influencing, the decisionmaking body to which it is addressed.'" *United States* v. *Gaudin,* 515 U.S. 506, 509 (1995) (quoting *Kungys* v. *United States,* 485 U.S. 759, 770 (1988)). The Court has further explained:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions: (a) "What statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "Whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts.

Gaudin, 515 U.S. at 512. The "evidence must be clear, unequivocal, and convincing." *Kungys,* 485 U.S. at 772.

While the DI's affidavit establishes the falsity of Applicant's statements, the Government does not explain what decision the statement had "the natural tendency" to influence or "was capable of influencing." *Gaudin,* 515 U.S. at 509 (quoting *Kungys,* 485 U.S. at 770). Among the possibilities are whether to grant or deny his application for registration, to pursue criminal charges against him, or to conduct further investigation to determine whether he had committed additional crimes or whether individuals (other than naïve patients [19]) were involved in supplying him with fentanyl. However, because the DI's affidavit does not offer any explanation as to why the false statement was "capable of influencing" any of the possible agency decisions, let alone identify which decision(s) the false statement was capable of influencing, I decline to address whether the statement was material.

In any event, given the extensive evidence under factors two and four establishing that Respondent knowingly wrote hundreds of controlled substance prescriptions even though he had surrendered his registration, that he wrote prescriptions within weeks of having surrendered his registration, that he wrote prescriptions even after being told to stop and that he could not do so until he obtained a new registration, as well as the evidence that he abused fentanyl, it is clear that issuing him a new registration would "be inconsistent with the public interest." 21 U.S.C. 823(f). Accordingly, Respondent's application will be denied.

Order

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

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8546 Filed 4–8–11; 8:45 am]

BILLING CODE 4410–09–P

[19] During the interview, Applicant also denied that he had ever issued prescriptions to patients to have them obtain drugs for himself. There is, however, no evidence that this statement was false.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09–2]

Alan H. Olefsky, M.D.; Denial of Application

On August 22, 2008, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Alan H. Olefsky, M.D. (Respondent), of Chicago, Illinois. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a practitioner, "for reason that [Respondent's] registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f)." ALJ Ex. 1, at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Show Cause Order specifically alleged that in 1989, Respondent issued "two false prescriptions for [the] controlled substances [Percocet and Halcion (triazolam), schedule II and schedule IV drugs, respectively] in the names of others and attempted to have them filled at a pharmacy in Florida." *Id.* The Show Cause Order alleged that on January 9, 1992, and after a hearing, the Administrator revoked Respondent's then-existing DEA registration having found the allegations proved and that Respondent had lied during the hearing regarding "the circumstances surrounding [his] misconduct." *Id.*

Next, the Show Cause Order alleged that "[f]rom at least December 2002, through October 2004," Respondent "again issued false prescriptions for various controlled substances in the names of [M.G., V.G., and T.C.]" and that "[t]hese prescriptions were for [Respondent's] personal use." *Id.* The Show Cause Order then alleged that on May 25, 2005, "DEA issued an Order proposing to revoke [Respondent's] DEA registration * * * based upon [his] issuing false prescriptions," and that on July 20, 2007, the Deputy Administrator issued a final order denying Respondent's application (his registration having expired), having found that he "had issued the prescriptions for [his] personal use and that such conduct violated federal law." *Id.* at 1–2 (citing 21 U.S.C. 843(a)(3)). Finally, the Order alleged that Respondent has "also exhibited a pattern of abusing alcohol" that includes a June 2004 arrest for driving under the influence and a January 2007 hospitalization "with a blood alcohol level of .327," and that his "history of abusing controlled substances and alcohol shows that granting [his] application for a DEA registration would be inconsistent with the public interest." *Id.* at 2.

By letter of October 6, 2008, counsel for Respondent requested a hearing on the allegations, ALJ Ex. 2, and the matter was placed on the docket of the Agency's Administrative Law Judges (ALJs). Following prehearing procedures, an ALJ conducted a hearing on June 2–3, 2009, in Chicago, Illinois. Both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law, and argument.

On February 22, 2010, the ALJ issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision (also ALJ or Recommended Decision). Therein, the ALJ considered the evidence pertinent to the five public interest factors and concluded that granting Respondent's application "would be inconsistent with the public interest." ALJ at 43.

As to the first factor—the recommendation of the appropriate State licensing board—the ALJ noted that Respondent's State licenses as a physician and as a handler of controlled substances "remain on indefinite probation and are subject to the restrictions stated in the May 22, 2007, consent order." ALJ at 35. Noting that Respondent is "currently authorized to handle controlled substances in Illinois," the ALJ concluded that "this factor weighs in favor of a finding that Respondent's registration would not be inconsistent with the public interest." *Id.* at 35–36. However, because "state licensure is a necessary but not sufficient condition for DEA registration," the ALJ concluded that "this factor is not dispositive." *Id.* at 36.

As to the second and fourth factors—Respondent's experience in handling controlled substances and his compliance with applicable Federal, State or local laws—the ALJ first noted that Respondent testified "in the instant proceeding that the explanation he offered in the 1991 hearing" about the Halcion and Percocet prescriptions "was true." *Id.* The ALJ did not, however, find his "explanation credible." *Id.*

Next, the ALJ found that "on numerous occasions between 2002 and 2004, Respondent issued prescriptions for alprazolam in other persons' names, had the prescriptions filled, and kept the drugs for his own use." *Id.* While the ALJ recognized that both Respondent and a psychiatrist who was involved in his treatment maintained that his "abuse of alprazolam was limited to the manner of acquiring it," she nonetheless concluded that his "fraudulent prescriptions for alprazolam indicate his willingness to misuse a DEA registration." *Id.*

The ALJ thus found that Respondent's conduct in both 1989 and from 2002 to 2004 violated 21 U.S.C. 843(a)(3), which prohibits acquiring a controlled substance by misrepresentation or fraud. *Id.* at 38. She also found that the 2002 to 2004 alprazolam prescriptions violated 21 U.S.C. 829 and 21 CFR 1306.04, because Respondent was not "acting in the usual course of professional practice" when he "appropriated to his own use the drugs he ostensibly prescribed to others." *Id.* Moreover, the ALJ found that Respondent violated 21 U.S.C. 841(a)(1) in that Respondent distributed controlled substances without a valid prescription. *Id.* Finally, the ALJ concluded that "[b]ecause Respondent issued controlled substance 'prescriptions' knowing that the person other than the one named on the prescription was the intended recipient of the controlled substances," he violated 21 CFR 1306.05, which requires that a prescription "bear the full name and address of the patient." *Id.* The ALJ thus concluded that "Respondent's handling of controlled substances and lack of compliance with law and regulations weigh[] in favor of a finding that his registration would not be consistent with the public interest." *Id.* at 39.

