent, PA Francis said ''no problem,'' and wrote prescriptions for all of the medications she had requested. Tr. 810.

During her testimony, the Respondent provided some details about her efforts to establish herself as a patient at Dr. Black's pain management practice and the difficulties she perceived in getting seen personally by Dr. Black. Tr. 808, 810, 820, 925. The Respondent testified that she contacted Dr. Black's office in July 2011 [89] to set up an appointment and that she was told to provide the office with x-rays, MRIs, and other medical records. Tr. 924–25. Then, in either July or August of that year, she met with a physician's assistant in Black's office, who prescribed her morphine.[90] Tr. 925–26. It would not be until a month later (August 2011), according to the Respondent, that she would have her first face-to-face visit with Dr. Black, at which point she received another controlled substance prescription. Tr. 926–27.

While Francis's account of her treatment relationship was restricted to the single, February 14, 2011 encounter and another where she administered an anti-nausea injection in the office,[91] the Respondent's recollection was quite different. According to the Respondent, PA Francis became her primary care provider, and she saw her ''periodically for refills on [her] medications,'' ''off and on for neck pain [and] trigger-point injections,'' as well as on an occasion where Francis administered an intravenous medication for dehydration caused by a virus. Tr. 811–14, 818. Also contrary to Francis's testimony (but consistent with Diminovich's testimony), the Respondent indicated that she ''periodically'' would ask (and presumably receive) hydrocodone prescriptions from PA Francis. Tr. 820. The Respondent described the interaction in this way:

> I would ask [PA Francis], I said, I just need—can you refill my hydrocodone and write me another prescription or whatever. And she said, Sure. And, you know, at that point, I would go on in and see another patient. And like I said, she left an hour ahead of me, so the majority of the time, it would be on my desk or I would—you know, she would ask [Ms. Diminovich]. She said, Can you print it out or whatever, and then I'll sign it.

Tr. 821. In addition to being inconsistent with PA Francis's testimony, this version of events also relies on Ms. Diminovich's ability to access a computer that can print out controlled substance prescriptions, a functionality not available to her without the Respondent intentionally permitting her access to the office medical software signed in as a practitioner. In view of the Respondent's testimony that she had others prepare controlled substance scrips for her, it would seem unlikely that, even if the Respondent's version were credited, the Respondent was not fully aware that Ms. Diminovich was regularly accessing the office software using the Respondent's credentials.

In an additional recollection that exceeded not only Francis's, but even Diminovich's, the Respondent also testified that sometimes Francis authorized Diminovich to administer injections of Toradol.[92] Tr. 819. According to the Respondent, when she would ask PA Francis ''can you give me a shot of Toradol . . . she'd say, Malana, get her some.'' Tr. 819.

Regarding the ill-fated phone call where the Respondent called out sick and subsequently met with Dr. Edmonds and PA Francis about employee-to-employee narcotics prescribing, the Respondent categorically denied ever telling anyone at McLeod Medical that she suffered a reaction to the hydrocodone prescribed by Francis on February 14, 2011. By the Respondent's account, she called in sick due to a headache or virus. Tr. 823. In the Respondent's words, ''I mean, I didn't think I'd have an adverse reaction to something I'd been on before.'' Tr. 823. The Respondent offered no explanation as to why the headache or virus would precipitate a meeting about the evils of controlled substance prescribing between employees, or any possible motivation for Francis to falsely attribute her illness to a medication reaction. The Respondent acknowledged that such a meeting did

[86] Although Francis was a physician's assistant at McLeod Medical, and Dr. Edmonds was a D.O. and, in her words, ''a very kind man'' (Tr. 825), the Respondent testified that she chose to establish with Francis because she ''was not comfortable seeing Dr. Edmonds as a provider, as my provider.'' Tr. 805.

[87] Tr. 802.

[88] The Respondent testified that she was not aware of any legal impediment that would have prevented her from prescribing these non-controlled substances to herself, but indicated that she did not do so because she had ''always been taught it was unethical, so [she] never did it.'' Tr. 804.

[89] This represents a significant departure from her representation to PA Francis during her February 14, 2011 appointment that she was already in contact with Dr. Black's office.

[90] Interestingly, the Patient Rx History Report portion of the PMP/Marjenhoff Report only lists two prescribers, ''FRA RA92'' (PA Francis) and ''BLA PA76.'' Gov't Ex. 6, at 14. Although this portion of the report, including the second prescriber's name, is redacted, the Respondent's version of events would seem to dictate that the report would reflect the presence of a third prescriber—which it does not. This also reflects on that portion of the Respondent's brief which points to the absence of any August 30, 2011 entry regarding a dispensing event from May Pharmacy. ALJ Ex. 60, at 5. The PMP/Marjenhoff Report only represents a query for prescriptions authorized by PA Francis (FRA RA92), with entries regarding the only other prescriber (BLA PA76) redacted. Gov't Ex. 6, at 1, 14. While it is beyond argument that the record would have benefited from additional, competent testimony regarding the PMP/Marjenhoff Report, notwithstanding the Respondent's protestation to the contrary, the absence of an entry concerning the August 30th prescription that was partially dispensed by May Pharmacy (Tr. 393), at least on the present record, does not undermine the strength of the Government's case.

[91] Tr. 202, 240–44.

[92] Toradol is not a controlled substance.

take place, but, contrary to the testimony of Edmonds and Francis, the Respondent characterized the tenor of the meeting as ''very casual'' and insisted that ''[t]here was no policy made.'' Tr. 824–25.

The Respondent testified that she saw PA Francis as her primary care provider approximately four to five times.[93] Tr. 819. She testified that she received refills of medication, trigger point injections of Novocain, treatment for dehydration, and MRIs and x-rays to be provided to Dr. Black. Tr. 811, 813–15, 818–20. The Respondent indicated that on those occasions when she asked for more hydrocodone prescriptions, PA Francis would leave a completed prescription on the Respondent's desk, or she would ask MA Diminovich to print it out for her. Tr. 820–22. At one point during her testimony, the Respondent stated that she received seven to eight prescriptions for controlled substances from PA Francis, and, at another point, she testified that the number could have been ten. Tr. 899. She also admitted, at first, that she received all ten prescriptions listed on the PMP/Marjenhoff Report as being dispensed from February 28, 2011 and onward and that she, or someone acting on her behalf, picked up each of these prescriptions. Tr. 901–03. At another stage of the proceedings, in response to a question by her counsel, the Respondent retreated from this position, demurring instead that she was not sure if she had obtained every one of those prescriptions. Tr. 918–21, 923.

Regarding her July 2011 positive drug test for opiates conducted by McLeod Medical, the Respondent testified that she had warned Dr. Edmonds to expect a positive result. Tr. 907. This was at some odds with the recollection of Dr. Edmonds, who testified that the Respondent did not indicate prior to the test that she was on opiates[94] and that, when the screen test administered at the office yielded a positive result, the Respondent told him she felt she was ''being singled out.'' Tr. 971. The Respondent testified that, contrary to Dr. Edmonds's testimony, the prescription bottle she produced in response to the positive urinalysis result was not dated subsequent to the urinalysis, but prior to it. Tr. 908. The Respondent initially testified that she had received a prescription for morphine from one of Dr. Black's associates,[95] but subsequently stated that the prescription for the morphine that triggered the positive drug test came from Dr. Black herself, and not from one of her associates. Tr. 927–28.

The Respondent related that, one Saturday morning following the positive urinalysis result, she received a phone call at home from Dr. Edmonds. Tr. 831–32. She explained that Dr. Edmonds told her that he had reason to believe that she had been forging prescriptions. Tr. 832. During her testimony, the Respondent took the position that Dr. Edmonds was mistaken in his recollection of their conversation. The Respondent recalled providing an answer with the word ''twice'' in it, but, according to her, she was responding to Edmonds's inquiry of how many times she had requested controlled substance prescriptions from Francis. Tr. 832–33. The Respondent never explained why, in July 2011, she would answer such a question with the word ''twice'' when she (and Ms. Diminovich) had previously testified that she was receiving controlled substances from PA Francis on a fairly regular basis since the preceding February, and certainly more than ''twice.'' In fact, when asked, the Respondent testified that she could not remember how many prescriptions she had received from PA Francis ''off the top of [her] head.'' Tr. 826. At another point in her testimony, the Respondent acknowledged that she had received ''seven or eight'' such prescriptions from PA Francis. Tr. 899. Even if it were momentarily assumed, *arguendo,* that the Respondent perceived the question to be how many controlled substance prescriptions she received from Francis, the answer ''twice'' makes no sense whatsoever.

The Respondent also denied ever admitting on the phone that she had forged prescriptions,[96] and, at the hearing, she flatly denied ever having forged a single scrip. Tr. 822, 834. The Respondent recalled being placed on administrative leave and being directed to both enroll in the MTP and write a letter of apology to PA Francis as conditions upon returning to work. Tr. 834–35. The Respondent testified that she wrote a letter of apology to PA Francis, pursuant to the conditions placed on her return to employment by Dr. Edmonds. Tr. 882. While the Respondent indicated that she did not apologize regarding the forgery accusations being levelled against her, she expressed her regret to PA Francis for having asked her to be her provider because her condition was possibly ''a little bit more complicated for her than [the Respondent] thought.'' Tr. 883. The Respondent also testified that she voluntarily contacted the MTP and underwent psychological and psychiatric examinations before being placed in a program of random drug screening. Tr. 840–42. According to the Respondent's testimony, the program assigned her a color code, and, each day, she was required to call a phone number. Tr. 842. If the Respondent's color was selected on any given day, she was required to report to a clinic and provide a urine sample that would be tested for indications of drug use. Tr. 842.

