DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 14–19]

Daniel A. Glick, D.D.S.; Decision and Order

On January 9, 2015, Chief Administrative Law Judge John J. Mulrooney, II (hereinafter, CALJ), issued the attached Recommended Decision (cited as R.D.).[1] Therein, the CALJ found that Respondent knowingly and materially falsified three renewal applications he submitted (in 2006, 2009, and 2012) for his DEA registration, when he failed to disclose that in 2003, he entered into a Consent Agreement with the Ohio State Dental Board pursuant to which his dental license was indefinitely suspended, and after his license reinstated, he was placed on probation. R.D. at 19–22.

Having concluded that the Government had ''made out a *prima facie* case'' to revoke Respondent's registration, *id.* at 22, the CALJ further found that he ''has not tendered an unequivocal acceptance of responsibility'' and was therefore ''foreclosed from a favorable result in these proceedings.'' *Id.* at 23. And, after finding that the egregiousness of Respondent's misconduct was ''enhanced by the fact that it was repeated on three occasions,'' *id.,* the CALJ further found that the Agency's interests in both specific and general deterrence supported the revocation of his registration. *Id.* at 23–25.

Respondent filed Exceptions to the CALJ's Decision. Having considered the record in its entirety including Respondent's Exceptions, I have decided to adopt the CALJ's factual findings, conclusions of law, and recommended order. A discussion of Respondent's Exceptions follows.

Respondent takes exception to the CALJ's finding that he did not adequately accept responsibility for his misconduct. Specifically, Respondent takes issue with the following reasoning in the CALJ's Recommended Decision:

> [t]o satisfy his modest burden to accept responsibility would have required, at a minimum, an acknowledgment that he knew and understood the answers were false when the applications were presented and thereafter. Even in his Closing Brief, the Respondent does not unequivocally state he was wrong and unreasonable at the time the DEA . . . renewal applications were submitted, but merely posits that he ''now agrees that he should have consulted with an attorney, someone with the federal government, or with the DEA specifically, before answering the liability question [on] the . . . application.''

R.D. 23 (quoting Resp. Post-Hrng. Br. at 3); *see also* Resp. Exceptions at 2–3.

According to Respondent, he ''did in fact accept responsibility and present an understanding that his answers were false.'' Exceptions at 2. Quoting from his proposed factual findings, his counsel argues that '' '[i]n retrospect, Respondent understands that he made a mistake in providing 'no' [answers] to various liability questions. Respondent had no intention of being deceitful.' '' *Id.* at 3 (quoting Post-Hrng. Br., at ¶ 11 (citing Tr. 124)). Further quoting from his proposed factual findings, Respondent's counsel argues that he '' 'is now fully aware of the importance of providing truthful answers' '' to the application's questions. *Id.* (quoting Post-Hrng. Br., at ¶ 12 (citing Tr. 127)). According to Respondent, ''these statements indicate that not only was Respondent aware that the statements he made on his application were false, but also that he now appreciated the importance of providing truthful answers.'' *Id.*

Having reviewed Respondent's testimony, I agree with the CALJ's conclusion that Respondent has not unequivocally acknowledged his misconduct. To be sure, Respondent did answer ''yes'' when asked by his counsel whether ''[i]n retrospect, would you say that was a mistake?'' Tr. 124. Yet a review of the record shows that ''that'' was not a reference to the three DEA applications he falsified but rather to an application for malpractice insurance. *See id.* at 122–24. As for Respondent's citation to the testimony at Tr. 127, here too, the questions failed to specifically refer to his DEA applications, rather than such generalities as his ''obligation to the patient populations that you treat,'' *id.* at 126, ''the importance of answering truthfully questions that may impact on that ability,'' and ''questions that were placed to you by PPOs.'' *Id.* at 127.

When Respondent did address why he provided a ''no'' answer to the question on the DEA applications regarding whether he had ever been disciplined by state licensing or controlled substance authorities, he claimed that he called either of two investigators for the State Dental Board and was ''specifically told'' that he could ''answer no'' on his DEA applications. Tr. 115–16. When pressed by the CALJ as to why he would ask investigators for the Dental Board how to answer questions on the DEA applications, Respondent testified:

> At the time I was asking about everything. So their answers were, and obviously I jumped and assumed, but their answers were, yeah, you can answer no. When I did and nothing happened, I took that as they know what they're talking about. I never had dealt with this previously, so I didn't know, you know, how to deal with it, and they're the only people I could talk to.

Tr. 116–17. When then asked by the CALJ ''why wouldn't you call DEA?'' Respondent answered:

> I don't know. I just—I think I assumed that the Ohio State Dental Board is my governing board of everything. In my mind, I don't separate it out, but I know it is a different thing and a different application, but, you know, without a dental license I can't get a DEA license, so my assumption is that the Ohio State Dental Board regulates or oversees all of my aspects of my license.

Id. at 117. And when asked by the CALJ whether, if he ''issued a subpoena to these two investigators . . . they would remember that they gave you advice on the DEA application and . . . didn't just say you need to talk to DEA about DEA's requirement?'' Respondent testified that ''they might not remember a specific conversation, but they may recollect it.'' *Id.* at 117–18. Respondent did not, however, call to testify either of the Board's Investigators who purportedly told him that he could provide a ''no'' answer to the DEA question.[2]

Later, on cross-examination, the Government asked Respondent: ''. . . if DEA asked you or if the PPO asked you or if the pharmacy board asked you about any previous disciplinary actions, do you understand the objective in their asking you whether you had any previous disciplinary actions with a licensing board?'' Tr. 129. Respondent answered: ''I don't think they explain the reason why they're asking.'' *Id.* After Respondent eventually conceded that protecting the public was the reason why these entities asked this question, the Government asked Respondent: ''[s]o how do you balance your reputational concerns with protection of the public?'' *Id.*[3] Respondent answered: ''I didn't feel I was a threat to the

[1] All citations to the Recommended Decision are to the slip opinion as issued by the CALJ.

[2] The record shows that one of the Board's investigators was subpoenaed by Respondent but did not appear because of illness. *See* Order Canceling Hearing and Setting Filing Deadlines, at 1 (Dec. 1, 2014). While the CALJ continued the matter to allow Respondent to call this witness, Respondent eventually decided not to call the witness and rested on the evidence he had previously presented. *Id.; see also* R.D. 21 n.40.

[3] Earlier, in questions that did not specifically address his falsification of his DEA applications but appear to have been related to his admitted falsifications of his applications to participate in insurance plans, Respondent explained that he provided false answers ''[f]or fear that it would do more harm to my reputation . . . it was more a reputational immaturity, if you will.'' Tr. 128.

public.'' *Id.* Still later, on questioning by the CALJ, Respondent answered ''yes'' when asked if he was ''concerned that [providing a yes answer] would trigger some other response both in insurance or the regulatory boards?'' *Id.* at 132.

Returning to the issue of why he did not contact DEA and ask how he should answer the question on his DEA applications, Respondent explained:

> I never had a relationship with anybody from the DEA. I never thought to call them directly, and my sole contact was with the governing board of my license. So I assumed they knew—they were the umbrella. So, if you go to the top, everything else falls underneath them. That's what I assumed.

Id. at 134.

After he again asserted that both the Dental Board and Ohio Pharmacy Board knew about his disciplinary record, the CALJ asked: ''[b]ut if DEA wasn't part of that, there was no reason that you had to know that DEA would know any of this . . . ?'' *Id.* at 135. Respondent answered: I assumed that DEA is under the pharmacy board.'' *Id.* When the CALJ then asked Respondent how he could ''assume that DEA would know any of it if you didn't report it or didn't tell them,'' and ''how would [DEA] know?'' Respondent answered:

> Either . . . I assumed that they're all in conjunction with each other, I assume, and if they didn't know about it, I don't know. Why wouldn't they know about it? If the board was able to find out about it, why wouldn't the—you know, if the dental board found out about it, I'm sure that the pharmacies—the drug board would find out about it.

Id. at 136.

Still later, on re-direct examination, Respondent agreed with his counsel that he had ''answered no to these liability questions on numerous applications.'' *Id.* at 141. Respondent's counsel then asked him if ''[w]hen you first started answering no to that question, were you under an impression that that was the proper answer, and if you were, how did you get that impression?'' *Id.* Respondent testified: ''I was led to believe that that was the proper answer from various people, and once I answered no and it passed, so to speak, then I was in the clear.'' *Id.*

Respondent then asserted that at the time, he thought these ''people'' were, in the words of his counsel, ''people in authority at least in the State of Ohio'' and with the Dental Board. *Id.* Respondent then agreed with his counsel ''that not consulting with an attorney or at least somebody'' at the DEA, was ''a grave mistake.'' *Id.* at 142. When then asked if ''you had to do it over again, how would you handle this?'' Respondent testified: ''I would answer yes with a form letter attached to the applications.'' *Id.*

The Agency has repeatedly held that where, as here, the Government has made out a *prima facie* case to support a finding that a registration should be suspended or revoked under one of the five grounds set forth in 21 U.S.C. 824(a), a registrant must '' 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility' '' that attaches with holding a registration. *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts [which subject his registration to suspension or revocation], the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination). A registrant's acceptance of responsibility must be unequivocal. *See Michael A. White,* 79 FR 62957, 62958 (2014); *The Medicine Shoppe,* 79 FR 59504, 59510 (2014); *Ronald Lynch,* 75 FR 78745, 78754 (2010).

