

#### IV. Sanction

Where, as here, the Government presented a *prima facie* case that it would be “inconsistent with the public interest” to grant the registration application, and Applicant did not rebut the Government’s *prima facie* case, the “burden of proof shifts” to Applicant “to show why it can be trusted with a registration.” *Jones Total Health Care Pharmacy, LLC v. Drug Enf’t Admin.*, 881 F.3d at 830; *see also Samuel Mintlow, M.D.*, 80 FR 3630, 3652 (2015) (“[S]ufficient mitigating evidence” must be presented “to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.”); *Cleveland J. Enmon Jr., M.D.*, 77 FR 57116, 57126 (2012) (same); *Robert M. Golden, M.D.*, 61 FR 24808, 24812 (1996) (same). Further, past performance is the best predictor of future performance and, when an applicant has “failed to comply with its responsibilities in the past, it makes sense for the agency to consider whether the pharmacy will change its behavior in the future.” *Pharmacy Doctors Enterprises, Inc. v. Drug Enf’t Admin.*, 789 F. App’x at 733 (citing *Jones Total Health Care Pharmacy, LLC v. Drug Enf’t Admin.*, 881 F.3d at 831 (citing *MacKay v. Drug Enf’t Admin.*, 664 F.3d at 820 (“[T]hat consideration is vital to whether continued registration is in the public interest.”) and *Alra Labs., Inc. v. Drug Enf’t Admin.*, 54 F.3d 450, 452 (7th Cir. 1995) (“An agency rationally may conclude that past performance is the best predictor of future performance.”))).

Additionally, in evaluating whether a practitioner should be entrusted with a registration, the Agency considers whether the practitioner has accepted responsibility for any misconduct; circuit courts have approved the Agency’s acceptance of responsibility requirement. *Pharmacy Doctors Enterprises, Inc. v. Drug Enf’t Admin.*, 789 F. App’x at 732; *Jones Total Health Care Pharmacy, LLC v. Drug Enf’t Admin.*, 881 F.3d at 830 (citing *MacKay v. Drug Enf’t Admin.*, 664 F.3d at 820 (“The DEA may properly consider whether a physician admits fault in determining if the physician’s registration should be revoked.”)); *see also Jeffrey Stein, M.D.*, 84 FR 46968, 46972–73 (2019) (unequivocal acceptance of responsibility); *Jayam Krishna-Iyer, M.D.*, 74 FR 459, 463 (2009) (collecting cases).

The Agency also has decided that the egregiousness and extent of the misconduct are significant factors in determining the appropriate sanction. *Garrett Howard Smith, M.D.*, 83 FR

18882, 18910 (2018) (collecting cases); *Samuel Mintlow, M.D.*, 80 FR at 3652 (“Obviously, the egregiousness and extent of a registrant’s misconduct are significant factors in determining the appropriate sanction.”). The Agency has also considered the need to deter similar acts by Applicant and by the community of registrants and potential registrants. *Id.*

In terms of egregiousness, the violations that the record evidence shows Applicant committed go to the heart of the CSA—not complying with required controlled substance recordkeeping and submitting a registration application that includes a material falsification.

Applicant did not take responsibility for the founded violations. Accordingly, it is not reasonable to believe that Applicant’s future controlled substance dispensing will comply with legal requirements.<sup>2</sup>

For all of these reasons, I find that it would be inconsistent with the public interest for me to entrust Applicant with a registration. Accordingly, I shall order the denial of Applicant’s registration application, Control No. W20008908A.

#### Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny the registration application submitted by Crosby Pharmacy and Wellness, Control No. W20008908A, seeking registration in Texas as a practitioner, and I hereby deny any other pending application submitted by Crosby Pharmacy and Wellness for a DEA registration in the State of Texas. This Order is effective May 11, 2022.

Anne Milgram,

Administrator.