The Respondent presented evidence of a series of nineteen (19) MTP urine drug sample (UDS) test reports for alcohol and controlled substances occurring between October 21, 2011 and March 23, 2012.[97] Resp't Ex. 1. The UDS reports supplied by the Respondent indicated that (at least on those pages) the Respondent's urine was consistently negative for all tested substances.[98] *Id.* Consistent with the paperwork she provided, the Respondent testified that she never received any indication of a positive result for controlled substances during the time she was monitored by MTP. Tr. 881–82; Resp't Ex. 1. It is worthy of note that an examination of the nineteen urinalysis reports reveals no discernible pattern of testing, indicating that, consistent with the Respondent's testimony, the tests were taken at random. Resp't Ex. 1. However, five of the nineteen reports also contain handwritten notations (the origins of which do not benefit from any level of explanation on the record)[99] stating that the Respondent had missed certain test dates or that certain tests were conducted to ''make up'' for other dates.[100] *Id.* at 7, 9, 10, 13, 18. A

[93] This is in substantial conflict to PA Francis's recollection that she had seen the Respondent once to administer an in-office injection for nausea and once as a pain patient. Tr. 185, 241, 243–44.

[94] Tr. 968–70.

[95] Tr. 836, 838–39.

[96] Tr. 832.

[97] The admissibility of this exhibit was adjudicated in a post-hearing order dated May 27, 2014. ALJ Ex. 56.

[98] The tests purportedly monitored use of the following substances: Ethanol, Amphetamines, MDMA, Barbiturates, Benzodiazepines, Cannabinoids, Cocaine, Meperidine, Methadone, Methaqualone, Opiates, Oxycodone, PCP, and Propoxyphene. Resp't Ex. 1, at 1–19.

[99] During the post-hearing motion practice that ultimately resulted in the admission of the UDS reports over the Government's objection, the Respondent offered a letter from the Executive Director/Drug Screen Coordinator at MTP, and an attachment purporting to explain the notations. Resp't Ex. 1A(ID). Although considered on the narrow issue of establishing admissibility, the proposed exhibit was not offered or received in evidence, but even if it had been, the proposed exhibit did little more than attempt to translate the handwriting on the UDS reports, and, on some occasions, it did not even accurately do that.

[100] Resp't Ex. 1, at 7 (noting, on report of December 6, 2011 test, ''make up for 12/5 Snow''); *id.* at 9 (noting, on report of December 23, 2011 test, ''not called on 12/23'' and ''M/U for 12/21/11''); *id.* at 10 (noting, on report of December 30, 2011 test,

Continued

notation on another report indicates that the test was a ''non[-]random extra test.'' *Id.* at 12. While the results of each of the provided nineteen tests were benign, the unexplained notations on several of the reports suggest that the Respondent's record for appearing for urinalysis tests as directed was less than even. Tr. 860–73. The Respondent's testimony about her UDS rescheduling was likewise uneven. The Respondent testified to having missed at least four of the tests and, possibly, to missing two others. Tr. 861, 863, 865–66, 869–70, 870–71, 872–73. At first, the Respondent stated that she only missed tests because of inclement weather. Tr. 864; Resp't Ex. 1, at 7. However, as her testimony progressed, the Respondent conceded that other UDS test dates were missed due to conflicts with her work schedule. Tr. 866, 869, 871–73. Missed tests scheduled for December 21st and 28th were apparently made up two days later, on the 23rd and 30th respectively. Resp't Ex. 1, at 9–10. A test the Respondent apparently missed on March 2, 2012 was made up four days later, on March 6th. *Id.* at 18. A missed test originally scheduled for January 10, 2012 was not made up until eight days later, on January 18th,[101] but, curiously, a January 13, 2012 test was labeled ''non-random extra test,'' without any explanation in the paperwork, and took place three days after the January 10th miss. *Id.* at 12. The Respondent testified that she volunteered for this ''extra test'' via email because she had ''missed the week before,'' and she ''was just proving [her]self.'' Tr. 968–69.

Standing in isolation, there is nothing categorically pernicious about rescheduling one (or even several) random urinalysis test(s). As with many issues, it is generally a question of degree. Of eighteen random tests, the Respondent missed and rescheduled six. Resp't Ex. 1. Assuming (as she urges) that the UDS package she provided contains all testing, excluding the ''extra'' test, this presents a missed test rate of 33% of all randomly-scheduled UDS tests. Although rescheduling one-third of all random tests is by no means an insignificant number, the issue is (once again) less with the substance of her testimony than with its internal consistency. Initially, the Respondent stated that she only missed UDS tests due to inclement weather. Tr. 864. That position later morphed into misses borne of weather and work schedule. Tr. 866, 869, 871–73. The equivocation in her recollection and pattern of testimonial adjustments crafted on the spot to address uncontroverted evidence she was confronted with on the witness stand (such as the rescheduling notes from the UDS reports) diminishes the extent to which her testimony can be credited where it conflicts with other available evidence and testimony—and—she rescheduled one-third of her random urinalysis tests.

Despite her participation in the MTP program, the Respondent was eventually terminated from her employment at McLeod Medical by Dr. Edmonds in October 2011. Tr. 882. Even after losing her job, the Respondent testified that, ''to prove a point,'' she continued in the MTP program through March 2012 while she was also in the process of ''job seeking.'' [102] Tr. 847–48, 882.

The Respondent consistently and unambiguously eschewed any wrongdoing on her part. She denied ever presenting the prescription for hydrocodone written by PA Francis on February 14, 2011 to be filled at two different pharmacies,[103] and categorically denied ever forging any prescription for controlled substances. Tr. 822. She was likewise steadfast in her view that she never telephoned PIC Alvis and asked him to refrain from submitting her prescription through her insurance company. Tr. 947–48. According to the Respondent, the entire misadventure was the result of a mix-up caused by Dr. Black, who, without telling the Respondent, ''apparently had faxed this thing to [May Pharmacy].'' Tr. 947. The Respondent explained: ''I didn't realize that Dr. Black had done that, because, you know, she'll do it the day before, and you won't know it, you know, until you call the pharmacy.'' Tr. 948. Under the Respondent's version of events, she asked PIC Alvis to cancel the prescription, not because of an insurance issue, but because, before Alvis telephoned, she fortuitously received a phone call from May Pharmacy alerting her that a prescription she did not know about had been called in by Dr. Black and was ready for pickup. Tr. 947. Regrettably, this scenario does not explain the fact that PIC Alvis had been told by Pharmacist Romp at May Pharmacy that the Respondent picked up the prescription herself the day before she placed the phone call to Alvis and told him she was unaware of its existence. Tr. 284–85, 292–95. What's more, in view of the fact that May Pharmacy was only able to partially fill her medication, it is unclear why the staff there would have called her out of the blue to inform her that her prescription was ready for pick up, when the store did not yet possess the complete amount of the ordered quantity. The Respondent's account of events is simply not plausible.

At the hearing, the Respondent acknowledged that she knew it was wrong for a patient to see multiple prescribers for controlled substances and to fill those prescriptions at multiple pharmacies. Tr. 950–51. In her testimony, the Respondent initially ascribed her use of multiple pharmacies to present controlled substance prescriptions and collect them to convenience borne of the various routes she would take to commute from her home to McLeod Medical and back, based largely on seeking to avoid ''snow and ice.'' Tr. 828–31. This testimony was singularly unpersuasive and only enhanced in that respect by the fact that ten of the dispensing events in question took place between March and September, and, of that number, four occurred between July and September. Gov't Ex. 6, at 2–3, 13–14. This aspect of the Respondent's testimony was particularly telling on the issue of her credibility when viewed in light of her admissions that she is and was aware and understood that the principal reason that standard pain management contracts with patients include a clause prohibiting the use of multiple pharmacies is to avoid the risk of pharmacy-shopping and doctor-shopping, and that these are by no means new concepts in medical care. Tr. 933–34. The Respondent conceded that even under her view of events, she had been simultaneously utilizing multiple pharmacies and multiple practitioners,[104] and attributed this behavior as the result of the severity of the stress and pain she was experiencing. Tr. 948–49.

There were multiple additional areas where the Respondent's testimony was problematic. For example, the Respondent adamantly testified at great length that the prescriptions for hydrocodone written after February 14, 2011 were legitimately authorized by PA Francis. Tr. 820–22, 922. However, when she failed the random drug test conducted at McLeod Medical in July

''not called but maybe a test for 12/28 miss''); *id.* at 13 (noting, on report of January 18, 2012 test, ''make up for 1/10 working''); *id.* at 18 (noting, on report of March 6, 2012 test, ''make up for 3/2 working'').

[101] *Id.* at 13.

[102] Since the Respondent indicated she had already secured her current position at Indian Health Services in Crownpoint, New Mexico as of December 2011 (Tr. 752), it is difficult to understand her testimony as to why she still considered herself to be ''job seeking'' as late as March 2012.

[103] Tr. 942, 944.

[104] Tr. 950–51.

2011 by testing positive for opiates, the Respondent did not testify that she explained to Dr. Edmonds that she was receiving controlled substance prescriptions from PA Francis.[105] Instead, the Respondent testified that she presented to Dr. Edmonds a bottle of morphine prescribed by Dr. Black in an effort to explain why she had tested positive.[106] Tr. 907–08. If the Respondent truly believed she was legitimately obtaining prescriptions for hydrocodone, it defies reason why she would not have quickly and freely disclosed to Dr. Edmonds that she was receiving the medication from PA Francis, especially since this fact could have been quickly confirmed by McLeod Medical's own records.[107] The Respondent's testimony that she was unaware of any policy against employees prescribing narcotics to other employees[108] makes this even more bewildering.

