stations. While there are no specific prohibitions under the Controlled Substance Act regarding the sale of listed chemical products to these entities, DEA has nevertheless found that business establishments such as gas stations and convenience stores constitute sources for the diversion of listed chemical products. *See e.g., Sinbad Distributing,* 67 FR 10232, 10233 (2002); *K.V.M. Enterprises,* 67 FR 70968 (2002) (denial of application based in part upon information developed by DEA that the applicant proposed to sell listed chemicals to gas stations, and the fact that these establishments in turn have sold listed chemical products to individuals engaged in the illicit manufacture of methamphetamine); *Xtreme Enterprises, Inc.,* supra.

The Deputy Administrator also finds factor five relevant to the results of DEA's verification of the Respondent's proposed customers. Among the Respondent's potential customers were four establishments no longer in existence; two that refused to cooperate with DEA investigator; one that did not sell over-the-counter products of any kind; and several that had no standing agreement to purchase any over-the-counter medication products from Respondent. DEA has previously found that incomplete customer information, or questionable conduct by customers are grounds to deny an application to distribute list I chemicals. *Island Wholesale,* 68 FR 17406 (2003); *Shani Distributors,* 68 FR 62324 (2003).

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 28 CFR 0.100(b) and 0.104, hereby orders that the pending application for DEA Certificate of Registration, previously submitted by K & Z Enterprises, Incorporated be, and it hereby is, denied. This order is effective September 20, 2004.

Dated: July 27, 2004.

Michele M. Leonhart,

Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 03–1]

David A. Hoxie, M.D.; Revocation of Registration

On August 21, 2002, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to David A. Hoxie, M.D. (Respondent), proposing to revoke his DEA Certificate of Registration, BH4678833, pursuant to 21 U.S.C. 824(a)(1) and 824(a)(4), and deny any pending applications for renewal of registration as a practitioner under 21 U.S.C. 823(f). The Order to Show Cause alleged in relevant part that the Respondent materially falsified DEA applications for registration and that his continued registration would be inconsistent with the public interest.

By letter dated September 15, 2002, the Respondent requested a hearing on the issues raised by the Order to Show Cause. Following pre-hearing procedures, a hearing was held on August 26, 2003, in Columbus, Ohio. Counsel for the Government presented the testimony of three witnesses and introduced documentary evidence. The Respondent did not testify on his behalf or introduce any documentary evidence. After the hearing, both parties submitted written proposed findings of fact, conclusions of law, and argument.

On April 7, 2004, Administrative Law Judge Gail A. Randall (Judge Randall) issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision (Opinion and Recommended Ruling), recommending that Respondent's DEA Certificate of Registration be revoked and that any pending applications to renew or modify that registration be denied. On May 24, 2004, counsel for the Respondent filed exceptions to Judge Randall's Opinion and Recommended Ruling and on May 26, 2004, Judge Randall transmitted the record of these proceedings to the Administrator of DEA.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues her final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts in full the recommended ruling, findings of fact, conclusions of law and decision of the Administrative Law Judge. Her adoption is in no manner diminished by any recitation of facts, issues, or conclusions herein, or of any failure to mention a matter of fact or law.

The record before the Deputy Administrator shows that as of the date of the hearing, the Respondent was licensed to practice medicine in the State of Ohio. A review of the record in this proceeding reveals that in or around 2002, DEA's Columbus, Ohio office sought assistance from the agency's Los Angeles Field Division in obtaining information on any possible prior arrests in California involving the Respondent. To that end, a diversion investigator from the Los Angeles Field Division contacted the city's police department to obtain arrest records pertaining to the Respondent. The Los Angeles investigator also provided to the Bureau of Records, in Sacramento, Respondent's date of birth and Social Security number to further his search of arrest records involving the Respondent.

According to a Los Angeles Police Department arrest report which was admitted into the record of this proceeding, on or around December 15, 1973, the Respondent was arrested and charged with possession of marijuana. However, there is no record regarding the disposition of this charge. The record also contains an arrest report for September 19, 1978, which documents the Respondent's arrest on a charge of ''Poss Controlled Substance.'' As with the Respondent's prior arrest, the record is silent with regard to the disposition of this charge.