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#### DEPARTMENT OF JUSTICE

#### Drug Enforcement Administration

[Docket No. 22–7]

#### Adam T. Rodman, P.A.; Decision and Order

On November 8, 2021, a former Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause

(hereinafter, OSC) to Adam T. Rodman, P.A. (hereinafter, Respondent) of Dedham, Massachusetts. OSC, at 1 and 3. The OSC proposed the revocation of Respondent’s Certificate of Registration No. MR0956586. *Id.* at 1. It alleged that Respondent “[does] not have authority to dispense or prescribe controlled substances in the Commonwealth of Massachusetts, the state in which [he is] registered with the DEA.” *Id.* (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that on or about June 30, 2021, the Massachusetts Drug Control Program accepted Respondent’s voluntary surrender of his state controlled substances registration for schedules II through V. *Id.* at 2. According to the OSC, Respondent retained authority in schedule VI, which does not include federally-scheduled drugs. *Id.* (citing Mass. Gen. Laws ch. 94C, § 2).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2–3 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated December 1, 2021, Respondent timely requested a hearing.<sup>1</sup> Request for Hearing, at 1. In his Request for Hearing, Respondent objected to the revocation of his DEA registration and stated: “The basis for my objection is, in part, that my Massachusetts Controlled Substance Registration has not been suspended, revoked, or denied, and therefore 21 U.S.C. 824(a)(3) is not applicable.” *Id.*

The Office of Administrative Law Judges put the matter on the docket and assigned it to Administrative Law Judge Teresa A. Wallbaum (hereinafter, the ALJ). On December 2, 2021, the ALJ issued an Order Directing the Government to File Evidence Regarding Its Lack of State Authority Allegation and Briefing Schedule (hereinafter, Briefing Schedule). On December 15, 2021, the Government timely filed its Notice of Filing of Evidence and Motion for Summary Disposition (hereinafter, Government’s Motion). Order Granting the Government’s Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions

<sup>1</sup> The Request for Hearing was filed on December 1, 2021. Order Directing the Government to File Evidence Regarding Its Lack of State Authority Allegation and Briefing Schedule dated December 2, 2021, at 1. I find that the Government’s service of the OSC was adequate and that the Request for Hearing was timely filed on December 1, 2021.

<sup>2</sup> I do not consider remedial measures when an applicant does not unequivocally accept responsibility. In this matter, Applicant did not accept responsibility or propose remedial measures.

of Law, and Decision of the Administrative Law Judge dated January 27, 2022 (hereinafter, Recommended Decision or RD), at 2. In its Motion, the Government argued that because Respondent lacks authority to handle controlled substances in Massachusetts, the state in which he is registered with the DEA, his DEA registration should be revoked. Government's Motion, at 2–3. On January 18, 2022, Respondent timely<sup>2</sup> filed his Opposition to Government's Motion for Summary Disposition (hereinafter, Respondent's Opposition). RD, at 2. In his Opposition, Respondent argued that the plain language of 21 U.S.C. 824(a)(3) does not apply to him and that his DEA registration should not be revoked because his Massachusetts Controlled Substance Registration was not suspended, revoked, or denied, but instead voluntarily surrendered. Respondent's Opposition, at 2–4.

On January 27, 2022, the ALJ granted the Government's Motion, finding that “[t]here is no genuine issue of material fact in this case.” RD, at 6. Further, the ALJ found that Respondent's argument regarding the plain language of 21 U.S.C. 824(a)(3) was “at odds with clear Agency precedent on the issue and must therefore fail,” because “regardless of how or why [Respondent] lost his authority to handle controlled substances under state law, he has lost it.” *Id.* at 7. Accordingly, the ALJ recommended that Respondent's DEA registration be revoked and that any application to renew or modify his registration, or any applications for any other DEA registrations in Massachusetts, be denied based on Respondent's lack of state authority to handle controlled substances. *Id.* at 8. By letter dated February 22, 2022, the ALJ certified and transmitted the record to me for final Agency action and advised that neither party filed exceptions.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

## Findings of Fact

### Respondent's DEA Registration

Respondent is the holder of DEA Certificate of Registration No. MR0956586 at the registered address of 983 Providence Highway, Dedham, Massachusetts 02026. Government's Motion, Declaration of [Diversion Investigator (DI)], at 1. Pursuant to this

DEA registration, Respondent is authorized to dispense controlled substances in schedules II through V as a mid-level practitioner. *Id.* Respondent's registration expires on April 30, 2024. *Id.*

### The Status of Respondent's State License

On June 30, 2021, the Massachusetts Drug Control Program accepted Respondent's voluntary surrender of his Massachusetts controlled substances registration for Massachusetts drug schedules II through V and stated that Respondent was “no longer authorized to prescribe, distribute, possess, dispense or administer controlled substances from schedules II through V in the Commonwealth of Massachusetts.” Government's Motion, Declaration of DI, Exhibit (hereinafter GX) A. The Massachusetts Drug Control Program also clarified that Respondent's Massachusetts controlled substances registration would retain authorization for schedule VI medications only. *Id.*