Moreover, at the time her urinalysis was conducted, the Respondent had been presented with a form that would have allowed her to list medications she was taking. Tr. 964. The Respondent did not list any medications on the form. Tr. 958, 964, 966–70. The absence of an appropriate note on the applicable form, and the Respondent's decision not to inform Dr. Edmonds that she was receiving controlled substances from PA Francis at the time the screen test showed positive, as well as her decision to only explain the positive drug test by presenting a prescription bottle dated after the test, all undermine her testimony. On this record, it is far more likely that the Respondent's positive urinalysis test was the result of taking medications procured over PA Francis's forged signatures, and for which the Respondent had no ready, lawful explanation that lent itself to disclosure to Dr. Edmonds.

The Respondent's testimony regarding her relationship with Dr. Black was also confusing, and its apparent contradictions call further into question her credibility as a witness. At first, the Respondent testified that when she first asked to be seen by PA Francis as a patient on February 14, 2011, she had already set up an appointment with Dr. Black. Tr. 801, 808. Then, she stated that she told PA Francis during that initial visit that she had attempted to make an appointment with Dr. Black but that the appointment would be ''months down the line.'' Tr. 810. This would mean that, notwithstanding the severe pain she claimed she was enduring, the appointment that the Respondent had purportedly set up with Dr. Black's pain practice was scheduled five to six months hence. The Respondent later testified that her initial contact with Dr. Black's office occurred (five months later) in July 2011 when she attempted then to schedule an appointment with her. Tr. 924–25. Even setting aside PA Francis's (credible) recollection that the Respondent told her she would be seeing Dr. Black in several weeks, and only needed medication for one month,[109] the Respondent's testimony regarding when she initially made appointment arrangements with Dr. Black, as well as her purported timeline of her history with Black's practice, labors under this unexplained, internal inconsistency of the time when she had her first contact with Black's practice.

At one point in her testimony, the Respondent was confident that the morphine prescription that resulted in the positive McLeod Medical office UDS was written by Dr. Black. Tr. 932–33. At another point in her testimony, the Respondent was equally resolute that the causal prescription was issued by ''Dr. Black's associate.'' Tr. 839. This is another in a pattern of testimonial inconsistencies, but regardless of which version reflects reality, for the reasons that follow, neither version is helpful to the Respondent's cause. The Respondent testified that her telephone call to Dr. Black's office to set up an initial appointment took place sometime in July 2011, with the first appointment occurring approximately two weeks later. Tr. 925–26. During that initial visit (which would have to be mid-July at the earliest), she was seen by a PA, who, according to the Respondent, wrote her a prescription for morphine. Tr. 926. The Respondent then stated that she finally met with Dr. Black approximately one month after the first appointment, which, according to the rough timeline of events given by the Respondent at the hearing, would have taken place sometime between mid-August through mid-September 2011. Tr. 926–27. The date of the McLeod Medical urinalysis, however, was July 19, 2011, at least a month prior to her appointment with Dr. Black herself.[110] If that version of her testimony is credited, which recollects that the morphine that resulted in the positive test was prescribed by Dr. Black herself (not a staff member)[111] at the Respondent's second visit to her office (in mid-August), that would mean that the prescription issued by Dr. Black was issued at least a month after the urinalysis took place.

The Respondent's timeline is even problematic if that portion of her testimony is credited which holds that it was a prescription from ''Dr. Black's associate''[112] that caused the positive result. Dr. Edmonds credibly testified that the Respondent presented him with a prescription bottle dated July 25, 2011. Tr. 366. Even assuming that the opiate-positive result on the July 19th urinalysis was the result of a mid-July prescription written by a PA in Dr. Black's office prior to the test, there would be no reason for the Respondent to be in possession of a July 25, 2011 prescription bottle. July 25th would be a date between the appointment with Dr. Black's PA and the date (a month later by her account) when she was seen by Dr. Black. During her testimony, there was no mention of an additional appointment between the first PA appointment and the appointment with Black, and the Respondent's recollection of her conversation with the PA reflected that she would be seeing Dr. Black on her next visit. Tr. 926. Even if the positive urinalysis was the result of a morphine prescription she received from Dr. Black's PA in mid-July (a month prior to her first encounter with Dr. Black), there is no explanation as to why (as credibly testified to by Dr. Edmonds) she would have had a prescription bottle dated July 25, 2011,[113] a date that occurred during the month between the PA and Dr. Black appointments.

Needless to say, the conflict in the Respondent's timeline of events here does not enhance her credibility. In one telling exchange, the Respondent testified that she did not remember the date of the McLeod urinalysis, and thought that it may have occurred in October of 2011,[114] a date that would have lent itself much better to the Respondent's testimonial timeline, irrespective of the dates of treatment she proposed as having occurred at Dr. Black's practice.

During her testimony, the Respondent indicated that all her prescriptions were picked up from the various pharmacies by herself or a member of her family. Tr. 901–03. Later, in response to questioning from her counsel, the

[105] Neither did Dr. Edmonds testify to such a conversation.

[106] Dr. Edmonds testified that the bottle was dated subsequent to the urinalysis. Tr. 363.

[107] Indeed, perhaps the greatest puzzlement of this case is the odd avoidance on the part of both parties to *subpoena* and produce medical records from McLeod Medical and Dr. Black that would likely have resolved almost all contested issues.

[108] Tr. 828.

[109] Tr. 175, 182–83.

[110] Tr. 365.

[111] Tr. 927–28.

[112] Tr. 839.

[113] Tr. 366.

[114] Tr. 932.

Respondent claimed that she could not recall whether she had obtained all of those same prescriptions. Tr. 918–19, 921, 923. The initial response, asked and answered directly, rings as more credible, and is corroborated, at least to some extent, by PIC Alvis's recollection that the Respondent's prescriptions dispensed at the Walmart Pharmacy Edgewood were picked up by either the Respondent or members of her family. Tr. 315–16.

As described above, in addition to being the witness with the most at stake in the outcome of the proceedings, the Respondent's testimony throughout this hearing was punctuated by internal inconsistencies, implausibility, and chronic equivocation. As discussed in great detail, *supra,* there were several times where her answers seemed to evolve with objective evidence and dates she was confronted with. Accordingly, while there were parts of the Respondent's testimony that were credible, where her testimony conflicts with other, more credible aspects of the record, it cannot prevail.

The Analysis

The Government urges that the Respondent's application for DEA COR be denied because the granting of a COR to the Respondent would be inconsistent with the public interest. Under 21 U.S.C. 823(f),[115] the Agency may deny the application for a COR upon supported findings that ''the issuance of such registration . . . would be inconsistent with the public interest.'' 21 U.S.C. 823(f). The following factors have been supplied by Congress in determining ''the public interest'':

(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.

Id.

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Agency may properly give each factor whatever weight it deems appropriate in determining whether an application for a registration should be denied. *Id.; David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993); *see Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005); *Joy's Ideas,* 70 FR 33195, 33197 (2005); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16422, 16424 (1989). Moreover, the Agency is ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *Morall,* 412 F.3d at 173. The Agency is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick* v. *DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (holding that the Agency's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors and that remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest. . . .'' *Jayam Krishna-Iyer,* 74 FR 459, 462 (2009).

In the adjudication of an application for a DEA COR, the DEA has the burden of proving that the requirements for registration are not satisfied. 21 CFR 1301.44(d). Where the Government has sustained its burden and established that an applicant has committed acts inconsistent with the public interest, that applicant must present sufficient mitigating evidence to assure the Agency that he or she can be entrusted with the responsibility commensurate with such a registration. *Steven M. Abbadessa, D.O.,* 74 FR 10077, 10078, 10081 (2009); *Jackson,* 72 FR at 23853. Where the Government has met this burden, the applicant must show an acceptance of responsibility for its misconduct and a demonstration that corrective measures have been undertaken to prevent the re-occurrence of similar acts. *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010). In determining whether and to what extent a sanction is appropriate, consideration must be given to both the egregiousness of the offense established by the Government's evidence and the Agency's interest in both specific and general deterrence. *Fred Samimi, M.D.,* 79 FR 18698, 18713 & n.40 (2014); *David A. Ruben, M.D.,* 78 FR 38363, 38364, 38385 (2013).

Normal hardships to the practitioner, and even the surrounding community, which are attendant upon the denial of a registration, are not a relevant consideration. *Linda Sue Cheek, M.D.,* 76 FR 66972, 66972–73 (2011); *Gregory D. Owens, D.D.S.,* 74 FR 36751, 36757 (2009). The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs., Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether an applicant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct, *Hoxie,* 419 F.3d at 483; *see also Ronald Lynch, M.D.,* 75 FR 78745, 78754 (2010) (holding that the Respondent's attempts to minimize misconduct undermined acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Abbadessa,* 74 FR at 10078; *Krishna-Iyer,* 74 FR at 463; *Medicine Shoppe–Jonesborough,* 73 FR 364, 387 (2008).

Factors 1 & 3: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority; and Any Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

Regarding Factor 1, it is undisputed that the record contains no specific recommendation from authorities in New Mexico, the state where the Respondent seeks to hold a COR. However, the record does contain a settlement agreement and final order from the Board of Medical Examiners of the State of Iowa (Iowa Board).

Although the plain language of the CSA appears to require a recommendation addressed to DEA's COR decision, the Agency has indicated that it has ''typically taken a broader view as to the scope of this factor.'' *Ralph J. Chambers, M.D.,* 79 FR 4962, 4969 (2014) (citing *Tony T. Bui, M.D.,* 75 FR 49979, 49986 (2010)); *see also Kenneth Harold Bull, M.D.,* 78 FR 62666, 62672 (2013). Whatever the outer limits are of the Agency's ''broader view,'' it is not so broad that it includes recommendations from a state beyond the state where the Respondent seeks to hold her DEA COR. *Zizhuang Li, M.D.,* 78 FR 71660, 71663 (2013) (holding that the state where an applicant seeks to hold a COR is ''the appropriate State

[115] Regrettably, in its OSC, prehearing statements, and closing brief, the Government consistently and erroneously relies upon 21 U.S.C. 824, the CSA revocation statute. ALJ Ex. 1, at 1; ALJ Ex. 4, at 1; ALJ Ex. 7, at 1; ALJ Ex. 40, at 1; ALJ Ex. 59, at 1.

licensing board or professional disciplinary authority'' within the meaning of 21 U.S.C. 823(f), not a state where the applicant formerly practiced and is no longer authorized to handle controlled substances). Hence, even to the extent that a COR recommendation intent could be extrapolated from the order of the Iowa Board, it will carry no weight under this factor.