While Respondent had the burden of production on the issue of whether he accepted responsibility for his misconduct and can be entrusted with a registration, the CALJ found his evidence insufficient to rebut the Government's *prima facie* case. I agree with the CALJ. As discussed above, the testimony which Respondent cites in his Exceptions as evidence that he acknowledges his misconduct did not even address his falsifications of the three DEA applications. When Respondent did address why he falsified his DEA applications, he asserted that he was told by investigators for the Ohio Dental Board that he could answer ''no.'' Notably, while the CALJ continued the proceeding to allow Respondent to present the testimony of one of the Dental Board investigators who purportedly would have corroborated his claim, Respondent eventually rested his case without calling this witness.

The CALJ found implausible Respondent's testimony that a Dental Board investigator told him he could answer ''no'' to the DEA application's liability question. R.D. at 15–16. I agree and find that Respondent provided false testimony on this issue. Indeed, the only respect in which Respondent provided truthful testimony related to this issue was when he acknowledged that he was concerned that if he answered ''yes'' to questions on the various applications ''it would trigger some other response both in insurance or the regulatory boards.'' Tr. 132. Disturbingly, even at the hearing, Respondent persisted in offering excuses rather than admit that he lied on his three DEA applications. His false testimony is fatal to his contention that he acknowledges his misconduct and his claim that he is entitled to remain registered.

As the ALJ noted, because Respondent has failed to acknowledge his misconduct, his assurance (even if I found it credible) that he will provide truthful answers on future DEA applications is irrelevant. R.D. 23. Moreover, in his Exceptions, Respondent ignores that there are additional factors that are relevant in determining the appropriate sanction. *See, e.g., Joseph Gaudio,* 74 FR 10083, 10094 (2009); *Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36504 (2007).

These include the egregiousness and extent of a registrant's misconduct. *See Jacobo Dreszer,* 76 FR 19386, 19387–88 (2011) (explaining that a respondent can ''argue that even though the Government has made out a *prima facie* case, his conduct was not so egregious as to warrant revocation''); *Paul H. Volkman,* 73 FR 30630, 30644 (2008); *see also Paul Weir Battershell,* 76 FR 44359, 44369 (2011) (imposing six-month suspension, noting that the evidence was not limited to security and recordkeeping violations found at first inspection and ''manifested a disturbing pattern of indifference on the part of [r]espondent to his obligations as a registrant''); *Gregory D. Owens,* 74 FR 36751, 36757 n.22 (2009). They also include the Agency's need to deter similar acts, both with respect to the respondent in a particular case and the community of registrants. *See Gaudio,* 74 FR at 10095 (quoting *Southwood,* 71 FR at 36503). *Cf. McCarthy* v. *SEC,* 406 F.3d 179, 188–89 (2d Cir. 2005) (upholding SEC's express adoption of ''deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions'').

The CALJ found that Respondent's misconduct was egregious in that he materially falsified his applications three times and was ''motivated by his desire to avoid drawing negative

attention to himself and his practice.'' R.D. 23. In other words, Respondent intended to deceive the Agency. Notably, in his Exceptions, Respondent does not challenge the CALJ's finding that his conduct is egregious. I agree with the CALJ and conclude that Respondent's multiple falsifications warrant the revocation of his registration.

Finally, the CALJ also found that the Agency's interests in both specific and general deterrence support the revocation of his registration. Here too, Respondent does not challenge the CALJ's findings. I agree with the CALJ's findings that the Agency's interests in both specific and general deterrence support the revocation of Respondent's registration.

Accordingly, I reject Respondent's Exceptions and will adopt the CALJ's recommended order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration BG1606219 issued to Daniel A. Glick, D.D.S, be, and it hereby is, revoked. I further order that any application of Daniel A. Glick, D.D.S., to renew or modify his registration, be, and it hereby is, denied. This Order is effective December 30, 2015.

Dated: November 19, 2015.

Chuck Rosenberg,

Acting Administrator.

Robert W. Walker, Esq. for the Government.

Michael J. Goldberg, Esq., for the Respondent.

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

Chief Administrative Law Judge John J. Mulrooney, II. On August 4, 2014, the Deputy Assistant Administrator of the Drug Enforcement Administration (DEA) issued an Order to Show Cause (OSC) [4] proposing to revoke the DEA Certificate of Registration (COR) Number BG1606219,[5] and deny any pending applications of Daniel A. Glick, D.D.S. (Respondent) pursuant to 21 U.S.C. 824(a) (2012), on the basis that the Respondent allegedly materially falsified multiple applications to renew his DEA COR.[6] On August 15, 2014, the Respondent filed a timely request for a hearing.[7] A hearing was conducted in this matter on November 19, 2014, in Cleveland, Ohio.

The issue ultimately to be adjudicated by the Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes by substantial evidence that the Respondent's continued registration with the DEA should be revoked pursuant to 21 U.S.C. 824(a).

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.

The Allegations

In its OSC, in support of the revocation it seeks, the Government alleges that the Respondent ''materially falsif[ied] [his] renewal applications for continuing authorization to handle controlled substances under [his] DEA COR,'' in violation of 21 U.S.C. 824(a)(1).

The Stipulations of Fact

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

1) Respondent is currently registered with DEA as a practitioner in Schedules II–V under DEA registration number BG1606219 at a registered location of 22901 Millcreek Boulevard, Suite 140, Beachwood, Ohio 44122. His DEA COR is current, and reflects an expiration date of September 30, 2015.

2) On November 6, 2003, Respondent entered into a Consent Agreement with the Ohio State Dental Board (Dental Board).

3) On or about September 19, 2003, Respondent was charged with felony possession of cocaine in the Cuyahoga County Court in Ohio.

4) On October 22, 2003, Respondent entered a plea of no contest to the above charges. On or about that same date, Respondent successfully petitioned the court for treatment in lieu of conviction, and on or about October 6, 2004, the charge of cocaine possession was dismissed, and Respondent's plea of no contest was vacated.

5) On January 7, 2004, Respondent's dental license was reinstated by the Dental Board.

6) Cocaine is a Schedule II controlled substance pursuant to 21 CFR 1308.12(b)(4).

The Evidence

The Government's Evidence

The Government's case-in-chief included the testimony of two witnesses: Ohio State Dental Board Executive Director Lili Reitz, Esq. and DEA Diversion Group Supervisor Scott Brinks.

Diversion Group Supervisor (GS) Scott Brinks, the lead DEA investigator on the Government's case, testified that he is a fifteen-year DEA investigator, retired Department of Veterans Affairs police officer, and former military police officer.[8] Tr. 64. GS Brinks testified that his contact with this case began as result of his independent investigation of the Respondent's brother, who, at the time, was also a practicing dentist and DEA registrant. In the course of investigating the Respondent's brother, GS Brinks happened upon the Respondent's 2003 airport arrest for cocaine possession and followed up.[9] Tr. 65–66. After conducting some additional research in DEA's Registration Information Consolidation System (RICS),[10] GS Brinks discovered that the Respondent answered ''no'' to a liability question (Question 3) on his DEA COR renewal application asking whether his state license had ever been suspended, notwithstanding the existence of a consent agreement with the Ohio State Dental Board (Dental Board) wherein his state license had been suspended as a result of his arrest.[11] Tr. 66; Gov't Ex. 7. GS Brinks explained the system by which DEA processes renewal applications for registrants, and stated that if a registrant enters a remarkable or ''yes'' answer to a liability question, the file is assigned to a field office for further investigation. Tr. 68. An application received with no remarkable answers to the liability questions is routinely processed without any field investigation, and according to GS Brinks, ''[i]t will just automatically be renewed.'' Tr. 68–69.

Through GS Brinks's testimony, the Government offered three COR renewal applications submitted by the

[4] ALJ Ex. 1.

[5] Gov't Exs. 1, 7.

[6] ALJ Ex. 1, at 1–2.

[7] ALJ Ex. 2.

[8] Diversion Group Supervisor (GS) Brinks testified that at the time he investigated the Respondent, he served as a Diversion Investigator (DI) in DEA's Cleveland office, but that he was subsequently promoted to his current position as Diversion Group Supervisor at the Merrillville (Indiana) Resident Office. Tr. 64–65.