On August 30, 2021, the Massachusetts Board of Registration of Physician Assistants (hereinafter, the Board) entered into a Consent Agreement for Probation (hereinafter, Consent Agreement) with Respondent regarding Respondent's Massachusetts Physician Assistant license. Respondent's Opposition, Exhibit (hereinafter, RX) A, at 1–2. By signing the Consent Agreement, Respondent admitted that on various dates between October 4, 2018, and September 30, 2019, he had diverted controlled substances. *Id.* at 2. Specifically, Respondent admitted that for multiple patients, he had examined them, written them prescriptions for controlled substances, and asked them to bring him the filled prescriptions. *Id.* The Consent Agreement placed Respondent's Massachusetts Physician Assistant license on probation for two years subject to various requirements and conditions. *Id.* at 2–8.

According to online records for Massachusetts, of which I take official notice, Respondent's Massachusetts controlled substances registration is current, but authorized only for drug schedule VI.<sup>3</sup> Massachusetts Health

Professions License Verification Site, <https://madph.mylicense.com/verification> (last visited date of signature of this Order). Further, online records for Massachusetts list Respondent's Massachusetts Physician Assistant license as on probation. *Id.*

Accordingly, I find that Respondent is not currently licensed to dispense controlled substances in schedules II through V in Massachusetts, the state in which he is registered with the DEA.

### Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) “upon a finding that the registrant . . . has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.”<sup>4</sup> With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.*, 76 FR 71371 (2011), *pet. for rev. denied*, 481 F. App'x 826 (4th Cir. 2012); *Fredrick Marsh Blanton, M.D.*, 43 FR 27616, 27617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress

properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at [dea.addo.attorneys@dea.usdoj.gov](mailto:dea.addo.attorneys@dea.usdoj.gov).

<sup>4</sup> Respondent argues that 21 U.S.C. 824(a)(3) only refers to revocation, suspension, or denial; however, the Agency has consistently stated that the central issue is whether or not the registrant is “currently authorized to handle controlled substances in the state,” *James Hooper*, 76 FR 71371 (2011) (quoting *Anne Lazar Thorn*, 62 FR 12847, 12848 (1997)); thus, it is of no consequence whether the registrant's state license was revoked or suspended, has expired, or was voluntarily surrendered. *See, e.g., Alex E. Torres, M.D.*, 87 FR 3352 (2022) (voluntary surrender of medical license); *Tel-Pharmacy*, 87 FR 2904 (2022) (state pharmacy license expired); *Humberto A. Florian, M.D.*, 86 FR 52203 (2021) (state medical license revoked); *Javaid A. Perwaiz, M.D.*, 86 FR 20732 (2021) (state medical license expired); *Michael Thomas Watkins, M.D.*, 85 FR 27246 (2020) (voluntary agreement to cease practicing medicine in Massachusetts). What is of consequence is the fact that Respondent is no longer authorized to handle controlled substances in the Commonwealth of Massachusetts, where he is registered with the DEA. Furthermore, the letter of acceptance of the consent agreement from the Massachusetts Drug Control Program implies that Respondent may only re-apply for such a registration in September 2023. *See GX A*, at 1.

<sup>2</sup> Respondent was granted an extension of time to file a reply to the Government's Motion. *See* Order Amending Briefing Schedule dated December 23, 2021.

<sup>3</sup> Under the Administrative Procedure Act, an agency “may take official notice of facts at any stage in a proceeding—even in the final decision.” United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), “[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.” Accordingly, Respondent may dispute my finding by filing a

defined the term “practitioner” to mean “a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.” 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner’s registration, Congress directed that “[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.” 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner’s registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper*, 76 FR at 71371–72; *Sheran Arden Yeates, M.D.*, 71 FR 39130, 39131 (2006); *Dominick A. Ricci, M.D.*, 58 FR 51104, 51105 (1993); *Bobby Watts, M.D.*, 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton*, 43 FR at 27617.