As discussed, *supra,* the record does not contain any recommendation from New Mexico state authorities. However, the fact that a state has not acted against an applicant's state authority is not dispositive in this administrative determination as to whether granting her registration is consistent with the public interest. *Patrick W. Stodola, M.D.,* 74 FR 20727, 20730 (2009); *Krishna-Iyer,* 74 FR at 461. It is well-established Agency precedent that ''state [authority] is a necessary, but not sufficient condition for registration.'' *John H. Kennedy, M.D.,* 71 FR 35705, 35708 (2006) (quoting *Leslie,* 68 FR at 15230). DEA bears an independent responsibility to determine whether a registration is in the public interest. *Mortimer B. Levin, D.O.,* 55 FR 8209, 8210 (1990). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 FR 6580, 6590 (2007), *aff'd, Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008), *cert. denied,* 555 U.S. 1139 (2009). Congress vested authority to enforce the CSA in the Attorney General, not state officials. *Stodola,* 74 FR at 20735 n.31. Thus, contrary to the position taken by the Respondent in her brief,[116] on these facts, the absence of a recommendation by the appropriate state licensing board does not weigh for or against a determination as to whether granting the Respondent's COR application would be consistent with the public interest. *See Roni Dreszer, M.D.,* 76 FR 19434, 19444 (2011) (''[T]he fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of the Respondent's DEA certification is consistent with the public interest.'').

Regarding Factor Three, the record in this case does not contain evidence that the Respondent has been convicted of (or even charged with) [117] a crime related to any of the controlled substance activities designated under this provision in the CSA. Although the standard of proof in a criminal case is more stringent than the standard required at an administrative proceeding, and the elements of both federal and state crimes relating to controlled substances are not always co-extensive with conduct that is relevant to a determination of whether registration is within the public interest, evidence that an applicant has been convicted of crimes related to controlled substances is a factor to be evaluated in reaching a determination as to whether he or she should be entrusted with a DEA COR. The probative value of an absence of any evidence of criminal prosecution is somewhat diminished by the myriad of considerations that are factored into a decision to initiate, pursue, and dispose of criminal proceedings by federal, state, and local prosecution authorities. *See Robert L. Dougherty, M.D.,* 76 FR 16823, 16833 n.13 (2011); *Dewey C. MacKay, M.D.,* 75 FR 49956, 49973 (2010) (''[W]hile a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry.''), *aff'd, MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011); *Ladapo O. Shyngle, M.D.,* 74 FR 6056, 6057 n.2 (2009). Therefore, contrary to the position taken by the Respondent,[118] the absence of criminal convictions militates neither for nor against the denial sought by the Government.

Accordingly, consideration of the record evidence under Factors One and Three weighs neither for nor against the Government's petition to deny the Respondent's COR application.

Factors 2 & 4: The Respondent's Experience in Dispensing Controlled Substances; and Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances

Regarding Factor 2, in requiring an examination of an applicant's experience in dispensing controlled substances, Congress manifested an acknowledgement that the qualitative manner and the quantitative volume in which an applicant has engaged in the dispensing of controlled substances may be significant factors to be evaluated in reaching a determination as to whether an applicant should be (or continue to be) entrusted with a DEA COR. In some (but not all) cases, viewing an applicant's actions against a backdrop of how her regulated activities have been performed within the scope of her registration can provide a contextual lens to assist in a fair adjudication of whether registration is in the public interest. In this regard, however, the Agency has applied principles of reason, coupled with its own expertise, in the application of this factor. For example, the Agency has taken the reasonable position that this factor can be readily outweighed by acts held to be inconsistent with the public interest. *Krishna-Iyer,* 74 FR at 463; *see also Hassman,* 75 FR at 8235 (acknowledging Agency precedential rejection of the concept that conduct inconsistent with the public interest is rendered less so by comparing it with a respondent's legitimate activities that occurred in substantially higher numbers); *Paul J. Cargine, Jr.,* 63 FR 51592, 51560 (1998) (''[E]ven though the patients at issue are only a small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future.''). Similarly, in *Cynthia M. Cadet, M.D.,* the Agency determined that existing List I precedent [119] clarifying that experience related to conduct within the scope of the COR sheds light on a practitioner's knowledge of applicable rules and regulations would not be applied to cases where intentional diversion allegations were sustained. 76 FR 19450, 19450 n.3 (2011). The Agency's approach in this regard has been sustained on review. *MacKay,* 664 F.3d at 819.

In addition to Factor 2 (experience in dispensing), Factor 4 (compliance with laws related to controlled substances) is also germane to a correct resolution of the present case. In order to maintain the ''closed regulatory system'' designed by Congress in the CSA to ''prevent the diversion of drugs from legitimate to illicit channels,'' *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005), Factor 4 looks to the applicant's compliance with federal and state laws related to controlled substances as an indicator of whether an applicant should be entrusted with the responsibilities of a registrant, 21 U.S.C. 823(f)(4). A careful look at the testimony and evidence presented at the hearing demonstrates that the Respondent has failed to comply with both federal and state laws related to controlled substances, and her conduct in this

[116] ALJ Ex. 60, at 14.

[117] DI Bencomo's testimony that DEA ''tried'' to bring criminal charges was not considered for any purpose in this recommended decision. Tr. 655.

[118] ALJ Ex. 60, at 14.

[119] *See, e.g., Volusia Wholesale,* 69 FR 69409, 69410 (2004).

respect must be considered in regard to her ability to assume the responsibilities of a registrant in accordance with the public interest.

The evidence of record establishes that, in 2011, the Respondent committed controlled substance-related transgressions in New Mexico (New Mexico Misconduct), and, in 2005, was disciplined in Iowa for misconduct that occurred in that state (Iowa Misconduct). The New Mexico Misconduct is relevant under Factor 4, and the Iowa Misconduct is relevant under both Factors 2 and 4.

The CSA provides that it is ''unlawful for any person knowingly or intentionally . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.'' 21 U.S.C. 843(a)(3). The evidence presented at the hearing regarding the New Mexico Misconduct shows that the Respondent violated this provision of the CSA on eleven (11) separate occasions.

On February 16, 2011 (Dispensing Event 2), the Respondent improperly presented the same February 14 controlled substance scrip to Walgreens Pharmacy that she had previously presented to Walmart Pharmacy Edgewood (Dispensing Event 1) via facsimile. The scrip, which was validly authorized by PA Francis,[120] indicated that the prescription was not to be refilled. Gov't Ex. 3, at 1–2; Gov't Ex. 8, at 1. The second presentation was made two days after the first, at a different pharmacy. There is little question that the Respondent's actions were intentional and calculated to procure twice as much medication as PA Francis prescribed. The preponderant evidence supports the Respondent's fraudulent, deceptive use of the February 14 scrip to obtain controlled substances in Dispensing Event 2 through subterfuge. *See* 21 U.S.C. 843(a)(3).

In the same way, the evidence establishes that the Respondent presented the same March 11 scrip to acquire controlled substances at Walgreens Pharmacy (Dispensing Event 4), Walmart Pharmacy Edgewood (Dispensing Event 5), and Walmart Pharmacy Albuquerque (Dispensing Event 6) on March 11, 15, and 21, respectively. Even apart from forged signatures on the scrip (discussed, *infra*), the successive presentation of these scrips to dupe multiple pharmacies into dispensing controlled substances was also done in violation of 21 U.S.C. 843(a)(3).

The evidence of record also preponderantly establishes that the Respondent, on ten occasions (Dispensing Events 3–12),[121] presented scrips that contained the forged signature[122] of PA Francis to multiple pharmacies, and that when she presented these scrips, the Respondent was well aware that the signatures were forged. It is clear that the Respondent had access to the computer system that generated these scrips, and that she, or members of her immediate family, picked up the dispensed medications. Tr. 208, 217, 283, 314, 382–85, 725–28, 826, 901–03. Further, the lengths that the Respondent went to in obstructing PIC Alvis's telephonic inquiries to McLeod Medical to resolve his (ultimately justified) misgivings about the legitimacy of the prescription, demonstrated significant consciousness of guilt on the part of the Respondent, as did her request to the Walmart Pharmacy Edgewood staff to refrain from submitting the prescription to her insurance carrier due to a contrived coverage issue. Tr. 285–88, 268–69. Additional evidence of knowing culpability can be inferred by the Respondent's decision to present the scrips at multiple pharmacies. This approach was plainly calculated to reduce the likelihood of detection by vigilant pharmacists who would be likely to ask probing questions about the frequency of new scrips for the same medication. Utilizing multiple pharmacies facilitated the presentation of a single scrip to effect multiple dispensing events. Thus, the manner in which these scrips (forged and otherwise) were employed to procure controlled substances by the Respondent violated 21 U.S.C. 843(a)(3).

The Respondent has also violated New Mexico state law related to controlled substances. Under New Mexico state law,

> [i]t is unlawful for a person intentionally to possess a controlled substance unless the substance was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of professional practice or except as otherwise authorized by the Controlled Substances Act.[123]

N.M. Stat. Ann. § 30–31–23(A).[124] Here, the evidence demonstrates that, on those same eleven occasions, the Respondent (or through family members acting on her behalf) obtained possession[125] of the controlled substances dispensed during Dispensing Events 2–12, and did so through the use of invalid prescriptions.[126] Gov't Ex. 5, at 3–12; Tr. 826. As discussed, *supra,* the prescription the Respondent used to obtain controlled substances in Dispensing Event 2 was no longer valid at the time of presentation because the medication it authorized had already been filled in Dispensing Event 1, two days earlier. The scrip authorized the dispensing of a fixed quantity of controlled substances, not double that amount at different pharmacies. Thus, forged scrips were presented on ten occasions, one was improperly presented when it was no longer valid, and the credible evidence establishes that all were picked up by the

[120] Tr. 185.