[9] The Respondent's brother was the subject of an unrelated Order to Show Cause before this tribunal (Docket No. 14–18).

[10] A printout of the relevant RICS inquiry result (RICS printout) was received into the record without objection.

[11] The RICS printout reflected that all liability questions were answered in the negative.

Respondent on August 7, 2006, August 8, 2009, and August 19, 2012.[12] Gov't Exs. 4, 5, 6. Each of the three COR renewal applications reflected a negative answer to Question 3, which, in pertinent part, asks:

Has the applicant ever . . . had a state professional license or controlled substance registration . . . suspended . . . or placed on probation. . . .

The testimony presented by GS Brinks was essentially uncontested.[13] Beyond that, he presented as an objective, experienced [14] regulator who has no stake in the outcome of the Respondent's proceedings. Taken as a whole, his testimony was sufficiently detailed, plausible, and internally consistent to merit full credibility in the instant matter.

The Government also introduced, without objection, an affidavit executed by 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 DEA initially assigned the Respondent COR BG1606219 on October 20, 1988. *Id.* at 1. The DEA Records Affidavit further provides that the Respondent most recently renewed this registration on August 19, 2012. *Id.* The DEA Records Affidavit states that at the time of the August 19, 2012 license renewal application, the Respondent answered in the negative to all four mandatory ''Background Investigation'' liability questions, including question one, whether he had ''ever been convicted of a crime in connection with controlled substance(s) under state or federal law . . .''; and Question 3, whether he 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?'' *Id.* The DEA Records Affidavit likewise certifies that the Respondent submitted additional DEA COR renewal applications on August 7, 2006 and August 8, 2009.[15] In both the 2006 and 2009 renewal applications, the Respondent also answered in the negative to Question 3 and the other liability questions. *Id.* at 2–3.

Executive Director (Exec. Dir.) Lili E. Reitz also testified for the Government. Exec. Dir. Reitz testified that she is and has been the Executive Director of the Dental Board since May 1996 and that she is also an attorney. Tr. 25. Exec. Dir. Reitz testified that as executive director, her responsibilities include overseeing the operations of the Dental Board's three ''primary functions'' regarding dental professionals in the state, *to wit,* licensing, regulation, and enforcement. Tr. 26, 28–29. As a result of her job functions, Exec. Dir. Reitz testified that she was familiar with the Dental Board's licensing requirements and renewal application process, and that in preparation for her testimony, she ''reviewed the files regarding [the Respondent] and [the Dental Board's] history with [the Respondent,] and the consent agreements, renewal information, anything relevant.'' Tr. 25–26, 35–36. According to Exec. Dir. Reitz, one of her job responsibilities is to review the renewal paperwork before it is made available to potential applicants each year. Tr. 37.

Although produced by the Government ostensibly to explain the finer points of the application and renewal procedures at the Dental Board, Exec. Dir. Reitz's testimony was regrettably marked by a significant level of inconsistency and confusion. Exec. Dir. Reitz initially explained that in Ohio, as dentists renew their state licenses every two years, they are only required to report disciplinary actions that occurred within that biennium and are likewise not required to report disciplinary actions occurring in a previous renewal period. Tr. 26–28. Early in her testimony, Exec. Dir. Reitz indicated that it was her belief that the pertinent liability question on the renewal application asks applicants to disclose only those disciplinary actions occurring in the two years prior to submission. Tr. 27–28. Exec. Dir. Reitz went on to explain that even where a disciplinary matter has been completed within the biennium, a dentist is still required to disclose it if the matter occurred within the relevant period for the application. Tr. 33–34. Exec. Dir. Reitz was unequivocal in her testimony that the biennium language in the renewal applications has been in place ''at least'' since May 1996, when she began her career at the Dental Board. Tr. 28, 37. Exec. Dir. Reitz even offered that the guidance to the practitioners in this regard is ''the way the question is worded [, which is] pretty clear.'' Tr. 34.

Later in her testimony, Exec. Dir. Reitz was compelled to admit that she was mistaken regarding the language in the renewal applications utilized by the Dental Board at the time of the renewal applications at issue in these proceedings. Tr. 39–41. When confronted with the undeniable reality that the language of the renewal applications in issue for the Respondent did not self-limit to two years, but rather stated ''at any time,'' Exec. Dir. Reitz conceded that she was unfamiliar with the language in the renewal applications in question. Tr. 44. It was only after the language utilized in the relevant forms was inflicted on her as she testified that she reasoned (with a level of conviction that equaled her earlier, likewise confident assurances) that the ''at any time'' language required a licensure renewal applicant at that time to disclose any and all previous disciplinary action taken against him or her at any time. Tr. 50. Exec. Dir. Reitz testified that she is confident that the current 2013 renewal applications now specify a two-year period, and that the Dental Board must have made the change to the liability question sometime between 2009 and 2013. Tr. 41–42. Her estimation as to why the Dental Board changed the question to limit the disclosure time to two years was because the Dental Board was ''getting the same information renewal period after renewal period for older types of actions.'' Tr. 45. Thus, the focus of the change was to ensure that the Dental Board was apprised of actions that had not been processed through its own disciplinary apparatus. Exec. Dir. Reitz testified that even prior to the application language modification, a renewal applicant ''would be expected to answer the question as written . . . [but f]rom the board standpoint, if they did not disclose something that occurred between the board and the licensee, we were aware of it anyway.'' Tr. 46. She explained that the liability question was more geared toward dentists disclosing disciplinary actions taken against them in other states, or by a different regulatory entities, and that the Dental Board has ''never disciplined a licensee for not disclosing to [them] an action that [it] took against that licensee.'' Tr. 48–49, 53. Exec. Dir. Reitz testified that the Dental Board would not necessarily know if an individual answered one of its liability questions incorrectly unless it conducted an audit, because the system does not ''flag'' an application for further review. Tr. 47. Exec. Dir. Reitz testified that because the Dental Board is aware of its own actions, the failure by an applicant to

[12] These exhibits were received over the Respondent's foundation objection. Tr. 72–78.

[13] The Respondent waived cross-examination of this witness. Tr. 79.

[14] GS Brinks testified that along with his education, prior law enforcement experience, and DEA training, he had been involved in ''well over 100'' diversion regulatory investigations. Tr. 65.

[15] A copy of the August 19, 2012 renewal application was received into the record. Gov't Ex. 6. Copies of the August 19, 2012 (Gov't Ex. 6), August 8, 2009 (Gov't Ex. 5), and August 7, 2006 (Gov't Ex. 4) renewal applications were also received into the record over the Respondent's (foundation) objection.

disclose a Dental Board matter would not be ''a major concern'' to the Dental Board. Tr. 53.

When pressed for details on any guidance that Ohio dentists would have had regarding the correct way to answer the ''at any time'' language in the 2009 Ohio dental license renewal application, Exec. Dir. Reitz testified that there was no internal guidance on this issue, no additional supplemental publications (such as a ''frequently asked questions'' resource) available to renewal applicants to assist in the process, and that the expectation was that the applicant would be required to comply with the plain language in the application in use at the time, to include the question that seeks disclosure of disciplinary actions that occurred ''at any time.'' Tr. 33–34, 42–43, 49. According to Exec. Dir. Reitz, telephonic inquiries by license renewal applicants are fielded by a cadre of experienced Dental Board staff members who ''have been there many years.'' Tr. 52. Exec. Dir. Reitz testified that she would be surprised if she were to learn that a Dental Board staff member ever provided advice to a caller that limited the temporal scope of the ''at any time'' question on the 2009 application. *Id.* When queried about whether staff members at the Dental Board routinely provide advice to state dental licensees about the requirements of other agencies, Exec. Dir. Reitz answered, ''We don't have any jurisdiction over those processes.'' Tr. 35.

Exec. Dir. Reitz also testified about a Consent Agreement that was entered into between the Respondent and the Dental Board in 2003 (Consent Agreement).[16] Gov't Ex. 3. In the Consent Agreement, the Respondent agreed to an indefinite suspension of his license to practice dentistry in exchange for the Dental Board not pursuing formal disciplinary proceedings against him.[17] *Id.* at 1; Tr. 31. The Consent Agreement expressly states that the Respondent's license was indefinitely suspended and could only be reinstated upon the Respondent having completed certain conditions and providing documentation to the Dental Board regarding the completion of those conditions. Gov't Ex. 3, at 1–2; Tr. 31. The Consent Agreement also specified that following reinstatement, the Respondent would be subject to a five-year probationary period, in which he was to ''abstain completely from the personal use or possession of drugs, except those prescribed, dispensed, or administered to him by another so authorized by law who has full knowledge of [the Respondent's] chemical dependency and the terms of the [Consent Agreement]'' and also to ''abstain completely from the use of alcohol.'' [18] *Id.* at 3.