As to the third factor—Respondent's conviction record for offenses related to the distribution or dispensing of controlled substances—the ALJ noted that in 1989, Respondent had been charged with two state law counts of obtaining controlled substances by fraud but that "no conviction resulted from those proceedings." *Id.* The ALJ likewise noted that Respondent had not been convicted of a controlled substance offense based on his conduct during the 2002 to 2004 period. *Id.* The ALJ thus concluded that "this factor, although not dispositive, weighs against a finding that Respondent's registration would be inconsistent with the public interest." *Id.*

With respect to the fifth factor—other conduct which may threaten the public health and safety—the ALJ reviewed Respondent's history of arrests for various offenses, his history of alcohol abuse, as well as the evidence pertaining to his recovery and acceptance of responsibility. *Id.* at 39–41. The ALJ specifically found that "Respondent's criminal history advises against granting him a registration." *Id.* at 41. Based on his having misrepresented to a law firm that he held an unrestricted medical license when he did not and his testimony that he could not recall the circumstances surrounding various arrests which appeared on his criminal record, the ALJ also found that Respondent had "willing[ly] misrepresent[ed] the truth," and that this "extends beyond his handling of controlled substances." *Id.*

While the ALJ further noted that "Respondent has demonstrated that he is committed to his recovery from alcoholism [and] has taken steps to ensure that he remains sober," she nonetheless found that "his past behavior poses serious questions as to whether he is capable of handling controlled substances responsibly and is willing and able to adhere to all applicable laws and regulations by which DEA registrants must abide." *Id.* at 42. Also noting that Respondent "has [not] fully addressed other behavioral issues, nor does he seem fully to recognize the extent of his misconduct in falsifying prescriptions," *id.* at 43, the ALJ thus concluded that this factor supports "a finding that granting Respondent's application would not be consistent with the public interest" and recommended "that his pending application for registration be denied." *Id.*

Thereafter, Respondent filed Exceptions to the ALJ's Recommended Decision. On March 23, 2010, the ALJ forwarded the record to me for final agency action.

Having considered the record as a whole, I agree with the ALJ's ultimate conclusion that granting Respondent's application "would be inconsistent with the public interest" and her recommendation that his application be denied.[1] As the ultimate fact finder, 5 U.S.C. 557(b), I make the following findings.

Findings

Respondent is a physician licensed to practice medicine in Illinois and Indiana. RX 1, at 5 & 7. Respondent, however, has been no stranger to disciplinary proceedings brought by both this Agency and state licensing authorities. This matter is the third time he has been the subject of a DEA proceeding. *See* GX 3 (2007 Final Order denying Application), GX 4 (1992 Final Order revoking registration). Moreover, he has been subject to multiple proceedings brought by the Illinois Department of Financial and Professional Regulation including a 1995 proceeding (which was based on the first DEA proceeding), GX 1, at 7; a 2005 proceeding in which the State imposed a suspension because his "actions constitute[d] an immediate danger to the public," GX 10, at 1, a March 2007 suspension based on Respondent's having violated a November 2006 consent order which had restored his medical license, GX 12, at 1–2, GX 13; and a December 2007 consent order which, while restoring his Illinois Physician and Surgeon License and Controlled Substance License, placed him on probation for a minimum of five years.[2] GX 1, at 9–10, 13.

On February 24, 2005, Respondent submitted an untimely renewal application, his previous registration having expired on December 31, 2004. GX 3, at 3. Thereafter, based on Respondent's loss of his state authority and evidence that he had obtained controlled substances by calling in fraudulent prescriptions, the Deputy Assistant Administrator issued an Order to Show Cause to him which proposed the denial of any pending applications. *Id.* at 2. Respondent did not timely request a hearing. *Id.* at 2–3. While Respondent's application was treated as an application for a new registration, I found the allegations proved and issued a Final Order denying Respondent's application for a DEA registration. *Id.* at 9. On January 21, 2008, Respondent submitted a new application for registration; it is this application which is the subject of this proceeding. GX 1.

The 1989 Incident

On January 4, 1989, Respondent was arrested at Huntington Drug Depot, a pharmacy in Fort Lauderdale, Florida, after he presented two forged prescriptions for controlled substances: one for 60 dosage units of Percocet, a schedule II narcotic controlled substance which contains oxycodone, the other for 30 dosage units of Halcion .25 mg. (triazolam), a schedule IV controlled substance. GX 4, at 1. Both prescriptions were written on pre-printed forms of an HMO named

[1] For reasons explained throughout this decision, I reject the various arguments raised by Respondent in his exceptions.

[2] Based on the Illinois proceeding, Medical Licensing Board of Indiana brought a proceeding against Respondent; the Indiana Board placed Respondent's license on "indefinite probation." RX 6, at 1 & 5.

"Health America"; the prescriptions were dated January 3, 1989, listed the patient as "Chris Pulin," and bore the DEA registration number and purported signature of Evan K. Newman, M.D. *Id.; see also* GX 14, at 3–4. Respondent had previously worked at Health America but had resigned his position in November 1988. *Id.* at 3.

Upon reviewing the prescriptions, a pharmacist became suspicious because they were "too legible," and having been written on the HMO's forms, could have been filled for a fraction of the price at one of the HMO's participating pharmacies. GX 14, at 4–5. His suspicions aroused, the pharmacist called Dr. Newman, who told him that he did not have a patient named "Chris Pulin" and that he did not recall issuing the prescriptions. *Id.* at 5 n.6. The pharmacist then called the police; upon their arrival, both the owner of the store and his son, who was working as a pharmacy clerk, identified Respondent as the person who had presented the prescriptions and Respondent was arrested. *Id.* at 4–5. Moreover, a subsequent "search of Broward County and Fort Lauderdale records failed to disclose any record regarding a Chris Pulin." *Id.* at 9.