[121] March 1, March 11, March 15, March 21, March 31, April 6, July 9, August 4, August 9, September 10.

[122] In its brief, the Government argues that its evidence establishes that the ''Respondent illegally acquired hydrocodone on ten occasions by forging ten prescriptions . . . using PA Francis's DEA number.'' ALJ Ex. 59, at 25. At another point in its brief, the Government argues that ''the evidence shows that the Respondent forged and filled ten hydrocodone prescriptions to herself using PA Francis's DEA number.'' *Id.* at 28. Technically, the prescriptions were filled, not by the Respondent, but by hapless pharmacists, duped by the Respondent into doing so. To the extent that the Respondent argues that no handwriting or forgery evidence is present in the record that directly connects her to the actual scrawling of Francis's fabricated signature (ALJ Ex. 60, at 11, 15), she is correct. While there is ample evidence of record to support the proposition that PA Francis's signature was forged on ten scrips, and that these forged scrips were presented to multiple pharmacies by the Respondent to wrongfully obtain controlled substances, there is no evidence that the Respondent, herself, did the actual forging.

[123] This statute clearly shares the CSA's goal of preventing the diversion of controlled substances. *See Fred Samimi, M.D.,* 79 FR 18698, 18710 (2014) (stating that, to be considered under Factors 2 and 4, violations of state law must have a sufficient nexus to the CSA's goal of preventing the diversion of controlled substances).

[124] The CSA contains an almost identical provision as this section in New Mexico state law. *See* 21 U.S.C. § 844(a) (''It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice. . . .''); *see also Tyson D. Quy, M.D.,* 78 FR 47412, 47412 n.1 (2013) (sustaining the finding of a violation of 21 U.S.C. § 844(a) where the respondent obtained controlled substances without a valid prescription). The Government, however, did not allege a violation of this provision.

[125] The Respondent's argument that the record contains no evidence that the controlled medications were actually dispensed (ALJ Ex. 60, at 9) is illogical and unpersuasive. The Respondent admitted that she or her family members picked up her prescriptions from the various pharmacies where they had been presented. Tr. 901–03. Furthermore, in light of her litigation posture that all the prescriptions in question were legitimately issued by PA Francis, it would have been illogical and implausible for her (or some mystery person) to have presented these scrips and then left them unclaimed at pharmacies all over the Albuquerque area. There is simply no basis in the record (or in reason) to support the Respondent's suggestion that an unknown mystery person, for unknown reasons, procured signed, discarded scrips written on behalf of the Respondent, presented them at various pharmacies, and then, unbeknownst to the Respondent, surreptitiously picked them up with a photo identification. ALJ Ex. 60, at 11.

[126] It is uncontested that the allegations in this case involve only prescriptions and not orders.

Respondent or members of her family on her behalf. Tr. 283, 826, 901–03.

The controlled substances the Respondent procured under Dispensing Events 3–12 were likewise not obtained pursuant to valid prescriptions under federal and state law. Under the implementing regulations of the CSA, in order for a prescription for controlled substances to be valid, it must be ''issued for a legitimate medical purpose by an individual *practitioner* acting in the usual course of his professional practice.'' 21 C.F.R. 1306.04(a) (emphasis added). As defined by the CSA, a ''practitioner'' is a ''physician . . . or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . ., to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice or research.'' 21 U.S.C. 802(21); *see* 21 C.F.R. 1306.02 (referring back to the definitions found in 21 U.S.C. 802). The record evidence shows that the prescriptions filled by forged scrips on these ten occasions were not authorized by a physician or other person licensed to prescribe controlled substances, but by a forger. PA Francis credibly denied ever signing or authorizing the prescriptions filled at Dispensing Events 3–12. Tr. 205–06, 261. Documents with forged signatures are not issued by one with authority to do so and, as such, are not valid prescriptions under federal law. 21 C.F.R. 1306.04(a)

Neither were the scrips presented in Dispensing Events 3–12 valid under state law. In New Mexico, a ''prescription'' is defined as ''an order given individually for the person for whom is prescribed a controlled substance, either directly from a licensed practitioner or the practitioner's agent to the pharmacist . . . or indirectly by means of a written order signed by the prescriber.'' N.M. Stat. Ann. § 30–31–2(S). Once again, the scrips presented to the pharmacies on these occasions were not authorized or signed by a ''licensed practitioner,'' and, thus, the Respondent did not obtain the controlled substances dispensed on Dispensing Events 3–12 through a valid prescription. The Respondent's possession of controlled substances violated New Mexico state law because such possession was not ''obtained pursuant to a valid prescription,'' as defined by federal and state law. N.M. Stat. Ann. § 30–31–23(A).

Additionally, the sheer amount of the controlled substances obtained by the Respondent adds significantly to the equation. During the 208 days the Respondent was presenting bad prescriptions, she received 248-days' worth of medication. The exorbitant quantities of controlled substances she was obtaining, where the dates overlapped and exceeded even the dosages set forth in the forged scrips, eviscerates any rational claim of lack of knowledge.

Thus, the evidence demonstrates that the Respondent, on eleven different occasions, violated both the CSA [127] and New Mexico state law [128] when she obtained possession of controlled substances through Dispensing Events 2–12, and improperly obtained powerful, controlled drugs in copious amounts. Consideration of the New Mexico Misconduct evidence of record under Factor 4 (compliance with federal and state controlled substances laws), militates so powerfully in favor of denying her COR application, that this evidence, standing alone is sufficient to satisfy the Government's burden of production to establish a *prima facie* case.

The Iowa Misconduct likewise reflects adversely on Factor 4, but also on Factor 2. In the Iowa Board Order/Settlement Agreement, the Respondent and the Iowa Board agreed that the Respondent ''inappropriately and repeatedly prescrib[ed] controlled drugs to numerous patients in violation of the laws and rules governing the practice of medicine'' and that the Respondent violated Iowa's pain management rule, Iowa Admin. Code r. 653–13.2 (2013), which, *inter alia,* serves ''to minimize the potential for substance abuse and drug diversion,'' *id.* r. 653–13.2(1).[129] The agreed-to violations provide that the Respondent prescribed and continued to prescribe controlled substances to multiple patients in the face of drug-seeking, doctor-shopping, and drug-abuse indicators, and without appropriately documenting these features in the patients' charts. Gov't Ex. 9, at 12–17.

It is worthy of note that while the Iowa proceedings clearly raise issues that are relevant to this determination, the Iowa Board Order/Settlement Agreement, the Government's arguments to the contrary notwithstanding,[130] has not been extended preclusive effect. Agency precedent has acknowledged the Supreme Court's recognition of the applicability of the *res judicata* doctrine in administrative proceedings. *Christopher Henry Lister, P.A.,* 75 FR 28068, 28069 (2010) (citing *Univ. of Tenn.* v. *Elliot,* 478 U.S. 788, 797–98 (1986)) (''When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*[.]''). Factual findings and legal conclusions based on state law reached by state administrative tribunals are given preclusive effect in DEA administrative proceedings under the subset of the doctrine known as collateral estoppel (also referred to as ''issue preclusion''). *Thomas Neuschatz, M.D.,* 78 FR 76322, 76325–26 (2013); *Robert L. Dougherty, M.D.,* 76 FR 16823, 16830 (2011); *Gilbert Eugene Johnson, M.D.,* 75 FR 65663, 65666 (2010); *see James William Eisenberg, M.D.,* 77 FR 45663, 45663–64 (2012) (taking official notice of findings in state medical board censure order with preclusive effect).

While the Agency recognizes the preclusive effect of findings and state law conclusions resulting from state administrative hearings, it has not extended, *carte blanche,* the same effect to settlement agreements (or consent agreements) entered between respondents and state agency boards. As discussed, *supra,* the IBO/SA provided by the Government constitutes the ratification of a settlement agreement between the Respondent and the Iowa Board. In *Ralph J. Chambers, M.D.,* the Agency held that a settlement agreement between the respondent and state medical board was not entitled to preclusive effect in the DEA proceedings because the settlement agreement said ''nothing about whether [the respondent] would be estopped from challenging the findings in a subsequent proceeding brought by the Board (or another state agency) against him.'' 79 FR 4962, 4970 (2014). While the respondent in *Chambers* had agreed not to seek judicial review of the settlement agreement, the Agency held that the Government's failure to cite state authority holding that such language was entitled to preclude the parties from re-litigating the issues raised in the settlement agreement barred the settlement agreement from having any preclusive effect. *Id.* A similar issue arose in *David A. Ruben, M.D.,* in which the Agency held that the findings memorialized in two orders based on consent agreement between the respondent and state agency board were entitled to preclusive effect in the DEA proceedings because, in the consent agreements, the respondent (1) manifested an intent not to contest the validity of the orders in subsequent

[127] 21 U.S.C. § 843(a)(3).

[128] N.M. Stat. Ann. § 30–31–23(A).

[129] The charging document does not allege a violation of a specific provision within Iowa's pain management rule.

[130] ALJ Ex. 59, at 29.

proceedings before the state board, (2) relinquished his right to judicial review of the matters alleged in the orders, and (3) waived his right to any further action related to the orders. 78 FR 38363, 38366 (2013). Because state law allowed for a settlement agreement to have preclusive effect if the parties to the agreement had manifested such intent, the Agency held that the respondent in *Ruben* was precluded from re-litigating the same findings at the DEA proceedings. *Id.* at 38366–67.