According to Exec. Dir. Reitz, the Dental Board worked in conjunction with the state pharmacy board and the Cleveland Police Department regarding the Respondent's possession of a controlled substance. Tr. 29. Exec. Dir. Reitz referred to the Consent Agreement as a ''typical impairment consent agreement that [the Dental Board] enter[s] into with dentists.'' Tr. 32. According to Exec. Dir. Reitz, the Board ''had concerns about [the Respondent's] alcohol and drug use.'' [19] Tr. 59. Exec. Dir. Reitz further testified that the Respondent completed intensive outpatient treatment as required by the Consent Agreement and that his license was reinstated in early 2004. Tr. 60–61.

Exec. Dir. Reitz's testimony was certainly not without its warts. She presented as a witness who was as committed to her first version of licensee application expectations as she was to her second, corrected version. As the Dental Board's Executive Director for eighteen years, it would not be unreasonable to expect that she understood the requirements of the application language that, according to her own testimony, each new iteration of which she was obligated ''to review . . . before it gets issued for each licensing or renewal period.'' Tr. 37. Her testimonial deficiencies were amplified by her initial representation that, prior to taking the witness stand in this case, she ''reviewed the files regarding [the Respondent] and [the Board's] history with [the Respondent] and the consent agreements, renewal information, anything relevant.'' [20] Tr. 25. It was clear that she was surprised on the stand by the language utilized in the 2009 Renewal Application, which indicates that she either did not pay attention to the contents of the documents she reviewed, or (contrary to her initial testimony) did not really review them ahead of time. Although she testified unequivocally that the language had not changed in eighteen years, she was forced to backtrack and admit that she did not know what the earlier language said, or when it may have changed. Will Rogers once famously said that ''[i]t isn't what we don't know that gives us trouble, it's what we know that ain't so.'' Considering the complex and varied responsibilities associated with her duties as the executive director of a dental board with statewide jurisdiction, the fact that Ms. Reitz was not intimately familiar with the intricacies of each yearly iteration of that body's renewal application questions should be of no surprise, and only of modest significance here. Still, the confidence with which she declared both the earlier and corrected versions of the renewal application questions as established facts provides cause for some reflection.

Still, even with its blemishes, Exec. Dir. Reitz's testimony was credible. Notwithstanding the aforementioned single internal inconsistency, Exec. Dir. Reitz presented as an impartial and generally knowledgeable state regulator who was mistaken on one (ultimately non-dispositive) issue. When confronted with the issue, Exec. Dir. Reitz quickly, candidly, and commendably addressed and persuasively explained the basis for her mistake and did not equivocate in any way.[21] Tr. 41, 44, 54, 62. Exec. Dir. Reitz obviously has no stake in the outcome of the Respondent's DEA proceedings, and her testimony was sufficiently objective, detailed, and plausible to be fully credited in this recommended decision.

[16] Gov't Ex. 3; Tr. 30, 33.

[17] In response to a question on the subject, Exec. Dir. Reitz indicated that the Respondent and the Dental Board entered into another consent agreement that is unrelated to the issues in this DEA enforcement action. Tr. 36.

[18] The Consent Agreement also required the Respondent to continue participation in drug and alcohol programs and to be subject to random screenings for drugs and alcohol. *Id.* The Consent Agreement also provided that should Respondent test positive for drugs or alcohol, or should he refuse to submit to testing in the probationary period, his license would be indefinitely suspended. Although the Agency has sustained adverse actions against the registrations of practitioners based on violations of 21 U.S.C. 843(a)(3) and personal abuse of controlled substances thus obtained, *Roger A. Pellmann, M.D.,* 76 FR 17704, 17709 (2011); *Randall Relyea, D.O.,* 72 FR 40378, 40380 (2008); *Alan H. Olefsky, M.D.,* 72 FR 42127, 42128 (2007), the Government does not allege in the instant case that self-abuse of drugs or alcohol is a basis for the revocation of the Respondent's COR.

[19] Although the Consent Agreement does not list any findings of fact among its stipulations, admissions, and understandings, a close reading of the Consent Agreement suggests a significant level of concern on the part of the Dental Board that the Respondent could have been drug and/or alcohol dependent prior to entering into the Consent Agreement. For example, as a condition of reinstatement, the Respondent was required to obtain documentation from a treating provider that he was ''no longer drug or alcohol dependent and that he [was] able to practice dentistry in accordance with the accepted standards of the profession.'' Gov't Ex. 3, at 2. The Respondent also had to provide documentation of having completed treatment from an ''approved treatment provider'' before the Dental Board would reinstate his license. *Id.*

[20] Exec. Dir. Reitz later clarified that she had not reviewed the Respondent's renewal applications. Tr. 54.

[21] In fact, upon leaving the witness stand, Exec. Dir. Reitz offered an apology for any confusion caused by this aspect of her testimony. Tr. 62.

The Respondent's Evidence

The Respondent presented his case-in-chief through his own testimony and two exhibits.[22] In the course of his testimony, the Respondent briefly described his career in the practice of dentistry, which along with his regular practice includes a history of some community service (including service to underserved patients), membership in professional organizations, and some modest involvement in academia. Tr. 81–84. He explained that he is a licensed dentist (D.D.S.) in the state of Ohio and that he has been practicing continuously [23] since his licensure in August 1988, at which time he joined his father and brother's dental practice after dental school. Tr. 81.

Although the Government's case focused on the three COR renewal applications at issue, the Respondent, during his direct testimony, raised the issue of, and spoke at some length about, the events precipitating his 2003 airport arrest and corresponding criminal charge for possession of cocaine. According to the Respondent, cocaine was found at the airport in his checked luggage as he was preparing to depart with some high school friends for Key West for a fortieth birthday party. Tr. 96–97. The Respondent testified in essence that the cocaine was brought to enhance the vacation experience, which in his words:

> was going to be a reunion of 12 high school friends that were [*sic*] going to be a party weekend, hell raising, all that fun stuff that you did back in the day. Me being a big—trying to be the big man on campus, I thought I would be the one to lead the parade, if you will.

Tr. 136–37. The Respondent related that after being stopped at the gate when drugs were discovered in his suitcase, he was placed in a detention room at the airport and subsequently arrested, booked, processed, and jailed for three days until he was released on his own recognizance. Tr. 89–90, 98. Although at the DEA hearing he ultimately agreed that his luggage contained cocaine that he placed there himself, he also was steadfast in his opinion that he was not a cocaine user, and pointed out more than once that at the time of his arrest, there was no cocaine in his system. Tr. 136, 140.

The Respondent's testimony regarding the cocaine was uneven and confusing. At one point, the Respondent testified that ''[t]here was cocaine in a suitcase that was registered in my name.'' Tr. 96. He then offered that ''one of the bags that was checked in under my name had cocaine in it'' and that the bag ''[h]ad cocaine in it, and that's why I was arrested.'' Tr. 97. When pressed on the issue of how it was that the cocaine ended up in his bag, the Respondent answered: ''I will take ownership of it. I always have and I always will. I had the cocaine in my bag.'' Tr. 97. After multiple questions and an equal number of equivocations, the Respondent's answers eventually morphed from his ''tak[ing] ownership'' and ''accept[ing] responsibility'' for the cocaine to his reluctant admission that he had actually placed the cocaine in his own bag. Tr. 97–98. Later in his testimony, the Respondent described how another member of his party was carrying fireworks, and that he (the Respondent) ''was able to get the cocaine'' and that he was ''the one that was going to carry it.'' Tr. 139. The Respondent, at another point in his testimony, did volunteer that he now feels his actions were a ''stupid mistake'' and a ''stupid, hugely horrible mistake.'' Tr. 97, 99. The testimony the Respondent offered regarding his arrest veered wildly, and was styled much less as an acceptance of responsibility than as an innocent man nobly accepting culpability for a high school chum. Suffice it to say that this narrative structure did not enhance the credibility of the Respondent's testimony.

The Respondent also testified about the criminal proceedings associated with his arrest. According to the Respondent, following his arrest, he was offered the option to participate in a drug court program [24] for one year because his infraction was an ''isolated incident.'' Tr. 85. According to the Respondent, the drug court program required that he undergo urinalysis testing, attend AA meetings, and counsel/mentor other individuals in the program once a month.[25] Tr. 87. Under his understanding of this legal process, his participation in drug court would reduce his felony charge to a misdemeanor charge, and following completion of the process, he would obtain an expungement. Tr. 88–89. According to the Respondent, he understood was that as a result of his participation in the drug court program, ''from a legal standpoint I was told the incident never happened because I complied and everything went well.'' Tr. 85.