Respondent was then taken to the police station and interviewed. GX 4, at 1. There, he refused to give his name or date of birth, stated that the incident could jeopardize his life and career, and insisted that someone else had presented the prescriptions and that the police had arrested the wrong person.[3] *Id.* Respondent had no response when the officer told him that both pharmacists had identified him as the individual who had presented the prescriptions.[4] GX 15, at 20.

At his hearing, Respondent testified that he had received a phone call from a Ms. Schwartz, whom he did not know, and that she had asked him if he could help out an elderly friend of hers who had sustained a fall and lacked health insurance. GX 4, at 2; GX 15, at 100, 148. Respondent claimed that he told Ms. Schwartz to take her friend to Health America, where he could be examined. GX 4, at 2; GX 15, at 101.

According to Respondent, several days later, Ms. Schwartz called again stating that her friend had received a couple of prescriptions and asked Respondent if he could "have them filled at a reduced price." GX 15, at 102. In his testimony, Respondent claimed that later that day, an envelope was slipped under his door which contained a note with Chris Pulin's name and address and the two prescriptions. *Id.* at 103–04. In his testimony, Respondent maintained that he went to the pharmacy intending to have the prescriptions filled and handed the piece of paper and the prescriptions to the pharmacist who was working as the clerk. *Id.* at 108. Respondent testified that he did not intentionally or knowingly take the two prescriptions for Halcion and Percocet to the pharmacy knowing that they were forged. *Id.* at 113. In the instant matter, he also testified that he had never taken Halcion, Percocet, or generic oxycodone. Tr. 18.

In her 1991 Recommended Ruling, the ALJ found that Respondent was "a less than candid witness" and was not "generally credible." GX 14, at 12. She further explained that "Respondent's explanation of his conduct is most charitably described as inherently implausible," as a physician agreeing "to obtain a highly abused medication such as Percocet for a total stranger is * * * totally at odds with any rational notion of professional responsibility." *Id.*

On January 2, 1992, the Honorable Robert C. Bonner, DEA Administrator, himself no stranger to tall tales having previously served as a United States District Judge, adopted the ALJ's findings of fact and legal conclusions in their entirety and revoked Respondent's registration. GX 4, at 3 (57 FR 928 (1992)). The Administrator expressly found "that Respondent refuses to accept responsibility for his actions and does not even acknowledge the criminality of his behavior." *Id.* at 2. The Administrator further found that "Respondent's version of the incident is simply unworthy of belief." *Id.* He then noted that, although the state charges against Respondent had been dismissed, "Respondent's conduct demonstrates an absolute disregard for Federal and state law and nothing presented during Respondent's case persuades the Administrator that the Respondent is now willing to carefully abide by the laws and regulations relating to controlled substances."[5] *Id.* at 3.

On both his recent application for a new DEA registration and in his testimony in the instant proceeding, Respondent maintained that his 1991 story was true. For example, on his application, Respondent wrote: "From February 10, 1992 until February 10, 1993, my DEA registration was revoked *based on allegations* that in 1989, in Florida, I attempted to fill two prescriptions, *which were allegedly forged to try to help a person who did not have insurance*." GX 1, at 7 (emphasis added).

Moreover, in his testimony in the instant proceeding, Respondent told the exact same story of having been called "out of the blue" by Ms. Schwartz, whom he did not know and had never spoken to before, and was asked by her to help her elderly friend who had fallen down some stairs; how several days later, Ms. Schwartz had called him back and stated that her friend had obtained two prescriptions and asked if he would get them filled for her friend; how the prescriptions were slipped under his door; and how he had not forged the prescriptions and that the only thing he had done wrong was to "not look[] more into the authenticity of the prescriptions and doing what I did." Tr. 25–32. While the Administrator's (and ALJ's) findings that Respondent's story was not credible are *res judicata,* the ALJ explained that she did not find his story any more credible now than she had in 1991. ALJ at 36.

The 2002—2004 Incidents

In October 2004, an Investigator with the Illinois Department of Financial and Professional Regulation (IDFPR), Division of Professional Regulation (DPR), received an anonymous complaint, which alleged that Respondent was calling in to pharmacies false prescriptions for Xanax (alprazolam), Dilaudid (hydromorphone) and Viagra (a non-controlled prescription drug), under the names of M.G., V.G., and T.C., and that Respondent was going to the pharmacies and picking up the prescriptions for his personal use. GX 5, at 1. The informant further stated that Respondent paid cash for the drugs to avoid them being traced to him and identified three Chicago pharmacies where the prescriptions were being filled.[6] *Id.* The informant also reported

[3] At the time of his arrest, Respondent was wearing sunglasses and a hat which was "pulled down over his head." GX 14, at 4. When the police attempted to interview him at the station, Respondent refused to take off his sunglasses claiming he had glaucoma; he also initially refused to take off his hat claiming he was bald. *Id.* at 6. However, when Respondent eventually took off his hat for a brief moment, he was not bald. *Id.*

[4] Respondent was charged with attempting to obtain a controlled substance by fraud in violation of state statute, but the charges were dismissed because "the information was filed incorrectly as to the charge." GX 14, at 6–7.

[5] DEA granted Respondent a new registration in July 1993.

[6] The informant also reported that Respondent had been arrested for DUI on June 22, 2004 and was driving "on a suspended license while under the influence of alcohol." GX 5, at 6. At the hearing, Respondent admitted that he had been convicted of the DUI charge. Tr. 95. According to the report of a psychiatrist who evaluated him for the IDPFR, Respondent told her that the police officer thought he was drunk because he had difficulty walking due to a sprained ankle. Tr. 116–17. At the hearing,

Continued

that Respondent had been arrested for DUI on June 22, 2004 and was driving "on a suspended license while under the influence of alcohol." *Id.* at 6.

Upon receipt of this information, the DPR Investigator and a DEA Diversion Investigator (DI) went to the pharmacies and obtained at each of them, a profile which listed the prescriptions Respondent had written in the names of M.G., V.G. and T.C. GX 7. Subsequently, the DPR Investigator prepared a spreadsheet of the prescriptions. *Id.* The Investigators confirmed the informant's report that Respondent had issued prescriptions for alprazolam .5 mg. in the names of T.C., M.G., and V.G.