While the complex facts in both *Chambers* and *Ruben* do not lend themselves to a discernable bright-line rule for when a settlement or consent agreement should be given preclusive effect, it is clear that Agency precedent dictates that the parties to the agreement must have manifested their intent that the findings and conclusions accompanying the agreement be non-challengeable and binding upon the parties. *Chambers,* 79 FR at 4970; *Ruben,* 78 FR at 38366. Also relevant to this determination is an analysis of whether state law recognizes the nature and wording of the agreement entered into by the parties as creating a preclusive effect upon the parties in subsequent litigation. *Chambers,* 79 FR at 4970; *Ruben,* 78 FR at 38366.

In this case, the settlement agreement memorialized by the IBO/SA contains little evidence that the Respondent and the Iowa Board intended that the findings and conclusions discussed therein would have preclusive effect. While the Respondent agreed to ''voluntarily waive[ ] any rights to a contested hearing on the allegations,'' [131] the agreement between the parties contains no language prohibiting the Respondent from seeking judicial review or establishing a waiver of the Respondent's ability to pursue further action related to the allegations that formed the basis for the IBO/SA. Moreover, in the absence of the manifested intent of the parties that an agreement will have preclusive effect, Iowa state law holds that settlement agreements are not binding on a party through the doctrine of collateral estoppel because the issues in the settlement agreements are not ''actually litigated.'' *Winnebago Indus., Inc.* v. *Haverly,* 727 NW.2d 567, 572 (Iowa 2006) ('''In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. . . . The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention.''' (quoting Restatement (Second) of Judgments § 27 cmt. e (1982))).

Accordingly, on the present record, because the parties to the Iowa Board Order/Settlement Agreement did not manifest the intent that the issues raised in the IBO/SA would preclude the Respondent from re-litigating those issues outside of the Iowa Board's jurisdiction, and because Iowa state law does not apply the doctrine of collateral estoppel to settlement agreements, the findings and conclusions contained in the IBO/SA are not binding upon this tribunal. As such, the parties in this DEA administrative adjudication were not precluded from re-litigating the issues raised in the Iowa Board Order/Settlement Agreement, and this adjudication must and does make appropriate findings.

All that said, it is beyond argument that the IBO/SA was prepared and submitted to the Iowa Board by the Respondent, and, by the terms of the document, constitutes an accepted offer to be disciplined based on the allegations set forth in the Iowa Board Charging Document. Gov't Ex. 9, at 2 ¶ 4, 6, ¶ 14. Thus, by executing the IBO/SA, the Respondent admitted multiple serious episodes of controlled substance prescribing that were effected in violation of Iowa state law and practice standards. Iowa Admin. Code r. 653–13.2.

The explanatory language supplied by the Respondent in her COR application relating to the surrender of her Iowa license was reviewed and accepted by the Respondent at her DEA hearing on the merits. Tr. 936–38. The Respondent accepted the truth of the allegations by: (1) executing the Iowa Board Order/Settlement Agreement; (2) supplying an (albeit incomplete, and arguably misleading) explanation of the incident that contains no factual challenge to the Iowa findings in her COR application; [132] and (3) offering no resistance to official notice regarding the Iowa Board's findings and actions. Tr. 625–26, 978. Accordingly, the facts as alleged in the Iowa Board Charging Document and IBO/SA are deemed credible, stand unopposed, and are, thus established in this recommended decision.

Even accepting the (unopposed) truth of the Iowa Board's findings through the Respondent's admissions contained therein, neither the documents provided by the Government, nor the testimony of any witness, assign a date for the occurrences for which the Respondent was disciplined by the Board. In her (problematic) COR application explanation, the Respondent lists an ''incident date'' of March 15, 2000,[133] but the IBO/SA and the IBCD both indicate that she was not even licensed in Iowa until April 5, 2000. Gov't Ex. 9, at 1, 8. Thus, the ''incident date'' supplied by the Respondent in her COR application would have actually preceded her licensure in Iowa and, presumably, the Iowa Board's jurisdiction to act. The Iowa Board Charging Document was executed on June 2, 2005, and the IBO/SA was signed on November 15, 2005. *Id.* at 7, 16. Thus, the only knowable parameters of the Respondent's Iowa Misconduct would seem reasonably to fall between her April 5, 2000 date of licensure and the June 2, 2005 date upon which the Iowa Board issued its charging document, yet the Respondent has provided a date that preceded that period, and the Government has supplied no position on the subject.[134]

Even taking into account that the Iowa Board matter was resolved nine years ago, and six years prior to the commencement of the 2011 misuse of the scrips established in this case, the time is not so long as to have significantly attenuated the nature of the Iowa Misconduct.[135] This is particularly so where the New Mexico Misconduct that comprises the bulk of the Government's case here occurred subsequent to the execution of the IBO/SA. Prescribing to multiple patients in the face of known indicia of drug-seeking and drug-abuse behavior, with inadequate documentation, below the standard set by Iowa in its state laws reflects poorly on both the Respondent's compliance with state laws regarding controlled substances (Factor 4) as well as her experience as an irresponsible and unlawful prescriber of controlled substances (Factor 2), and supports the denial of her COR application.

Thus, consideration of the record evidence regarding the Iowa Misconduct under Factor 2 (experience in dispensing), and the Iowa and New Mexico Misconduct under Factor 4 (compliance with controlled substances laws), powerfully and persuasively supports the DEA COR denial sought by the Government.

[131] Gov't Ex. 9, at 6.

[132] Gov't Ex. 2, at 1–2.

[133] Gov't Ex. 2, at 1.

[134] The Government, as the proponent of this evidence, should have engaged in efforts to discern the date of the misconduct, but the Respondent interposed no objection based upon lack of temporal specificity regarding the dates of the Iowa Board case.

[135] The Respondent's prehearing motion to exclude consideration of this matter based on the time the incidents allegedly occurred was denied. ALJ Ex. 43, at 8; ALJ Ex. 45, at 6–7.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

The fifth statutory public interest factor directs consideration of ''[s]uch *other conduct* which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5) (emphasis added). Existing Agency precedent has long held that this factor encompasses ''conduct which creates a probable or possible threat (and not only an actual [threat]) . . . to public health and safety.'' *Dreszer,* 76 FR at 19434 n.3; *Michael J. Aruta, M.D.,* 76 FR 19420, 19420 n.3 (2011); *Beau Boshers, M.D.,* 76 FR 19401, 19402 n.4 (2011); *Jacobo Dreszer,* 76 FR 19386, 19386 n.3 (2011). Agency precedent has generally embraced the principle that any conduct that is properly the subject of Factor Five must have a nexus to controlled substances and the underlying purposes of the CSA. *Terese, Inc.,* 76 FR 46843, 46848 (2011); *Tony T. Bui, M.D.,* 75 FR 49979, 49989 (2010) (stating that prescribing practices related to a non-controlled substance such as human growth hormone may not provide an independent basis for concluding that a registrant has engaged in conduct which may threaten public health and safety); *cf. Paul Weir Battershell, N.P.,* 76 FR 44359, 44368 n.27 (2011) (noting that although a registrant's non-compliance with the Food, Drug, and Cosmetic Act is not relevant under Factor Five, consideration of such conduct may properly be considered on the narrow issue of assessing a respondent's future compliance with the CSA).

Similar ''catch-all'' language is employed by Congress in the CSA related to the Agency's authorization to regulate controlled substance manufacturing and List I chemical distribution, but the language is by no means identical. 21 U.S.C. 823(d)(6), (h)(5). Under the language utilized by Congress in those provisions, the Agency may consider ''such *other factors* as are relevant to and consistent with the public health and safety.'' 21 U.S.C. 823(h)(5) (emphasis added). In *Holloway Distributing,* the Agency held this catch-all language to be broader than the language directed at practitioners under ''other conduct which may threaten the public health and safety'' utilized in 21 U.S.C. 823(f)(5). 72 FR 42118, 42126 n.16 (2007). Regarding the List I catch-all language, the Administrator, in *Holloway,* stated:

> [T]he Government is not required to prove that the [r]espondent's conduct poses a threat to public health and safety to obtain an adverse finding under factor five. *See T. Young,* 71 [FR] at 60572 n.13. Rather, the statutory text directs the consideration of ''such other factors as are relevant to and consistent with the public health and safety.'' 21 U.S.C. § 823(h)(5). This standard thus grants the Attorney General broader discretion than that which applies in the case of other registrants such as practitioners. *See id.* § 823(f)(5) (directing consideration of ''[s]uch other conduct which may threaten the public health and safety'').

Id.[136] Thus, the Agency has recognized that, while the fifth factor applicable to List I chemical distributors—21 U.S.C. § 823(h)(5)—encompasses all ''factors,'' the Factor Five applied to practitioners—21 U.S.C. 823(f)(5)—considers only ''conduct.'' However, because § 823(f)(5) only implicates ''such *other* conduct,'' it necessarily follows that conduct considered in Factors 1 through 4 may not be considered in Factor Five.