The Respondent testified that approximately two months after his arrest, a Dental Board investigator visited his office.[26] Tr. 92–93. According to the Respondent, right from his initial contact with the Dental Board, the investigator advised him to enter into a consent agreement and told him that his dental license would likely be suspended. Tr. 92. The Respondent testified that one of the terms of the Dental Board Consent Agreement required that he undergo an evaluation for drug rehabilitation, but he was quickly rejected from the program because he was not addicted. Tr. 95–96. According to the Respondent, the evaluator told him: ''look, you're not a drug addict, you're an idiot.'' *Id.* As a result, the Respondent entered into a weekly program for approximately six weeks that he described as ''group therapy.'' Tr. 96.

The Respondent testified that the airport incident and its consequences burdened him with some financial hardships, the most significant of which was apparently his removal from some insurance company panels as a result of having been placed on probation by the Consent Agreement.[27] Tr. 99–100. According to the Respondent, removal from these panels resulted in his patients losing the benefit of lower, in-network rates for his dental services. The Respondent related that this development caused ''inner turmoil internally within my practice with the patients.'' Tr. 100. The Respondent testified that as a result of this financial hardship on his patients, he petitioned the Dental Board to be removed from probation early; a request which was granted. Tr. 101. The Respondent stated that his patients never knew the reason why he was removed from the insurance panels, and that there was no press

[22] At the commencement of the hearing on November 19, 2014, the parties represented that Kathy Carson, a witness noticed by the Respondent in his Prehearing Statement, was unavailable to testify due to illness. Tr. 5–11. The Respondent was offered the option of presenting this witness at a later date when she was well enough to testify. Tr. 146. The Respondent initially sought and was granted a continuance to present Ms. Carson's testimony at a later date, and subsequently withdrew that request after consulting with her. On December 1, 2014, the Respondent's counsel telephonically informed chambers staff that he was no longer seeking to present Ms. Carson's testimony and that he wished to rest his case on the evidence presented at the November 19, 2014 hearing.

[23] The Respondent indicated that he has been in continuous practice with the exception of the suspension mandated by the Dental Board consent order at issue here. Tr. 81.

[24] Counsel for the Respondent clarified for this tribunal that the name of the diversion court was the Greater Cleveland Drug Court. Tr. 85.

[25] In fact, the Respondent testified that he continued to attend court to counsel other people for ''a year or so'' after his obligation to do so was completed. Tr. 88.

[26] The Respondent believes the Dental Board was tipped off by the Cleveland Police Department. Tr. 93.

[27] The Respondent also vaguely alluded to some impact on his family, but did not elaborate. Tr. 101.

attention devoted to his dalliance at the airport. Tr. 101.

Boiled down to its essence, the Respondent's position in these proceedings has consistently been that his DEA COR application answers were incorrect because in 2009, he completed his Ohio state license renewal application (apparently incorrectly), and applied the same (incorrect) rule he used at the state level to his (federal) DEA application. In support of this position, the Respondent supplied the record with a copy of his 2009 Ohio State Dental Board license renewal application (2009 Renewal Application).[28] Tr. 103, 115; Resp't Ex. 1. Among the questions included on the 2009 Renewal Application regarding ''Discipline'' were the following: (1) ''Have you *at any time* had any disciplinary action initiated against you by any state licensing board? If yes, provide details'' and (2) Have you *at any time* surrendered, or consented to limitation upon: a) a license to practice dentistry/dental hygiene; OR b) state or federal privileges to prescribe controlled substances? If yes, provide details.'' Resp't Ex. 1, at 1–2 (emphasis supplied). The Respondent answered in the negative to both questions.[29] Before submitting the 2009 Renewal Application, the Respondent was also required to ''Agree'' to the following statements: (1) ''I understand that submitting a false, fraudulent, or forged statement or document or omitting a material fact in obtaining licensure may be grounds for disciplinary action against my license'' and (2) ''Under penalty of law, I hereby swear or affirm that the information I have provided in the application is complete and correct, and that I have complied with all criteria for applying on line.'' *Id.* at 3.

The Respondent testified that before filing his 2009 Renewal Application, he called investigators at the Dental Board for guidance in responding to the ''Discipline'' questions. Tr. 104. At the hearing, the Respondent said that he conceived the idea to call the Dental Board investigators after participating in the Caduceus program, which was a series of substance abuse rehabilitation meetings geared toward the special needs of professionals in the medical and dental communities. Tr. 108–10. According to the Respondent, the Dental Board investigator that he spoke to [30] told him that he could answer ''no'' to the Discipline questions because the Dental Board was aware of its own proceedings. Tr. 104–05. The Respondent stated that, by his reckoning (apparently in spite of the plain language of the question),[31] the Discipline question really queried whether discipline had occurred within the prior biennium. Tr. 105. The Respondent further explained: ''I was told after the expungement this incident never happened, and I wanted it to never happen, and so I thought in my mind it never happened.'' Tr. 107. In a revealing moment during his testimony, the Respondent provided the following insight about his thought process in answering the 2009 Renewal Application Discipline questions the way he did:

> So I was looking to answer it as no. So, when I found somebody to tell me to answer it as no, I'm like, okay, I got it.

Tr. 113.

The Respondent likewise testified to his process of answering ''no'' to the DEA liability question regarding whether he had ever had his license suspended or placed on probation. He stated that he asked the (state) Dental Board investigators about how to answer the (federal) DEA liability questions, and that, according the Respondent, the investigators told him that he could answer the DEA questions in the negative. Tr. 115. The Respondent clarified:

> At the time I was asking [the Dental Board investigators] about everything. So their answers were, and obviously I jumped and assumed, but their answers were, yeah, you can answer no. When I did and nothing happened, I took that as they know what they're talking about.

Tr. 116–17.

Additionally, the Respondent said that he believed that the (state) Dental Board oversees his (federal) DEA registration. The Respondent said:

> I just—I think I assumed that the Ohio State Dental Board is my governing board of everything. In my mind, I don't separate it out, but I know it is a different thing and a different application, but, you know, without a dental license I can't get a DEA license, so my assumption is that the Ohio State Dental Board regulates or oversees all of my [sic] aspects of my license.

Tr. 117.

At his DEA hearing, in addition to his misperception that investigators at the state Dental Board wielded authority over his (federal) DEA COR, the Respondent also attributed his decision not to check with DEA to his (equally inexplicable) assumption that all regulatory authority (even federal DEA regulatory authority) fell under the jurisdiction of his state pharmacy board, and that the state pharmacy board was notified in some way by the state Dental Board. Tr. 134–35. When pressed on the patent illogic of his reasoning, the Respondent had the following to say:

> Either (a) I assumed that they were all in conjunction with each other, I assume, and if they didn't know about it, I don't know. Why wouldn't they know about it? If the board was able to find out about it, why wouldn't the—you know, if the dental board found out about it, I'm sure that the pharmacies—the drug board would find out about it.

Tr. 136. Needless to say, the offered explanation does little to persuasively account for placing a patently false answer on three DEA COR renewal applications. The Respondent did allow that if he ''had to do it over again [he] would answer yes with a form letter attached to the applications.'' Tr. 142.

The Respondent, in a perhaps more candid moment during his testimony, admitted that at the time he completed the various applications, he was concerned about a ''trickle-down'' effect on other applications should he answer in the affirmative to the liability questions asked by the Dental Board in its Renewal Application. Tr. 131. He stated:

> I don't know, but my assumption is if you were to—once you start answering yes, there is an alleged trickle-down effect of repercussions, that once you can—and the presumption is if you continue to answer no and you've gone through treatment and you can answer no, then you're okay with other, you know, boards, with other insurance companies, with other things. It's a dumb assumption.

Tr. 131. The Respondent testified when completing the applications, he was concerned that if he answered ''yes'' to the liability questions, it would ''trigger'' some response from the

[28] The exhibit was admitted without objection from the Government. Tr. 125.

[29] The Respondent also answered in the negative the following two inquiries under ''Legal Questions'': ''(1) Have you been found guilty of, or plead guilty or no contest to a felony or misdemeanor? (exclude all traffic violations other than those involving driving under the influence of alcohol or drugs). If yes, provide details'' and (2) ''Have you been found guilty of, plead guilty or no contest to a federal or state law regulating the possession, distribution or use of any drug? If yes, provide details.'' Resp't Ex. 1. Additionally, the Respondent answered in the negative to the following question regarding ''Addiction'': ''In the past biennium, have you been addicted to or dependent upon alcohol or any chemical substance? You may answer 'no' to this question if you have successfully completed treatment at a program approved by the Ohio State Dental Board, and have subsequently adhered to all statutory requirements as contained in ORC Section 4715, or you are currently enrolled in a Board-approved program . . . If yes, provide details.'' *Id.*

[30] The Respondent stated that the investigator he spoke to was named Gail Noble, who was at that time his contact with the Dental Board. Tr. 105.