More specifically, Respondent issued alprazolam prescriptions in V.G.'s name for 60 tablets on April 4, May 17, and June 8, 2004. *Id.* 4. He issued prescriptions in T.C.'s name for 30 tablets on April 21 and May 7, 2004, as well as 60 tablets on September 8 and October 7, 2004. *Id.* at 3. Finally, he issued prescriptions in M.G.'s name for 60 tablets on July 8 and July 28, 2004. *Id.* at 4. Thus, between April 4 and October 7, 2004, Respondent called in prescriptions for a total of 480 tablets of alprazolam.

Moreover, in the order Respondent entered into with the Medical Licensing Board of Indiana, Respondent admitted that "from December 2002 to October 2004, [he] prescribed Xanax, Dilaudid, and Viagra using other individuals' names" and he "subsequently admitted that he consumed these drugs himself." RX 6, at 2.

Thereafter, the Chief of Medical Prosecutions for the IDFPR filed a complaint and a petition for temporary suspension of his medical license on the ground that Respondent's continued practice of medicine was "a danger to the public interest, safety and welfare." GX 9, at 1. The petition was supported by the affidavit of Larry G. McLain, M.D., Chief Medical Coordinator of the IDFPR, which stated that Respondent had "repeatedly issued false prescriptions for Xanax, Dilaudid and Viagra," that Respondent "call[ed] in these prescriptions in the names of [M.G., V.G., and T.C.]," and that he paid cash for the drugs which he was obtaining for "personal use." GX 9, at 5. Dr. McClain further noted Respondent's June 2004 DUI arrest and that he had an extensive criminal history.

On February 18, 2005, the DPR's Acting Director ordered that Respondent's medical license be suspended pending a hearing. GX 10. Thereafter, on May 25, 2005, the Deputy Assistant Administrator of the DEA Office of Diversion Control issued an Order to Show Cause to Respondent which proposed the revocation of his registration (and the denial of any renewal application) based on his having issued false controlled-substance prescriptions and his lack of authority under State law to dispense controlled substances, the latter being a requirement for holding a registration under Federal law. GX 3, at 2.

Regarding the events of this time period, Respondent testified that his drinking first became problematic around 2003 to 2004, when he switched from primarily drinking beer to drinking more wine and vodka. Tr. 10. Respondent stated that his drinking increased at this stage in conjunction with marital troubles, *id.* at 13, and that at the height of his abuse of alcohol, he consumed "[m]aybe a 750 ml bottle [of vodka] a [sic] week, maybe three-quarters of that." *Id.* at 12.

In the spring of 2006, Respondent underwent treatment at Lutheran General Hospital. Tr. 86. In June, Respondent completed inpatient treatment and signed an Aftercare Agreement with Illinois Professionals Health Program (IPHP).[7] *Id.* at 124, 137.

In September 2006, Respondent entered into a consent order with the IDFPR. The order, which became effective on November 21, 2006, restored Respondent's medical license and placed him on "Indefinite Probation." *Alan H. Olefsky, M.D.,* 72 FR 42127 (2007) (GX 3B, at 1). Among the conditions imposed by the order were that Respondent comply with the terms of an Aftercare Agreement and that he abstain from the use of alcohol and "mood altering and/or psychoactive drugs," except as prescribed by another physician. *Id.* at 42128. In the meantime, Respondent had been "discharged from Caduceus on [October 5, 2006] due to missing five consecutive group sessions," had "discontinued individual therapy with" a psychologist, and had missed five urine drug screens between September 20 and December 13, 2006. RX Group 11, at 1.

Within one month of the State's restoration of his license, Respondent resumed his drinking.[8] Tr. 14. In January 2007, Respondent was hospitalized with a blood alcohol content of .327. GX 12, at 2. On or about March 30, 2007, the IDFPR again petitioned for and obtained a temporary suspension of Respondent's medical license.[9] GXs 3A, at 3; 12 & 13.

Following his relapse, Respondent entered a treatment program for impaired professionals run by Resurrection Behavioral Health. GX 1, at 18. On April 10, 2007, Respondent "successfully completed treatment," *id.,* and the following day, Respondent entered into a second Aftercare Agreement. *Id.* at 25, 27. The Aftercare Agreement, which was in effect for a period of twenty-four months, required him to enroll in his "state Professional's Assistance Program," undergo random toxicology screens, attend Caduceus Aftercare meetings following completion of his long-term treatment program, attend AA meetings, and abstain from the "use of all mood-altering chemicals, except as prescribed by [his] primary or treating physicians." *Id.* at 25–26.

On April 10, 2007, Respondent also entered into a consent order with the IDFPR, which the latter approved on May 22, 2007. GX 1, at 16. The Consent Order "indefinitely suspended" Respondent's medical license "for a minimum of 6 months" from the March 30, 2007 suspension order but allowed him to regain his license by providing proof to an informal conference of the Medical Disciplinary Board that he had "successfully participated in a substance abuse treatment program for a minimum of 6 months." *Id.* at 13.

The Consent Order also provided that upon the restoration of his medical license, Respondent would be placed on probation for a minimum of five years subject to various conditions. *Id.* at 13–14. These conditions include that he

however, Respondent acknowledged that he had failed a breathalyzer test. *Id.* at 117.

[7] The IPHP is "a statewide program sponsored by Advocate Medical Group, the Illinois State Medical Inter-Insurance Exchange, and other health professional organizations." RX 1, part 3. It "provides support and advocacy for health care professionals who have difficulties with stress management, substance abuse, medical or psychiatric illness or other issues that may impact the professional's health, wellbeing, or ability to practice his or her profession." *Id.*

[8] Respondent testified that he relapsed because he didn't "have the sponsor set up" and did not attend Alcoholics Anonymous (AA) meetings regularly; the relapse occurred while he was nursing his terminally ill mother and experiencing "licensing issues" and "a sense of isolation living in Des Plaines." Tr. 86–87.