There is no question that Agency precedent has long held that self-abuse of controlled substances is a relevant consideration under Factor 5, even where there is no evidence of malfeasance related to a registrant's prescribing authority. *Bui,* 75 FR at 49989. Even so, on the facts elicited here, the Government's argument that the evidence sufficiently establishes self-abuse on the part of the Respondent that merits consideration under Factor 5 is unpersuasive. ALJ Ex. 59, at 32. It is unquestionably true that the Respondent provided a urinalysis sample that tested positive for opiates while she worked at McLeod, and could not (and still cannot) provide a credible explanation for why she was lawfully in possession of a controlled substance. However, PA Francis testified that, upon examining the Respondent and reviewing her x-rays, the Respondent had objective evidence of injuries consistent with the history she presented during the appointment, and that the (only legitimate) hydrocodone prescription Francis issued to her was appropriate under the circumstances. Tr. 181–85. Under the Agency's precedent, ''self-abuse'' under Factor 5 contemplates ''ingest[ion of] controlled substances for no legitimate medical reason.'' *Michael W. Dietz, D.D.S,* 66 FR 52937, 52938 (2001). The present record leaves little doubt that the Respondent procured controlled substances without legitimate prescriptions and ingested at least some of the medications,[137] and although there may well have been a recreational component to the Respondent's drug use, the only evidence received on the issue supports the Respondent's claim that she had an objective medical basis that could arguably have supported the prescribing of controlled substances for pain. To be clear, the Respondent was in violation of the law, but, on this narrow issue, the record does not support the proposition that ingesting the medication that resulted in the positive urinalysis result at McLeod Medical was self-abuse.[138]

That is not to say that the record evidence does not impact Factor 5. The preponderant evidence of record establishes that, regarding the New Mexico Misconduct, the Respondent engaged in significant, intentional efforts to circumvent the efforts of PIC Alvis at the Walmart Pharmacy Edgewood in his attempt to execute his corresponding responsibility under the DEA regulations. 21 C.F.R. 1306.04(a). At the time she presented a forged controlled substance prescription, the Respondent requested that staff members at the Walmart Pharmacy Edgewood refrain from processing the prescription through her health insurance company, based on her false representation that she was having issues with her health insurance company. Tr. 268–69. During her testimony, the Respondent conceded that she was insured by McLeod Medical and was having no such issues. Tr. 801–02, 946. To the extent that her testimony conflicts with the accounts presented in that regard by both PIC Alvis and PA Francis, her version is not credited.

When a Walmart Pharmacy Edgewood staff member inadvertently processed the prescription through the Respondent's insurance and the claim was declined because the same medication had been dispensed to the Respondent just days ago, it became apparent that her request to refrain from involving her health insurance company was borne of a desire to remain below the radar of the insurance company's

[136] In *Bui,* the Agency clarified that ''an adverse finding under [Factor Five did not require a] showing that the relevant conduct actually constituted a threat to public safety.'' 75 FR at 49988 n.12.

[137] As discussed, *supra,* although not charged by the Government, the possession of these controlled substances to ingest them was effected in violation of 21 U.S.C. 844(a); *see Quy,* 78 FR at 47412 n.1.

[138] As discussed, *supra,* the Respondent utilized illegitimate, forged prescriptions to accumulate quantities of controlled substances that far exceeded even the dosage directions on the false scrips. This aspect of the case is made even more chilling by the Respondent's argument that she ''was regularly tested during short intervals and never tested positive for the opiates she allegedly was forging prescriptions to obtain in large quantities.'' ALJ Ex. 60, at 10. On this record, it is simply impossible to know whether she was ingesting all or some of the medications she was procuring. What is uncontested, however, is that she had some objective evidence of a prior neck injury.

monitoring process. On these facts, it is clear that the Respondent's direction to PIC Alvis was a ruse designed to evade the scrutiny of her insurance company and the attention that a rejection based on an early refill would draw to her actions.

PIC Alvis had his staff make inquiry of the insurance company and PA Francis, the purported prescriber. Tr. 272, 281–82. After PIC Alvis (appropriately) declined to dispense medication to the Respondent's daughters on the presented scrip, the Respondent then attempted to mislead PIC Alvis by telephoning him and posturing that the whole affair was a misunderstanding. Tr. 284–85. Compounding the negative impact of the Respondent's plan to avoid detection, when McLeod Medical staff inquired of Walmart Pharmacy Edgewood as to whether they were still seeking to speak to PA Francis, the Respondent commandeered the call and declared that, since she had spoken with Alvis, the matter was closed. Tr. 285, 288–89.

Admirably, PIC Alvis persevered in his regulatory duty to resolve the anomaly with an appropriate level of care.[139] Tr. 288–89, 291–92. After consulting with a pharmacist at May Pharmacy who remembered the details regarding the filling of the prescription, he reached out to a third pharmacist to call PA Francis. Tr. 292–98. In effect, the actions of the Respondent (who now seeks to be a DEA registrant) made it necessary for PIC Alvis to resort to a covert action by an intermediary to have his (ultimately well-founded) professional reservations addressed.

Under the regulations, PIC Alvis, as the dispensing pharmacist, bears a ''corresponding responsibility'' to ensure that controlled substances are dispensed only on ''effective'' prescriptions. 21 C.F.R. § 1306.04(a). The regulations provide that ''to be effective [a controlled substance prescription] must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' *Id.* Under this language, a pharmacist has a duty ''to fill only those prescriptions that conform in all respects with the requirements of the [CSA] and DEA regulations. . . .'' *Electronic Prescriptions for Controlled Substances,* 75 FR 16236, 16266 (Mar. 31, 2010). In short, a pharmacist has a ''corresponding responsibility under Federal law'' to dispense only lawful prescriptions. *Liddy's Pharmacy, L.L.C.,* 76 FR 48887, 48895 (2011). Settled Agency precedent has interpreted this corresponding responsibility as prohibiting the filling of a prescription where the pharmacist or pharmacy ''knows or has reason to know'' that the prescription is invalid. *E. Main St. Pharmacy,* 75 FR 66149, 66163 (2010); *Bob's Pharmacy & Diabetic Supplies,* 74 FR 19599, 19601 (2009) (citing *Medicine Shoppe,* 73 FR at 381); *see also United Prescription Servs.,* 72 FR at 50407–08 (finding a violation of corresponding responsibility where the pharmacy ''had ample reason to know'' that the practitioner was not acting in the usual course of professional practice). Once PIC Alvis, based on his professional training and experience, had identified a red flag that indicates that a controlled substance scrip was potentially illegal, he was prohibited under the law from dispensing until the red flag had been conclusively resolved. *Holiday CVS,* 77 FR 62316, 62341 (2012). PIC Alvis did not have the luxury of looking the other way,[140] but was duty-bound to take reasonable steps to investigate the issues raised by the Respondent's prescriptions.

Each DEA COR holder bears a responsibility to assure the integrity of the ''closed system'' [141] designed by Congress to ensure controlled substance accountability. Requiring PIC Alvis to resort to subterfuge to investigate the suspicious prescription for controlled substances (after intentionally misleading him by inventing an insurance coverage issue) is completely antithetical to the obligations and privileges the Respondent seeks to once again enjoy as a DEA registrant. PIC Alvis was performing his duty, and the Respondent, a prospective registrant with a pending COR application,[142] was intentionally frustrating his efforts. By intentionally misleading and then intercepting PIC Alvis's phone inquiry to PA Francis, the Respondent knowingly attempted to preclude Alvis from executing the due diligence obligation he bears as a dispensing pharmacist under federal law. Preventing a pharmacist from discharging his lawful duty to resolve a prescription anomaly substantially increases the risk of controlled substances being dispensed outside the boundaries of the closed regulatory system. The Respondent's attempts to thwart Alvis's efforts to inquire behind the circumstances surrounding the Respondent's scheme to procure controlled substances through the misuse of scrips fits squarely within the bounds of ''other [143] conduct which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5); *see Jerry Neil Rand, M.D.,* 61 FR 28895, 28897 (1996) (adding false information to medical charts to conceal true nature of prescribing practices is conduct that adversely reflects upon Factor 5); *Nelson A. Smith, M.D.,* 58 FR 65403, 65404 (1993) (employing strategies to avoid detection of improper prescribing, such as falsifying medical chart information and recommending specific pharmacies to patients to avoid detection, reflects adversely on Factor 5). This is a case of a former/prospective DEA registrant in the system attempting to compromise another DEA registrant who was doing his job of guarding against diversion. In light of the fact that the Respondent was clearly utilizing her knowledge of the system as a former DEA registrant and her access to McLeod Medical phone lines as an employee there, coupled with how these actions constitute a calculated and abject betrayal of the very obligations she seeks to once again enjoy as a registrant, the New Mexico Misconduct evidence considered under this factor militates powerfully and persuasively, even standing alone, in favor of the Government's opposition to the Respondent's application for a COR.

Recommendation

In this case, balancing the relative merits of the evidence under the public interest factors, the Government has satisfied its *prima facie* case for denial of the Respondent's COR application. In Iowa, the Respondent repeatedly prescribed inappropriate controlled substances to multiple patients in violation of Iowa Law. In New Mexico, the Respondent presented a controlled substance scrip to multiple pharmacies to procure double the amount of controlled substances that the prescriber (PA Francis) intended to prescribe, presented many other controlled substance scrips that she knew or had reason to know were forged, even presenting one of those forged scrips three times to three different pharmacies, and intentionally impeded

[139] 21 C.F.R. 1306.04(a).

[140] The Agency has never been, and cannot be, persuaded by a policy of ''see no evil, hear no evil.'' *Carlos Gonzalez, M.D.,* 76 FR 63118, 63142 (2011). Even in a criminal context regarding prescriptions illegitimately issued, the courts have held that a factfinder ''may consider willful blindness as a basis for knowledge.'' *United States* v. *Katz,* 445 F.3d 1023, 1031 (8th Cir. 2006).

[141] *Gonzales,* 545 U.S. at 13.

[142] The New Mexico Misconduct took place after the Respondent submitted her COR application and while its adjudication was pending. Stip. 3; Gov't Ex. 1.

[143] Since this conduct was designed to cover the Respondent's method for obtaining controlled substances, not specifically to obtain more, it is not covered by Factor 4 or any other of the public interest factors.

a pharmacist and his staff from executing his duty to resolve a prescribing anomaly. There is, thus, no question that, under Factors 2, 4, and 5, the preponderant evidence of record satisfies the Government's burden to make out a *prima facie* case for denial of the Respondent's application.