[31] The Discipline questions in the 2009 Renewal Application consistently use the phrase ''at any time,'' whereas the question in the next section, entitled ''Addiction,'' uses the phrase ''[i]n the past biennium.'' Resp't Ex. 1, at 1–2.

insurance companies or regulatory boards. Tr. 132. However, as he conceded, this plan met with limited success. A negative answer he supplied to a liability question in an insurance company renewal application did not shield him from scrutiny from the insurance carrier. His insurance agent confronted him with a report from the National Practitioner Data Bank [32] reflecting the Consent Agreement he entered into with the Dental Board. Tr. 120–22. In his testimony, the Respondent explained his approach in this way:

> I can only use the analogy of when you're applying for car insurance and the guy goes, oh, we looked it up. You've gotten these many tickets and bumped a red light. [The insurance agent] was renewing my malpractice insurance and he said, hey, there's something, there's a blip on your screen. And I was like, oh, okay.

Tr. 121–22. There was no confusion in this scenario. No advice from the Dental Board. The Respondent was merely unaware that his insurance carrier would ever find out about his disciplinary action, so he lied on his policy renewal paperwork and got caught. Essentially, he played the game and lost.

The Respondent's assessment of whether he was intending to deceive with his false DEA COR renewal application answers was all over the place. At one point in his testimony, he denied there was any attempt to deceive or mislead. Tr. 124. At another point, when asked by his counsel whether he felt he was ''being misleading or duplicitous,'' the Respondent's answer was more introspective: ''I think initially the first time, yes, but since then no. No. No.'' Tr. 125. When he was asked ''why not be truthful . . . ?'', the Respondent replied:

> For fear that it would do more harm to my reputation. I know it was pretty self—I don't know what the word is, it's escaping me right now, but it was more of a reputational immaturity, if you will.

Tr. 128. The Respondent conceded that at the time he completed his DEA COR renewal applications, he was more concerned about how the matter would have affected him professionally than he was concerned about ''any protection or any service to the public.'' Tr. 133–34.

The Respondent's testimony was problematic from a credibility standpoint. As discussed, *supra,* his presentation was marked with significant equivocations and inconsistencies. Although the Respondent entered a no contest plea to carrying cocaine in a suitcase bound for a reunion in Puerto Rico with childhood friends, when he testified initially at his DEA administrative hearing, he equivocated that the drugs were in a suitcase ''checked in under [his] name.'' Tr. 97. When pressed on the issue at his DEA hearing, he ultimately said that he would ''take ownership'' of the cocaine and had done so at the time of his criminal case. Tr. 97. Ironically, this is a minimization that, even if credited, would not have fortified his position in this case, yet the equivocation and attempt to minimize his own responsibility served to undermine his credibility.

In addition to its equivocations and inconsistencies, the Respondent's testimony was implausible. His theory, that, even as an experienced practitioner, he was misled by errant advice supplied by state investigators is simply not supported by reason. The language in the 2009 Renewal Application further undermines his position. The 2009 Renewal Application he points to actually distinguishes between the Discipline questions, which are phrased in terms of ''at any time,'' and Addiction questions, which are targeted at ''the past biennium.'' Resp't Ex. 1, at 1–2. The Respondent's credibility also is profoundly compromised by his admission that, when it suited him to do so, he intentionally attempted to mislead his insurance carrier by providing false information on his policy renewal form and was caught. The Respondent's testimony in these proceedings, taken as a whole, suffered from inconsistencies, equivocations, and implausibility that preclude a finding that he was entirely credible.

The Analysis

The Government seeks revocation of the Respondent's COR based on its evidence that on three occasions, the Respondent filed COR renewal applications wherein he falsely declared that his state professional license had never been suspended or placed on probation.[33] ALJ Ex. 1. Under the Controlled Substances Act (CSA), the material falsification of any application for a DEA COR (including a renewal application [34]) constitutes a basis for revocation or other sanction. 21 U.S.C. 824(a)(1).

For the Government to prevail under a theory of material falsification, its evidence must establish, by ''clear, unequivocal, and convincing'' evidence [35] that a registrant has provided false information in his or her application and that the false information provided is material. *Id.* A material falsification requires a showing that a statement tendered in a COR application is one that ''has a natural tendency to influence, or was capable of

[32] Resp't Ex. 2. According to the exhibit, the reports contain information on adverse actions against practitioners that is ''confidential and is disclosed only to legally authorized queriers for specified uses.'' *Id.* at 1. The Data Bank Report includes a copy of the ''Adverse Action Report: State Licensure Action'' by the Ohio State Dental Board. *Id.* at 4. The Data Bank Report classifies the adverse action as ''Probation of License'' and ''Suspension of License'' and states that the action was the result of a consent agreement. *Id.* at 5. The Data Bank Report states that the adverse action came about on the grounds of ''Impairment'' and that the basis was that the Respondent was ''unable to practice safely by reason of alcohol or other substance abuse.'' *Id.* at 5–6. The Data Bank Report further provides that the Respondent's license to practice was reinstated on January 7, 2004, that the last four years of the probationary period were ''lift[ed]'' effective March 9, 2005, and that the Respondent's license was ''in good standing and not subject to any conditions, restrictions or limitations.'' *Id.*

[33] The parties have stipulated that in 2003, the Respondent entered a plea of no contest to a state charge of felony cocaine possession. Stip. 3–4. Agency precedent is clear that a conviction obtained pursuant to a *nolo contendere* plea, or even one where adjudication is withheld or even subsequently dismissed, constitutes a conviction under this provision. *See Kimberly Maloney, N.P.,* 76 FR 60922 (2011) (collecting cases). The Agency has also held that failure to disclose a conviction of a crime in connection with controlled substances is material to the Agency's decision whether an individual should be in possession of a DEA COR. ''[T]he failure to disclose such a conviction constitutes a material falsification because it is 'capable of influencing' the decision as to whether to grant an application.'' *Pamela Monterosso, D.M.D.,* 73 FR 11146, 11148 (2008). Thus, on the present record, it is clear that, if charged, the Respondent's negative responses in his COR renewal applications regarding his cocaine possession conviction could have formed the basis to sustain multiple incidents of material falsification under the CSA. However, Agency precedent is equally clear that that the parameters of DEA administrative hearings are circumscribed by the charging document and the prehearing statements. *CBS Wholesale Distribs.,* 74 FR 36746, 36750 (2009) (citing *Darrel Risner, D.M.D.,* 61 FR 728, 730 (1996)); *see also Roy E. Berkowitz, M.D.,* 74 FR 36758, 36759–60 (2009). To have these material application falsifications available to form the basis of a sanction, the Government would have had to sufficiently allege them and provide the Respondent with adequate notice. *See CBS Wholesale Distribs.,* 74 FR at 36750 (''The Government's failure to set forth its legal theory indisputably denied Respondent a meaningful opportunity to present an argument to the contrary.''). At the outset of the hearing, the Government, through its counsel, affirmed that it would not proceed on a theory that the Respondent's false answer regarding whether he had ever been convicted constitutes a material false statement. Tr. 15. Hence, while the Respondent's arguably false statements about his drug conviction could, if offered, have been considered for other purposes, it could not (and did not) serve as an independent basis for a sanction against his COR.

[34] *See, e.g., Smith,* 76 FR at 53964 (revoking a registrant's COR upon finding that the registrant had materially falsified multiple renewal applications); *Therial L. Bynum, M.D.,* 61 FR 3948, 3948–50 (1996) (revoking a registrant's COR upon finding that the registrant had materially falsified a renewal application).

[35] *Kam,* 78 FR at 62696 (quoting *Kungys,* 485 U.S. at 772).

influencing, the decision of the decisionmaking body to which it was addressed.'' *The Lawsons, Inc., t/a The Med. Shoppe Pharmacy,* 72 FR 74334, 74338 (2007) (quoting *Kungys* v. *United States,* 485 U.S. 759, 770, 772 (1988)); *see also Robles* v. *United States,* 279 F.2d 401, 404 (9th Cir. 1960), *cert. denied,* 365 U.S. 836 (1961). To prevail, the Government need not prove that any Government decision, including the decision regarding the registration application, was actually influenced. *The Lawsons,* 72 FR at 74339. The touchstone is whether the statement had the *capacity* to influence. *See United States* v. *Alemany Rivera,* 781 F.2d 229, 234 (1st Cir. 1985), *cert. denied,* 475 U.S. 1086 (1986); *Alvin Darby, M.D.,* 75 FR 26993, 26998 (2010).