[9] Following the DPR's March 30, 2007 order which imposed a second suspension of Respondent's medical license, the second DEA proceeding, which had been held in abeyance (after the DPR's November 2006 order restoring Respondent's medical license) was forwarded to me for final agency action. GX 3A, at 3. While I found that Respondent did not have a current registration, I found that he had an application pending before the Agency. *Id.* I denied the application for two independent reasons: (1) That Respondent lacked authority under Illinois law to dispense controlled substances, which is an essential prerequisite for obtaining a DEA registration, and (2) that Respondent had violated Federal law by "repeatedly issu[ing] false prescriptions" for alprazolam and Dilaudid, which he then filled and "personally abused." *See* 72 FR at 42128 (citing 21 U.S.C. 802(21), 823(f), and 843(a)(3)).

comply with his Aftercare Agreement; that he abstain from use of alcohol and mind altering/psychoactive drugs unless prescribed to him by another physician; that he submit to random urine screens; that he not prescribe any controlled substances to himself, his family or friends; that his primary care physician file quarterly reports with the IDFPR regarding his "condition, prognosis, and any medication prescribed"; that he be "prohibited from ordering or maintain inventories of any controlled substance"; that he "be prohibited from administering or writing prescriptions for controlled substances outside of his worksite"; and that, if practicing as a physician, he do so where he was not "the only physician actively involved in the practice of medicine." *Id.* On December 5, 2007, the IDFPR restored Respondent's license to active status and placed it on probation subject to the conditions set forth in the May 2007 Consent Order.[10] GX 1, at 9–10.

Respondent's Evidence Regarding the Post-2002 Incidents

At the hearing, Respondent testified that while he was an alcoholic he had never been addicted to controlled substances and denied that he had ever taken a controlled substance for other than a legitimate medical purpose. Tr. 16. While Respondent acknowledged that he had written between 20 and 50 prescriptions in other persons' names in order to obtain alprazolam, *id.* at 18 & 21, and that he had not obtained the drug "correctly," *id.* at 36, he maintained that he was not abusing the drug but "was using it to sleep" as he "was not taking it in the amount over the recommended dose to use it for sleep purposes." *Id.* Respondent also claimed that he had never had a problem with the abuse of controlled substances. *Id.*

Subsequently, Respondent testified that he took the alprazolam only when he had "trouble sleeping" after having worked the night shift in the emergency room. *Id.* at 100. Respondent further explained that there "were just four or five shifts in the emergency room for a month. And it wasn't all the time, it was occasionally." *Id.* When further questioned as to how many tablets he took a day, Respondent testified that "I would take a half of one in the morning when I needed to fall asleep." *Id.* at 101.

Continuing, Respondent contended that "the amounts were common. A lot of the people * * * the person who evaluated me in terms of this case * * * found that the amount over the period of time was not a matter of abuse, in terms of the number of * * * Xanax." *Id.* Respondent then noted that a psychiatrist who had evaluated him for the IDFPR had "made a comment * * * that considering the amount of medications in my evaluation I did not suffer from any substance abuse problem. I'm just reflecting off of that report. They substantiated that, this psychiatrist in that department." *Id.* at 102. *See also id.* at 105 ("Her conclusion * * * was that I did not suffer from a drug problem, an addiction to drugs based on her interviewing me and the Xanax that was prescribed.").

As part of his case, Respondent submitted a copy of the psychiatric evaluation done on him for the IDPFR. RX 12. With respect to his use of substances, the report noted that Respondent "stated that over the last one and one half years, his consumption [of alcohol] increased to one or two ounces every few days. He reported occasional use of alprazolam 0.25 mg for sleep for the past two to three years. He denied use of any other medications or illicit substances." *Id.* at 3. While the psychiatrist also noted that she had reviewed pharmacy records (which showed that between April 4 and October 7, 2004, Respondent had issued alprazolam prescriptions totaling 180 tablets to T.C., 120 tablets to M.G., and 180 tablets to V.G.), she noted that the prescriptions "would have provided approximately 1 mg. daily of the substances during the time it was prescribed. Use of several milligrams at one time, especially if used with alcohol, could be dangerous and constitute abusive use. However, this examiner does not know who used the substance or how it was used." *Id.* at 6. Noting that no records had been submitted to her substantiating the claim that Respondent had also prescribed and used Dilaudid, the psychiatrist concluded that "[a]side from the allegations of [his] ex-wife, there is no clear evidence that [Respondent] demonstrated abuse of or dependence upon alcohol, prescription medications, or illicit substances." *Id.*

Respondent did not call the psychiatrist to testify and I decline to give weight to her report (which apparently was based largely on her interview of him) for several reasons. First, she concluded that Respondent was not even abusing alcohol, yet even Respondent acknowledges that he is an alcoholic and was so at the time in question. Tr. 111–16; RX Group 11, at 1.

Second, with respect to whether he was abusing alprazolam, while it is true that the total amount of alprazolam prescriptions noted above (480 tablets obtained between April 4 and October 7, 2004) would provide slightly more than 1 milligram per day, Respondent, during both his evaluation by the psychiatrist and in his testimony, claimed that he took only .25 mg. of alprazolam and that he did so only occasionally. RX 12, at 3; Tr. 100–01. Were Respondent's story true that he took half of a tablet five times a month to sleep following the night shift, over the approximately six to seven-month period in which he wrote the prescriptions,[11] he would have required no more than eighteen tablets in total, an amount 1/26th of the quantity he obtained. Notably, in her report, the psychiatrist did not even acknowledge the glaring inconsistency between the amount of alprazolam Respondent had obtained and his claimed rate of usage.[12]

As for his evidence of rehabilitation, Respondent introduced into evidence various letters written by Dr. Daniel H. Angres, Director, Resurrection Behavioral Health Addiction Services Division, Rush University Medical

[10] In addition to the 1989 Florida and 2004 DUI arrests, the Government also introduced records showing he had been arrested in May 1993 in Chicago for criminal damage to property; in March 1994 in Galena, Illinois for aggravated battery and criminal damage to property; in December 1995 for aggravated assault with a firearm; and in both December 1995 and November 2001 in Chicago for violation of a protective order. GX 6, at 1–2, 8–9; Tr. 45–46.

With the exception of the 1989 incident, the 2004 arrest for DUI, and one of the charges of having violated a protective order (which Respondent admitted having been convicted of, but then proceeded to minimize his culpability for, by claiming he had never been served with the protective order), the Government did not produce evidence apart from the arrest records and testimony based on the arrest records establishing that Respondent had committed any of these other offenses. As the Supreme Court has long noted, "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." *Schware* v. *Board of Bar Exam'rs,* 353 U.S. 232, 241 (1957). Accordingly, I do not consider any of the arrests, by themselves, to establish that Respondent committed the underlying conduct.