According to the Massachusetts Controlled Substances Act, “every person who . . . dispenses . . . any controlled substance within the commonwealth shall . . . register with the commissioner of public health, in accordance with his regulations.” Mass. Gen. Laws ch. 94C, § 7(a) (Westlaw, current through Chapter 14 of the 2022 2nd Annual Session). Further, “[a] prescription for a controlled substance may be issued only by a practitioner who is (1) authorized to prescribe controlled substances; and (2) registered pursuant to the provisions of [the Massachusetts Controlled Substances Act].” *Id.* at § 18(a).

Here, the undisputed evidence in the record is that Respondent is not authorized to dispense controlled substances in schedules II through V in Massachusetts.<sup>5</sup> Further, I agree with the ALJ that it is of no consequence that Respondent’s Massachusetts controlled

substances registration for drug schedules II through V was voluntarily surrendered rather than revoked or suspended. Thus, because Respondent is not authorized to prescribe controlled substances in schedules II through V in Massachusetts, Respondent is not eligible to maintain a DEA registration. Accordingly, I will order that Respondent’s DEA registration be revoked.

#### Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. MR0956586 issued to Adam T. Rodman, P.A. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Adam T. Rodman, P.A. to renew or modify this registration, as well as any other pending application of Adam T. Rodman, P.A. for additional registration in Massachusetts. This Order is effective May 11, 2022.

Anne Milgram,

Administrator.

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. 22–12]

#### Lezlie McKenzie, N.P.; Decision and Order

On December 10, 2021, a former Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Lezlie McKenzie, N.P. (hereinafter, Respondent) of Missoula, Montana. OSC, at 1. The OSC proposed the revocation of Respondent’s Certificate of Registration Number MM0938261 (hereinafter, registration or COR). *Id.* It alleged that Respondent “[is] currently without authority to handle controlled substances in Montana, the state in which [she is] registered with DEA.” *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that on July 26, 2021, the Montana Board of Nursing entered a Final Order that outlined “conditions [Respondent was] required to meet in order to maintain [her] Montana nursing license.” *Id.* The OSC further alleged that on October 26, 2021, the Montana Board of Nursing “indefinitely suspended [Respondent’s]

Montana nursing licenses for failure to abide by the terms” of the July 26, 2021 Order. *Id.*

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated January 6, 2022, Respondent timely requested a hearing.<sup>1</sup> Request for Hearing, at 1. In her Request for Hearing, Respondent stated that she “wish[es] to not relinquish any rights in regards to this matter and intend[s] to comply fully with any regulations of the DEA.” *Id.*

The Office of Administrative Law Judges put the matter on the docket and assigned it to Chief Administrative Law Judge John J. Mulrooney II (hereinafter, the Chief ALJ). On January 10, 2022, the Chief ALJ issued an Order Directing the Filing of Government Evidence Regarding Its Lack of State Authority Allegation and Briefing Schedule (hereinafter, Briefing Schedule). On January 24, 2022, the Government timely filed its Submission of Evidence and Motion for Summary Disposition (hereinafter, Government’s Motion). In its Motion, the Government argued that because Respondent lacks authority to handle controlled substances in Montana, the state in which she is registered with the DEA, her DEA registration should be revoked. Government’s Motion, at 2–5.

Respondent did not file any answer to the Government’s Motion. Order Granting the Government’s Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge dated February 8, 2022 (hereinafter, Recommended Decision or RD), at 2.

On February 8, 2022, the Chief ALJ granted the Government’s Motion, finding that “[s]ince the Respondent does not have authority as a practitioner in Montana, and this fact is not challenged by the Respondent, there is no other fact of consequence for this tribunal to decide in order to determine whether or not she is entitled to hold a COR.” RD, at 5. Accordingly, the Chief

<sup>5</sup> As previously discussed, Respondent is only authorized to dispense controlled substances in schedule VI in Massachusetts. *See supra*. According to the Massachusetts Controlled Substances Act, schedules I through V incorporate the five schedules of controlled substances under the CSA, with schedule VI consisting of “all prescription drugs not included in the first five schedules.” Mass. Gen. Laws ch. 94C, § 2(a) (Westlaw, current through Chapter 14 of the 2022 2nd Annual Session). As such, Respondent does not have state authority to dispense CSA controlled substances in Massachusetts.

<sup>1</sup> The Request for Hearing was filed on January 6, 2022. Order Directing the Filing of Government Evidence Regarding Its Lack of State Authority Allegation and Briefing Schedule dated January 10, 2022, at 1. I find that the Government’s service of the OSC was adequate and that the Request for Hearing was timely filed on January 6, 2022.