As a materiality determination turns on an analysis of the relevant substantive law, *Kungys,* 485 U.S. at 772, the allegedly false statement must be analyzed in the context of the decision before the DEA, namely, whether a registrant is entitled to remain registered. *Hoi Y. Kam, M.D.,* 78 FR 62694, 62696 (2013). The falsification must relate to a ground that could affect the decision, not merely a basis upon which an investigation could be initiated. *Darryl J. Mohr, M.D.,* 77 FR 34998, 34998 n.2 (2012); *Harold Edward Smith, M.D.,* 76 FR 53961, 53964 (2011); *Scott C. Bickman, M.D.,* 76 FR 17694, 17701 (2011). The entire application will be examined to determine whether there was an intention to deceive the agency. *See Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23852–53 (2007). Furthermore, the correct analysis depends on whether the registrant knew or should have known that he or she submitted a false application. *Dan E. Hale, D.O.,* 69 FR 64902, 69406 (2004); *The Drugstore,* 61 FR 5031, 5032 (1996); *Bobby Watts, M.D.,* 58 FR 46995, 46995 (1993). Although even an unintentional falsification can serve as a basis for adverse action regarding a registration, lack of intent to deceive and evidence that the falsification was not intentional or negligent are all relevant considerations. *Anthony D. Funches,* 64 FR 14267, 14268 (1999). The Agency considers the ''totality of the circumstances'' in evaluating whether a registrant's COR should be revoked based on a material falsification. *Thomas G. Easter II, M.D.,* 69 FR 5579, 5581 (2004).

The Agency has held that a material falsification existed when a registrant failed to disclose on DEA renewal applications that he had entered into consent agreements with the state licensing agency which had either placed him on probation or suspended his state license. *Smith,* 76 FR at 53964. In *Smith,* the Agency found that on two renewal applications, the Respondent had answered ''no'' to the liability question of whether he had ''ever surrendered or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation.'' *Id.* In evaluating the materiality of the false statement, the Agency looked to the public interest standard articulated in 21 U.S.C. 823(f) and concluded that the information withheld from the Agency (allegations in a state proceeding that the Respondent had been accused of writing false prescriptions) would have been ''material to the Agency's investigation and assessment of Respondent's experience in dispensing controlled substances and his compliance with applicable laws related to the dispensing of controlled substances.'' *Id.* The Agency also noted that the false statement in omitting the state proceedings was material because it would have yielded information about the Respondent's drug abuse, which is relevant to the public interest under Factor Five of section 823. *Id.; see also Gilbert Eugene Johnson, M.D.,* 75 FR 65663, 65665 (2010) (considering Respondent's failure to disclose past state disciplinary action under section 823 public interest factor relating to a registrant's experience in dispensing). Where the Government has based its material falsification case on state controlled substance handling privileges that have been suspended and restored before the filing of a COR application, the Agency has held that the basis for the state's action must constitute a ground that could constitute actionable misconduct against a DEA registration under the CSA. *Richard D. Vitalis, D.O.,* 79 FR 68701, 98706 (2014).

In the present case, the Respondent's state controlled substance privileges were suspended based on his arrest and no contest plea [36] regarding possession of controlled substances, *to wit,* cocaine. Stip. 3, 4; Tr. 93–95. The Agency has long held that possession of illicit drugs in contravention of state and/or federal controlled substance laws is an adverse consideration under the fourth CSA public interest factor.[37] *David E. Trawick, D.D.S.,* 53 FR 5326, 5327 (1988) (even though the respondent's illicit drug possession and distribution was outside the realm of his professional practice, it related to controlled substances and could serve as a proper basis for a sanction against his DEA COR), *aff'd, Trawick* v. *DEA,* 861 F.2d 72 (4th Cir. 1988) (''It is clearly reasonable to interpret th[e] unambiguous language [in 21 U.S.C. 824(a)(4)] as allowing a negative action on a DEA [COR] based on a misdemeanor possession conviction that is unrelated to the registrant's practice or the diversion concerns of the amendment itself.''); *see also Michael S. Moore, M.D.,* 76 FR 45867, 45868 (2011) (COR sanction sustained on basis of the respondent's state conviction for manufacture of marijuana, which was unrelated to his professional medical practice as an emergency room physician). Thus, inasmuch as the conduct that culminated in the Dental Board's Consent Agreement was squarely in violation of ''applicable State . . . laws related to controlled substances,'' that conduct clearly relates to a ground that could have affected [38] each of the three renewal applications from which its disclosure was intentionally omitted. *Vitalis,* 79 FR at 98708 (''[W]here an applicant currently holds unrestricted state authority to dispense controlled substances, the failure to disclose state action against his medical license may be material if the action was based on conduct . . . which is actionable under either the public interest factors or the grounds for denial, suspension, and revocation set forth in [21 U.S.C.] 824.'').

In this case, the pertinent inquiry is whether the Respondent knew, or should have known that he submitted false applications for renewal of his DEA COR in 2006, 2009, and 2012. The Respondent does not contest that he did not disclose the Consent Agreements that he had entered into with the Dental Board, or that it is important to answer liability questions truthfully as part of a

[36] While it is true that during the hearing conducted in this matter (Tr. 18–19, 85) and in his closing brief (Resp't Brf. at 2) the Respondent's current counsel urges that no plea of guilty of any kind was entered by the Respondent on the criminal case, this is inconsistent with the parties' stipulations and not supported by any documentary evidence of record. The Respondent's counsel was invited to provide statutory authority regarding the state procedural structure that may have been employed at the time of the resolution of the Respondent's criminal case (Tr. 20, 86), but no citations in this regard were ever supplied to assist this tribunal to resolve the inconsistency. Resp't Brf. at 2 n.2. It is interesting that in describing his own understanding of what occurred, the Respondent stated that ''this was going to take the incident from a felony to a misdemeanor, and then the misdemeanor, and then the misdemeanor, by going through this drug court, it was a misdemeanor, so it was from a legal standpoint not—from my standpoint not a big deal, and then going through this process I was able to get an expungement, which was the ultimate thing I wanted.'' Tr. 88–89.

[37] 21 U.S.C. 823(f)(4) (''Compliance with applicable State, Federal, or local laws relating to controlled substances.'')

[38] *Mohr,* 77 FR at 34998 n.2; *Smith,* 76 FR at 53964; *Bickman,* 76 FR at 17701.

practitioner's obligation to the public. Tr. 21, 127. The Respondent does, however, contest the revocation sanction sought by the Government, arguing that taken in context with parallel state licensure requirements, his answers to the liability questions, though not correct, were based on an interpretation of his obligations that was, at least in his view, not unreasonable. Tr. 21.

The liability question in the three DEA COR renewal applications was worded in straightforward terms that left scarce little to the imagination of even the most unschooled of applicants. In pertinent part, the question to which the Respondent replied in the negative queried: ''Has the applicant ever . . . had a state professional license . . . suspended . . . or placed on probation, or is any such action pending?'' Gov't Exs. 4–6. In fact, the Agency has specifically confirmed the clarity of the language utilized here in sustaining findings of materially falsified applications under 21 U.S.C. 824(a)(1). *Felix K. Prakasam, M.D.,* 70 FR 33203, 33205–06 (2005); *Anne D. DeBlanco, M.D.,* 62 FR 36844, 36845 (1997). With like clarity, the Consent Agreement with the Dental Board comprising the center of the case provides in pertinent part that the Respondent ''knowingly and voluntarily agrees with the [Ohio] Board, to the following PROBATIONARY [39] terms conditions and limitations,'' the first of which states that the Respondent's ''license to practice dentistry is indefinitely suspended.'' Gov't Ex. 3 at 1.

The Respondent is highly educated [40] and has been a practicing dentist and DEA registrant for over twenty-five years.[41] Gov't Ex. 7. Like all DEA registrants, the Respondent is responsible for understanding the concepts and duties as a dentist and his obligations as a registrant. As DEA has held in the past, a registrant's ''ignorance of the law is no excuse'' for actions that are inconsistent with responsibilities attendant upon a registration. *Sigrid Sanchez, M.D.,* 78 FR 39331, 39336 (2013) (citing *Patrick W. Stodola,* 74 FR 20727, 20735 (2009) and *Hageseth* v. *Superior Ct.,* 59 Cal. Rptr. 3d 385, 403 (Ct. App. 2007) (a ''licensed health care provider cannot 'reasonably claim ignorance' of state provisions regulating medical practice'')). Under Agency precedent, ''[a]ll registrants are charged with knowledge of the CSA, its implementing regulations, as well as applicable state laws and rules.'' *Id.* at 39333. The Respondent's argument that he was somehow understandably befuddled in his obligations to answer the straightforward liability question in issue is mortally undermined by his level of experience and education, as well as the stark clarity of the language employed by both the Dental Board in its Order and the DEA in Question 3 of the COR renewal application.

Another fatal blow to his defense stems from the fact that his case in this regard is entirely dependent upon the strength of his testimony, which, as discussed in detail, *supra,* was none too credible. In this case, the Respondent's testimony was regrettably marked with a level of equivocation, implausibility, and inconsistency that profoundly undermined his efforts to ameliorate his culpability.