[11] While Respondent actually wrote the prescriptions during slightly more than a six month period, I assume that the October 7, 2004 prescription would have lasted for several weeks.

[12] As noted above, the psychiatrist's report noted that Respondent "denied use of any other medications." RX 12, at 3. Yet in the Indiana Consent Order, he stipulated that he had also obtained Dilaudid and that he had "consumed these drugs himself." RX 6, at 2.

The psychiatrist did, however, diagnose Respondent as having adult antisocial behavior. *Id.* at 6. While she concluded that Respondent's "behavior may be deemed inappropriate, illegal, or dangerous by the IDFPR," and that the IDFPR could "revoke his medical license or place restrictions upon it," she concluded that his behavior was not "due to a mental disorder." *Id.* Dr. Angres, a psychiatrist and addiction specialist who was involved in treating Respondent, explained that while he engaged in antisocial behavior, this happened "historically when [he was] under the influence" and that such behavior "often occur[s] with alcoholism." Tr. 202.

Center, and Russell Romano, Jr., Respondent's case manager at IPHP.[13] Respondent also called both Dr. Angres and Mr. Romano to testify.

At the time of the hearing, Dr. Angres, who is board-certified in Psychiatry Neurology and Addiction Medicine, served as Medical Director, Resurrection Behavioral Health, Addiction Services Division. Tr. 179, 181, 187. Respondent was Dr. Angres' patient in the "partial step-down outpatient program,"[14] and during this portion of Respondent's treatment would see him "several times a week" both in a group setting and individually.[15] *Id.* at 200.

Dr. Angres testified that while Respondent "would act in ways [that] might be described as an anti-social type of way * * * he doesn't present with any severe personality disorder." *Id.* at 202. Dr. Angres further testified that Respondent was in compliance with his Aftercare Agreement, that his urine screens were negative, and that his recovery was "[v]ery solid, it's very solid." *Id.* at 207–08.

According to Dr. Angres, Respondent's primary problem is alcohol dependence and that while Respondent was also diagnosed as having abused benzodiazepines (the class of drugs which includes alprazolam), the latter was based on the manner in which Respondent had obtained the drugs and not on the amount he was using. *Id.* at 199–200. Dr. Angres asserted that Respondent was using alprazolam "as [a] prescribed quantity for sleep," and benzodiazepine dependence was ruled out as a diagnosis because his "use was of the level of what's often prescribed." *Id.* In Dr. Angres' view, Respondent's issuance of fraudulent prescriptions "sounded like [it] was more a matter of convenience." *Id.* at 200. However, on cross-examination, Dr. Angres' admitted that his knowledge as to how much alprazolam Respondent was using was based on what the latter had told him. *Id.* at 220.

Mr. Romano testified that he has known Respondent since the spring of 2006, when after the latter's admission to Lutheran General Hospital, the Hospital contacted Dr. Doot, the IPHP's medical director, to do a substance abuse consultation. *Id.* at 137. Dr. Doot recommended that Respondent undergo some "treatment for alcohol and chemical dependency" at the Advocate Addiction Treatment Program"; Respondent completed treatment and signed an Aftercare Agreement with IPHP. *Id.;* RX Group 11, at 1.

Mr. Romano testified that he had known Respondent throughout the period which included his relapse and admission to the Resurrection Behavioral Health treatment program. *Id.* at 141. Mr. Romano testified that since April 2007, when Respondent signed his second Aftercare Agreement, he had seen Respondent on a monthly basis. *Id.* at 140; RX 1, parts 4 and 5. Mr. Romano testified that "since that January 2007 treatment * * * [t]here's been a remarkable turnaround as far as [Respondent's] acceptance and understanding of his addiction" and that Respondent has shown "commitment" to his recovery. *Id.* at 142–43. Mr. Romano reported that Respondent's urine tests had been reported as negative. *Id.* at 144.

Respondent also testified concerning his rehabilitation efforts. At the time of hearing, Respondent had been in his current job for a year and a half which involves "doing group therapy and group treatment with nursing home patients that have mental illness, and actually also substance abuse problems." Tr. 79–80. In addition, he was working as a "general physician" in a clinic with other physicians. *Id.* at 81. Respondent was also attending Alcoholics Anonymous (AA) meetings three to four times per week, *id.* at 81–82, talked with his AA sponsor between two and four times a week, *id.* at 83, and on Saturdays, attended his Caduceus group. *Id.* at 84.

Respondent testified that a DEA registration "[i]s a privilege" and that he had "done a lot of wrong things." Tr. 94. According to Respondent, he was "totally sorry for the things [he had] done." *Id.* Respondent stated that he "know[s]" "what [he has] done" so that he's "not sure on terms of what level * * * of * * * horrific punishment [he] need[s] to go through anymore." *Id.*

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that the Attorney General "may deny an application for such registration if he determines that the issuance of such a registration is inconsistent with the public interest." 21 U.S.C. 823(f). In making the public interest determination, the CSA directs that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * 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,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application for a registration. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

Where the Government has met its *prima facie* burden of showing that issuing a new registration to the applicant would be inconsistent with the public interest, the burden then shifts to the applicant to "present sufficient mitigating evidence" to show why he can be entrusted with a new 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 inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he]

[13] Respondent submitted three letters written by Dr. Angres, all of which indicated that he had been in compliance with his after care program. RXs 1, part 6; 3 and 4. Respondent also submitted two letters from Mr. Romano, both of which stated that his "substance use disorder is in sustained, full remission which indicates to us that his petition to restore his DEA license is appropriate at this time." RX 2 (letter of April 8, 2008), RX 11, at 2 (letter of April 10, 2009).

Respondent also submitted letters supporting his application from an individual attesting to his work for Mobile Doctors, *see* RX 5, as well as from the social services directors at two nursing/rehabilitation centers. RXs 9 and 10.

[14] Dr. Angres testified that Resurrection Addiction Services Behavioral Health runs a day hospital program and that most patients live in an "independent living setting that [it] supervise[s]." *Id.* at 189. The day hospital program is a "form of intensive outpatient treatment" and is followed by an "intensive outpatient step-down program," which averages seven weeks in length and is then followed by a 20-month to 2-year period of "weekly aftercare monitoring." *Id.* The Caduceus Aftercare Program in which Respondent was participating typically lasts for two years, with facilitated weekly monitoring groups and random urine sampling by IPHP. *Id.* at 191. Aftercare in general usually lasts five years, during which time there is an expectation of continued 12-step/AA recovery and "appropriate sponsorship." *Id.* at 192.