''[T]o rebut the Government's *prima facie* case, [the Respondent is] required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the re-occurrence of similar acts.'' *Hassman,* 75 FR at 8236; *see Hoxie,* 419 F.3d at 483; *Lynch,* 75 FR at 78754 (holding that a respondent's attempts to minimize misconduct undermined acceptance of responsibility); *Mathew,* 75 FR at 66140, 66145, 66148; *Aycock,* 74 FR at 17543; *Abbadessa,* 74 FR at 10078; *Krishna-Iyer,* 74 FR at 463; *Medicine Shoppe,* 73 FR at 387. The acceptance of responsibility is a condition precedent for the Respondent to prevail once the Government has established its *prima facie* case. *Mathew,* 75 FR at 66148. This feature of the Agency's interpretation of its statutory mandate on the exercise of its discretionary function under the CSA has been sustained on review. *MacKay,* 664 F.3d at 822. In determining whether and to what extent a sanction, such as revocation of a license or denial of an application, is appropriate, consideration must be given to both the egregiousness of the offenses established by the Government's evidence and the Agency's interest in both specific and general deterrence. *Ruben,* 78 FR at 38364, 38385.

On the present record, the Respondent has neither accepted responsibility at any level, nor demonstrated persuasive remedial steps. Notwithstanding the strength of the evidence against her, the Respondent has persisted in steadfastly denying the veracity of the Government's New Mexico Misconduct charges regarding the presentation of any multiple-presented and/or forged scrips, as well as the deliberate steps she took in that state to undermine PIC Alvis's conscientious efforts to execute his corresponding responsibility as a DEA registrant pharmacist by intercepting his telephonic efforts to consult with PA Francis. Regarding the Iowa Misconduct, as discussed in more detail, *supra,* after interposing an incomplete and misleading rendition of events on her COR application, the Respondent did not challenge the events as portrayed in the IBO/SA, but neither did she discuss a single factual detail of the violations she was disciplined for.

On the issue of remedial steps, while the Respondent did testify that, after the New Mexico Misconduct, she continued her participation in urine drug screening for a relatively brief time after she was terminated from McLeod Medical,[144] and that, following the Iowa Misconduct, she took a class on the subject of the prescribing of pain medications,[145] neither step rises to any convincing of a truly remedial step at any persuasive level. By her own testimony, the urine drug screens were largely (albeit not exclusively) motivated by her desire to continue working for McLeod Medical, and thereafter to clear her name [146] (the opposite of accepting responsibility). Furthermore, the test results were marked with numerous unexplained misses and reschedules for urinalysis appointments that were designed to be administered at random. Tr. 860–73. The class the Respondent completed on pain management is a laudable step, but is significantly undermined by the fact that the New Mexico misconduct commenced well after the course was completed—hardly a convincing testimonial to the efficacy of this particular remedial measure. In any event, even if the propounded remedial steps were afforded some level of enhanced gravity, they are unavailing on the present record in the absence of an acceptance of responsibility. Under the Agency's precedent, remedial steps and acceptance of responsibility can only rebut the Government's *prima facie* case when both are present in the record. *See Samimi,* 79 FR at 18714 (holding that expressions of remorse are not persuasive in the absence of remedial steps). The Agency has held that ''[b]oth conditions are essential requirements for rebutting the Government's *prima facie* showing that granting an application or continuing an existing registration would be consistent with the public interest.'' *Hassman,* 75 FR at 8236 (internal quotation marks and citation omitted). The Respondent's reliance on *Jeffrey Martin Ford, D.D.S.,* 68 FR 10750 (2003), is misplaced. In *Ford,* the Agency granted a restricted registration upon a demonstration that ten-year-old drug use, which was admitted by the Respondent,[147] had been attenuated by time and treated with a formal drug rehabilitation program and years of clean urinalysis testing. *Id.* at 10750–53. The Respondent in these proceedings has never admitted to abusing controlled substances and has never participated in drug rehabilitation.[148]

In evaluating the appropriate sanction, DEA precedent requires consideration of the egregiousness of the established misconduct and the Agency's need to deter similar misconduct on the part of other registrants. *Ruben,* 78 FR at 38385–86. The New Mexico Misconduct evidence in this case reveals that the Respondent presented a scrip issued for a single controlled substance to procure multiple quantities, utilized multiple scrips that she knew or had reason to know were forged to procure more controlled substances, deliberately obstructed PIC Alvis's attempts to investigate (ultimately well-founded) red flags of diversion, and has expressed not the slightest level of remorse regarding any of her actions. There is a deliberative, calculating quality about the Respondent's actions that elevate the already egregious nature of the accomplished intentional diversion. These are actions that strike at the very heart of the responsibilities entrusted to a DEA registrant and mortally undermine any argument that she could be entrusted with a COR. On the issue of deterrence, it need not be overstated that granting her application under these circumstances would send the message to the regulated community (and the Respondent), in the most unequivocal terms, that there is virtually no level of the betrayal of registrant responsibilities that will result in significant consequences.

The Iowa misconduct also militates in favor of denying her application. The Respondent ''inappropriately and repeatedly prescribe[ed] controlled drugs in violation of the laws and rules governing the practice of medicine [and] engag[ed] in unprofessional conduct.'' Gov't Ex. 9, at 2. Even by the terms of the Iowa Board Order/Settlement agreement, the Respondent's controlled substance transgressions extended to multiple patients, and, in these proceedings, the Respondent neither refuted the factual basis of the conduct nor accepted any level of responsibility for them. Indeed, in her COR application, the Respondent's truncated explanation references only a single ''patient,'' notes that ''no investigation [by the Iowa Board] was needed,'' and

[144] Tr. 843, 882.

[145] Tr. 769; Gov't Ex. 2, at 2.

[146] Tr. 844, 913.

[147] The respondent in *Ford* complained that a police traffic stop that ultimately resulted in a criminal conviction was effected without the requisite level of probable cause, but did not deny that he had abused controlled substances. *Ford,* 68 FR at 10751, 10753.

[148] The Respondent testified that she was evaluated by MTP and never found to have a substance abuse problem. Tr. 917. This is hardly the same as successful completion of a drug rehabilitation program.

incorrectly represents that the only ''incident result'' was that she ''voluntarily took [a continuing medical education] course on prescribing controlled substances from Vanderbilt University.'' Gov't Ex. 2, at 1–2. The Respondent's explanation omits any reference to the multiple incidents where she ''repeatedly'' prescribed controlled substances to ''numerous patients,'' that she was assessed a $2,500.00 civil penalty, or that she received a five-year period of license probation with significant limitations, and reporting, monitoring, and notice requirements imposed as conditions of her probation. Gov't Ex. 9, at 2–6. Even beyond the issue that the Respondent did not accept responsibility for these actions, as discussed, *supra,* the ''explanation'' she included with her application lacked candor.[149]

Based on the present record, this applicant simply cannot be entrusted by DEA with a registration, and, for that reason, it is recommended that her application be **DENIED.**

Dated: June 3, 2014.

John J. Mulrooney, II,

Chief Administrative Law Judge.

[FR Doc. 2015–12135 Filed 5–19–15; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Notice of Charter Reestablishment

In accordance with the provisions of the Federal Advisory Committee Act, Title 5, United States Code, Appendix, and Title 41, Code of Federal Regulations, Section 101–6.1015, with the concurrence of the Attorney General, I have determined that the reestablishment of the Criminal Justice Information Services (CJIS) Advisory Policy Board (APB) is in the public interest. In connection with the performance of duties imposed upon the FBI by law, I hereby give notice of the reestablishment of the APB Charter.

The APB provides me with general policy recommendations with respect to the philosophy, concept, and operational principles of the various criminal justice information systems managed by the FBI's CJIS Division.

The APB includes representatives from local and state criminal justice agencies; tribal law enforcement representatives; members of the judicial, prosecutorial, and correctional sectors of the criminal justice community, as well as one individual representing a national security agency; a representative of the National Crime Prevention and Privacy Compact Council; a representative of federal agencies participating in the CJIS Division Systems; and representatives of criminal justice professional associations (*i.e.,* the American Probation and Parole Association; American Society of Crime Laboratory Directors; International Association of Chiefs of Police; National District Attorneys Association; National Sheriffs' Association; Major Cities Chiefs Association; Major County Sheriffs' Association; and a representative from a national professional association representing the courts or court administrators nominated by the Conference of Chief Justices). The Attorney General has granted me the authority to appoint all members to the APB.

The APB functions solely as an advisory body in compliance with the provisions of the Federal Advisory Committee Act. The Charter has been filed in accordance with the provisions of the Act.

Dated: May 11, 2015.

James B. Comey,

Director.

[FR Doc. 2015–12200 Filed 5–19–15; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act and Resource Conservation and Recovery Act

On May 14, 2015, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Central District of California in the lawsuit entitled *United States* v. *Anaplex Corporation,* Civil Action No. 2:15–CV–3615.

The United States filed this lawsuit under the Clean Water Act and the Resource Conservation and Recovery Act. The United States' complaint seeks injunctive relief and civil penalties for violations of regulations that govern discharges of pollutants to a publicly owned treatment works and the storage, disposal, and management of hazardous wastes at Anaplex's electroplating facility in Paramount, California. The consent decree requires the defendant to undertake a rinsewater use evaluation, implement ongoing pollution monitoring, report on hazardous waste handling measures, and pay a $142,200 civil penalty.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Anaplex Corporation,* D.J. Ref. No. 90–5–1–1–10454. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *http://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $13.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Henry Friedman,

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

[FR Doc. 2015–12115 Filed 5–19–15; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF LABOR

Office of Labor-Management Standards

Information Collection Request; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995

[149] *See George R. Smith, M.D.,* 78 FR 44972, 44979–80 (2013); *Glenn D. Krieger, M.D.,* 76 FR 20020, 20024 (2011); *David A. Hoxie, M.D.,* 69 FR 51477, 51479 (2004); *Maxicare Pharmacy,* 61 FR 27368, 27369 (1996).