The Respondent's evidence that he was confused by Ohio Dental Board policy is wholly unpersuasive. Moreover, no evidence about how that policy (even if conceded *arguendo* as having been validly understood by the Respondent) was communicated to him was presented in a manner that was deserving of reliance. Further, the Respondent's assertion that he attempted to ascertain his DEA COR application obligations through inquiry with an employee of the Dental Board is not only incredible, it is also not reasonable. There is nothing in the record or in common sense that would even theoretically imbue officials of the Dental Board with authority or expertise regarding the requirements of a DEA COR renewal form. In fact, Exec. Dir. Lili Reitz explicitly stated that the state dental board has ''no jurisdiction'' over other licensing agencies, which would naturally include the DEA. Tr. 35. Either the Respondent asked Dental Board officials (who had no basis to speak with knowledge or authority on DEA applications) in the hopes of securing an answer (even an incorrect one) that served his purposes (which the Respondent alluded to as a strategy following his completion of the drug court program [42]), or the Respondent never asked the Dental Board officials anything about his DEA application.[43] Either scenario does not advance the Respondent's position, and more fundamentally, even if the Respondent's (naïve) version were credited (a big ''if''), there is no policy of any state board that does or can affect the obligations of a DEA registrant to truthfully answer plainly-stated questions in a COR renewal application. State officials possess no authority to alter DEA registrant applications, and this is a fact that the Respondent, a DEA registrant, clearly knew or should have known. Likewise, the Respondent's testimony that he believed that the DEA, a federal agency in the United States Department of Justice, was ''under'' the control of the Ohio state pharmacy board [44] does nothing other than further undermine his credibility. In short, on these facts, the Respondent's understanding of how much of the information he was obligated by Dental Board policy to include accurately on his application to renew his state dental license is little more than a red herring. His reliance on that theory here mortally undermines any argument that he has accepted responsibility for his actions by any measure that would militate in his favor in these proceedings.

Recommendation

In evaluating the DEA COR applications in their entirety, this record as a whole, and considering the totality of the circumstances [45] surrounding the Respondent, his experience, and the facts as he knew them to be at the time he submitted the applications, it is clear that the Respondent's answers were false, and that they were supplied by the Respondent with an intention to deceive the Agency,[46] and that the Respondent knew or should have known that his answers were false. *Hale,* 69 FR at 69406; *The Drugstore,* 61 FR at 5032; *Watts,* 58 FR at 46995. Thus, inasmuch as the Government's evidence has established by clear and convincing evidence that the Respondent has materially falsified three applications to renew his COR, it has supplied sufficient evidence to support revocation, and thus, made out a *prima facie* case for the relief it seeks. ''[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.'' *Jeri*

[39] All caps in original document. Gov't Ex. 3.

[40] Tr. 81–82.

[41] The Respondent was admitted to the practice of dentistry in 1988 and first became a DEA registrant that same year. Tr. 81; Gov't Ex. 7. Thus, at the time he submitted the first of the charged DEA COR renewal applications in 2006, he had been a dentist and DEA registrant for eighteen years.

[42] Tr. 112–113.

[43] Although the Respondent initially noticed and subpoenaed Kathy S. Carson, one of the two employees that the Respondent testified he could have spoken with about the issue, he subsequently withdrew his request to call the witness. This was done in spite of the fact that the case was continued to accommodate an illness which made Ms. Carson unavailable to testify on the originally-scheduled hearing date.

[44] Tr. 135.

[45] *Easter,* 69 FR at 5581.

[46] *See Jackson,* 72 FR at 23852–53.

Hassman, M.D., 75 FR 8194, 8236 (2010); *see Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005); *Ronald Lynch, M.D.,* 75 FR 78745, 78754 (2010) (holding that a 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); *Steven M. Abbadessa, D.O.,* 74 FR, 10077, 10078 (2009); *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (2009); *Med. Shoppe–Jonesborough,* 73 FR 364, 387 (2008). The acceptance of responsibility must be unequivocal, or relief from sanction is unavailable. *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* v. *DEA,* 664 F.3d 808, 822 (10th Cir. 2011). The Agency has found that when a respondent is equivocal in accepting responsibility, such acceptance is ineffective and thus, any evidence of remedial measures taken is irrelevant. *The Medicine Shoppe,* 79 FR 59504, 59510 (2014). In determining whether and to what extent a sanction 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. *David A. Ruben, M.D.,* 78 FR 38363, 38364, 38385 (2013).

As discussed, *supra,* the Respondent's insistence that his false response to Question 3 was borne of a reasonable misunderstanding of the information sought is simply not credible or reasonable and fatally undermines his efforts to meet the Government's case. The Respondent is an experienced COR registrant, a highly-educated professional, and a professor at a dental school. Offering a mitigation case based on a theory that this could have happened to anyone, and upon reflection (and more importantly, discovery by DEA), the answers should have technically been different, convincingly demonstrates that the Respondent does appreciate his own deceitfulness in his multiple COR renewal applications. To satisfy his modest burden to accept responsibility would have required, at a minimum, an acknowledgement that he knew and understood the answers were false when the applications were presented and thereafter. Even in his Closing Brief, the Respondent does not unequivocally state he was wrong and unreasonable at the time the DEA COR renewal applications were submitted, but merely posits that he ''now agrees that he should have consulted with an attorney, someone with the federal government, or with the DEA specifically, before answering the liability question in the DEA [COR] renewal application.'' Resp't Brf. at 3. The clear import of the Respondent's position is that he is only guilty of failing to acquire a definitive legal interpretation regarding an ambiguous clause in an application. Thus, since the Respondent has not tendered an unequivocal acceptance of responsibility, under established Agency precedent, he is foreclosed from a favorable result in these proceedings and the issue of remedial actions is irrelevant.[47]

Although the egregiousness of the Respondent's material false misrepresentations is certainly enhanced by the fact that it was repeated on three occasions, and (even according to his own testimony) was actively motivated by his desire to avoid drawing negative attention to himself and his practice,[48] a far more significant part of the equation regarding the exercise of discretion here is founded in a consideration of the Agency's interests in deterrence of similar misconduct. Agency precedent has recognized that in the exercise of its oversight responsibilities, DEA must properly factor legitimate interests in both specific (related to the Respondent's future controlled substance privileges) and general (among the regulated community overall) deterrence. *Ruben,* 78 FR at 38385. Regarding specific deterrence, the Agency has an interest in ensuring that the Respondent complies with the CSA in future practice. Specific deterrence is especially important in the instant case given the Respondent's equivocation at hearing regarding the wrongfulness of his conduct as well as his stated motivations for failing to disclose the suspension and probation of his dental license. A strong indicator of his future conduct in this regard is his history of only disclosing his disciplinary issues to his insurance carrier when he was caught. The Respondent's presentation makes it clear that if presented with a similar circumstance, he would likely as not follow the same course. If the Respondent were amenable to learning this lesson, it would have been learned at the time he was caught trying to deceive his insurance carrier. There is no objective reason on the present record to believe that getting caught in a falsification by DEA will have any greater effect than getting caught by a falsification by his insurance carrier. The record supports the conclusion that he will act in what he feels is his own best interests. Simply put, there is just no basis in this record to conclude that the Respondent has evolved into a more candid registrant, and the interests of specific deterrence militate in favor of a denial of his COR application.

Regarding general deterrence, as the regulator in this field, the Agency bears the responsibility to deter similar misconduct on the part of others for the protection of the public at large. *Ruben,* 78 FR at 38385. Agency regulators are not and cannot be omniscient. To perform its regulatory mission, DEA must depend primarily on the candor of members and prospective members of the regulated community. The Respondent here did not come forward of his own volition; his actions were discovered by DEA. There is no question that for years the Respondent profited (monetarily and professionally) by his own lack of candor here. In this case, issuance of a published decision imposing no sanction on a registrant who attempted to (and for many years did) shield himself from a deserved level of scrutiny regarding multiple renewal applications by tendering material false answers designed to mask his misconduct would broadcast a message to the regulated community that lack of candor in material matters carries no consequence to the Respondent, only potential advantage for others in similar situations. Such a holding would unequivocally incentivize nuanced or even patently false answers on applications where the accuracy of the information is vital to the Agency's mission to regulate registrants who are entrusted or seek to be entrusted with the responsibility of handling controlled substances.

The evidence of record, which includes material false statements in multiple COR renewal applications and no basis upon which to find that the Respondent has accepted responsibility for his action, compels a recommendation that the Respondent's DEA registration be **REVOKED**.

Dated: January 9, 2015.

JOHN J. MULROONEY, II

Chief Administrative Law Judge

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[47] In any event, the record contains no significant evidence of remedial steps to prevent reoccurrence beyond the Respondent's assurances.

[48] Tr. 128.