[15] While Dr. Angres testified that he attended some of the Caduceus aftercare groups and would have patients come in at different intervals, he did not specify the frequency with which he was seeing Respondent. Tr. 200–01.

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); *Cuong Tron Tran,* 63 FR 64280, 64283 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995). Because of the authority conveyed by a registration and the extraordinary potential for harm caused by those who misuse their registrations, DEA places significant weight on an applicant/registrant's candor in the proceeding. *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).

Having considered all of the factors, I hold that the Government has met its *prima facie* burden of showing that Respondent has committed acts which render his registration inconsistent with the public interest. Indeed, the Government satisfied its *prima facie* burden simply by introducing the 1992 and 2007 Agency Orders. While I have carefully considered Respondent's evidence as to his rehabilitation, as explained below, I hold that Respondent has not rebutted the Government's *prima facie* case because he has failed to accept responsibility for his misconduct and gave false testimony in this proceeding.

Factor One—The Recommendation of the State Licensing Board

As an initial matter, while the IDFPR has restored Respondent's medical and controlled substances licenses and placed them on active but indefinite probation, it has made no recommendation as to whether Respondent's application should be granted. While under 21 U.S.C. 823(f), the possession of authority under state law to dispense controlled substances is an essential requirement for obtaining a registration, as the ALJ recognized, DEA has long held that a practitioner's possession of state authority is not dispositive under the public interest standard. ALJ at 36.

In his Exceptions, Respondent argues that the ALJ "failed to give proper consideration and weight to the circumstances" which led the IDFPR to restore his licenses as well as "the level of oversight and control" it has placed on his license. Resp. Exceptions at 3–4. DEA has long held, however, that it has " 'a separate oversight responsibility with respect to the handling of controlled substances and has a statutory obligation to make its independent determination as to whether the granting of [a registration] would be in the public interest.' " *Jeri Hassman, M.D.,* 75 FR 8194, 8227 (2010) (quoting *Mortimer B. Levin,* 55 FR 8209, 8210 (1990)). *See also Alvin Darby,* 75 FR 26993, 27000 n.32 (2010); *Edmund Chein,* 72 FR 6589, 6590 (2007), *aff'd Chein* v. *DEA,* 533 F.3d 828 (DC Cir. 2008) (The authority to determine whether the issuance of a registration is consistent with the public interest has been granted to the Attorney General and "delegated solely to the officials of this Agency.").

Contrary to Respondent's contention, this case is best decided based on the record compiled in this proceeding and not in the IDPFR matter. The record in this matter shows that Respondent has violated Federal criminal laws related to the dispensing of controlled substances (in multiple instances no less) and has now lied about it in two separate agency proceedings. ALJ at 36. Moreover, the record establishes a glaring inconsistency between Respondent's testimony as to his purported rate of alprazolam usage and the quantities of drugs he was obtaining. Whatever the IDPFR's reasons were for ignoring this, I decline to do so. I thus conclude that while the IDPFR's restoration of his state medical and controlled substances licenses renders him eligible to hold a DEA registration, it is not dispositive of whether his registration would be consistent with the public interest.[16]

Factors Two, Four, and Five—Respondent's Experience in Dispensing Controlled Substances, Compliance With Laws Related to Controlled Substances, and Such Other Conduct Which May Threaten Public Health and Safety

As found in two previous Agency Orders, Respondent has on multiple occasions either attempted to obtain, or successfully obtained, controlled substances "by misrepresentation, fraud, forgery, deception, or subterfuge," in violation of 21 U.S.C. 843(a)(3). *See also* 21 U.S.C. 846 (CSA's attempt provision). More specifically, on January 4, 1989, Respondent attempted to fill forged prescriptions for 60 tablets of Percocet, a schedule II narcotic, and 30 tablets of Halcion, a schedule IV benzodiazepine, at a Fort Lauderdale pharmacy but was arrested. *See* GX 4.

When questioned by the police, Respondent lied claiming that someone else had presented the prescriptions and that they had arrested the wrong person. At the 1991 hearing, however, Respondent changed his story claiming that he had been called out of the blue by a person he did not know who had asked him to fill the prescriptions for a friend and that several days later, the prescriptions were slid under his door. Then, as now, the ALJ found the story to be "inherently implausible" and the then-Administrator found that it was "simply unworthy of belief." Notwithstanding that in this proceeding, Respondent had a fresh opportunity to acknowledge his criminal behavior and accept responsibility for his misconduct, he repeated his lies.

Moreover, as I found in my 2007 Decision and Order, which denied his previous application, on multiple occasions during 2002 through 2004, Respondent called in fraudulent prescriptions in the names of three persons for alprazolam and Dilaudid (hydromorphone, a schedule II controlled substance) to obtain drugs for his personal abuse. While in this proceeding the Government primarily focused on Respondent's prescribing and use of alprazolam, my finding that Respondent issued fraudulent prescriptions for both alprazolam and Dilaudid is *res judicata. See University of Tennessee* 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*[.]"). While Respondent waived his right to contest the allegations, *see* 72 FR 42127, he nonetheless had a full and fair opportunity to litigate these issues in that proceeding.[17]

While at the hearing Respondent acknowledged that he had issued at least twenty fraudulent prescriptions for alprazolam during the 2002 through 2004 period, his testimony regarding his rate of usage of the drug is glaringly inconsistent with the amount of the drug he obtained. As found above, between April 4 and October 7, 2004, Respondent obtained a total of 480 tablets of this drug. Yet in his testimony he maintained that he used the drug only four to five times a month (to help him sleep) and that he cut the tablets in half. Were this true, he would have used at most only eighteen tablets. Respondent offered no explanation to

[16] I concur with the ALJ's finding that there is no evidence that Respondent has been convicted of crimes related to the manufacture, distribution or dispensing of controlled substances. However, DEA has held that a finding that an applicant has not been convicted of such an offense is not dispositive. *See, e.g., Edmund Chein,* 72 FR 6580, 6593 n.22 (2007).

[17] In addition, in a proceeding brought by the Medical Licensing Board of Indiana, Respondent admitted that he had consumed Dilaudid (in addition to the Xanax). RX 6, at 2. In the instant matter, Respondent offered no explanation as to his use of Dilaudid.

account for the other 460 tablets he obtained during this period. The inconsistency between the amounts he obtained and his testimony supports the conclusion that Respondent lied about his rate of usage and likely did so to portray himself as being only an alcoholic and not a drug abuser.[18]

Thus, while Respondent produced extensive evidence of his rehabilitation from alcohol abuse, there is ample reason to be skeptical of his claim that he is not a drug abuser and that he has learned from his mistakes. Moreover, even assuming the good faith of those who have treated (and/or evaluated) him, and that the treatment he received for his alcoholism would be efficacious in treating prescription drug abuse notwithstanding his apparent unwillingness to acknowledge the extent of his alprazolam misuse, it is nonetheless clear that Respondent has a serious aversion to telling the truth. I therefore hold that Respondent has failed to accept responsibility for his misconduct and has failed to rebut the Government's *prima facie* case.

In his Exceptions, Respondent contends that he "cannot eradicate his past criminal history" and that the ALJ's recommendation that his application be denied "is tantamount to a permanent revocation * * * especially since the DEA considered most of the same information" in my 2007 order which denied his previous application. Exceptions, at 14. Respondent also contends that because the issues litigated in "the 1992 hearing before DEA are *res judicata* [they] should not be considered in any determination in this matter." *Id.* at 6. Finally, he contends that he has been adequately punished for his past misconduct and that the proper focus should have been "whether the circumstances in existence at the time of the prior denial in July 20, 2007 have sufficiently changed to warrant the issuance of Respondent's DEA registration." Exceptions, at 6–12.

Contrary to Respondent's view, Congress expressly directed the Agency to consider an "applicant's experience in dispensing * * * controlled substances." 21 U.S.C. 823(f). Respondent's previous incidents of presenting fraudulent prescriptions are thus properly considered in this proceeding. Moreover, while it is true that Respondent "cannot eradicate his past criminal history," he could have testified truthfully in this proceeding and accepted responsibility for his misconduct.[19] *See Robert Leslie,* 68 FR 15227 (2003) (denying application based on physician's continued unwillingness to accept responsibility for criminal conduct he engaged in seventeen years earlier). I am therefore wholly unpersuaded by Respondent's contention that the circumstances have sufficiently changed to warrant granting his application.

Respondent cites *Azen* v. *DEA,* 76 F.3d 384 (tablet) (9th Cir. 1996), an unpublished decision, as support for his contention that in light of his evidence of rehabilitation, it would be "unduly harsh" to deny his application. Putting aside that the Ninth Circuit upheld the Agency's decision to revoke Dr. Azen's registration, Respondent ignores that in 1993, the Agency previously gave him a second chance to demonstrate that he could be entrusted with a registration, yet he again breached this trust. Respondent also ignores under the Agency's rules, he had a way back to regaining his registration. That he could not testify truthfully about either the 1989 episode or his more recent criminal behavior and abuse of alprazolam makes clear that, notwithstanding his rehabilitation efforts, he cannot be entrusted with a new registration.[20] Accordingly, Respondent's application will be denied.

[18] To make clear, in light of the inconsistency between the amount of alprazolam Respondent obtained and his claimed rate of usage, I reject the ALJ's conclusion "that Respondent's abuse of alprazolam was limited to his manner of acquiring it." ALJ at 36.

[19] In arguing that he has been adequately punished for his past misconduct, Respondent misapprehends the nature of this proceeding. This is a remedial proceeding aimed at protecting the public interest. *See, e.g., Samuel S. Jackson,* 72 FR at 23853 (citing *Leo R. Miller,* 53 FR 21931, 21932 (1988)). My decision to deny Respondent's application is not based on a determination that he needs to be punished but on the fact that his unwillingness to accept responsibility and testify truthfully establishes that he cannot be entrusted with a registration notwithstanding his efforts at rehabilitation.

Respondent also argues that "it has been over three years since [he] engaged in any conduct that would suggest that it would be against the public interest to issue" him a new registration. Exceptions at 15. This argument ignores that Respondent's testimony at the proceeding is itself conduct which demonstrates that granting his application would be inconsistent with the public interest. In addition, that three years have passed without further incident is hardly impressive given that he has been without a registration during this period, thus denying him of the means to issue more fraudulent prescriptions.

[20] I find it unnecessary to give any weight to the 2005 incident in which Respondent represented to a Chicago law firm that he had an active and unrestricted medical license when his licensed had been suspended. *See* GX 8. Between his presentation of the two fraudulent prescriptions in 1989, his false statement to the police following his arrest, his false testimony in the 1991 proceeding, and the more recent incidents of his calling in numerous fraudulent prescriptions, there is more than ample evidence to question his credibility.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as by 28 CFR 0.100(b) and 0.104, I hereby order that the application of Alan H. Olefsky, M.D., be, and it hereby is, denied. This Order is effective May 11, 2011.

Dated: April 1, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–8543 Filed 4–8–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–7]

Thomas E. Mitchell, M.D.; Dismissal of Proceeding

On September 11, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Thomas E. Mitchell, M.D. (Respondent), of Santa Ana, California. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration and the denial of any pending applications to renew or modify his registration on the ground that, because of an action brought by the Medical Board of California (MBC), he lacks authority to dispense controlled substances in the State in which he is registered. Show Cause Order at 1.

On October 13, 2009, Respondent's counsel filed a letter in which he requested an extension of time (of 60 days no less) to respond to the Show Cause Order. Letter from Robert H. McNeill, Jr., to Hearing Clerk (Oct. 9, 2009). Therein, Respondent's counsel stated that Respondent was currently awaiting trial on two felony counts of violating California's tax laws. *Id.* Respondent's counsel further stated that "[t]he resolution of the criminal case will significantly affect Dr. Mitchell's decision of whether to request a hearing on the Order to Show Cause." *Id.*

Deeming this letter to be a request for a hearing, on October 22, 2009, the ALJ issued an order directing that the Government file its pre-hearing statement on or before January 6, 2010, and that Respondent file his pre-hearing statement on February 8, 2010. Order for Prehearing Statements at 1–2. Thereafter, on November 2, 2009, the Government moved for summary disposition on the ground that, on December 18, 2008, the MBC had suspended Respondent's Physician's and Surgeon's Certificate for failing to