The record also contains a Los Angeles Consolidated Booking Form which documents the July 6, 1980, arrest of the Respondent on the charge of driving under the influence of drugs. However, the record is unclear as to the disposition of this charge. The record contains yet another arrest report dated July 11, 1981, which documents the arrest of the Respondent on the charge of driving under the influence of alcohol and drugs. A field sobriety test performed at the time of the arrest describes Respondent as having ''very poor'' coordination, ''very thick and slurred'' speech, and ''tottering unsteady, falling/stumbling'' balance. The report also notes that the Respondent later entered into treatment where he apparently conveyed to the treating physician that he had smoked two PCP (phenylcyclohexylamine) cigarettes.

The above arrest record also contained a document entitled ''Los Angeles PD Disposition of Arrest and Court Action.'' The exhibit identifies the Respondent as the arrestee and lists his date of birth. However, the section of the form entitled ''Court Information'' was blank and therefore, the disposition of this charge is unclear.

The Respondent was again arrested on August 7, 1983, and charged with possession of PCP. A Government witness testified that he obtained information that the Respondent had entered a final plea of ''Nolo'' to two misdemeanor charges, one for possession of a controlled substance in violation of the State Health and Safety Code, and a second charge related to a vehicle code violation. Pursuant to a

plea agreement, the Respondent received a suspended sentence for 90 days in jail, and given credit for time served. On November 30, 1983, the charges were disposed of, and the Respondent was placed on prohibition for two years, ending on November 29, 1985.

As with Respondent's prior arrests, the record is unclear as to the total sentence served. A Government witness testified at the hearing that the court had ''dismissed'' or ''put aside'' the sentence for count three. The court further ordered probation for 36 months for counts one and two. With respect to his compliance with probation, evidence was presented that on March 17, 1988, the Respondent was found in violation and was sentenced to 30 days in jail. However, the record is unclear as to the specific criminal violation the probation relates to, since the probation term for the Respondent's 1983 conviction was to end in November of 1985.

On January 26, 1984, the Respondent was again arrested in Los Angeles, California and charged with being under the influence of PCP. However, there is no information in the record as to the disposition of this charge. Further evidence was presented that on September 25, 1984, in Los Angeles, California, the Respondent was arrested for driving with a suspended drivers' license and apparently provided a statement to the arresting officer that he (Respondent) was aware of the suspension of his license.

On or about November 14, 1995, the Respondent was issued DEA Certificate of Registration BH4678833 for his medical practice in Ohio. The last renewal of this registration was issued to the Respondent on October 18, 2001, and its date of expiration is October 31, 2004.

The two DEA applications at issue in the Government's allegation of material falsification are renewal applications dated October 31, 2001, and the second dated October 14, 1998. On both renewal applications, the Respondent was asked the following questions: ''Has the applicant ever been convicted of a crime in connection with controlled substances under State or Federal law?''; (2) ''Has the applicant ever surrendered or had a Federal controlled substance registration revoked, suspended, restricted or denied?''; and (3) ''Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation?'' On both applications, the Respondent provided a ''No'' response to these three questions.

The record also contains the Respondent's application for an Ohio medical license, signed before a Notary Public on June 17, 1996. A review of that application reveals that Respondent provided a ''No'' response to the following question: ''Have you ever been convicted or found guilty of a violation of Federal law, State law, or municipal ordinance other than a minor traffic violation?''

Also admitted into evidence was the Respondent's application for Virginia medical license, dated January 20, 1995. The Respondent provided a ''No'' response to the following question included on the application: ''Have you ever been convicted of a violation of/or pled Nolo Contendere to any Federal, State, or local statute, regulation or ordinance, or entered into any plea bargaining relating to a felony or misdemeanor (Excluding traffic violations, except convictions for driving under the influence)?''

As noted above, in response to the Order to Show Cause the Respondent directed a letter to DEA dated September 15, 2002, requesting a hearing. In that letter, the Respondent denied that he had ever been arrested for drug charges, engaged in a plea bargain or received probation, and had never violated probation or received a sentence of an additional thirty days in jail.

During an interview conducted in March of 2002 by a DEA diversion investigator and an investigator from the Ohio Medical Board, the Respondent again denied these events. Specifically, the Respondent denied ever having been arrested on any charge including those related to controlled substance violations, ever having been convicted, ever having entered into any plea bargains, and ever having served any probation time. When asked during that interview why it had taken him so long to complete his education, the Respondent attributed the delay to his having been in jail on several occasions. However, Respondent never acknowledged that he had been convicted of any Controlled Substances Act offenses.

The Respondent further informed the DEA diversion investigator that he only possessed a drivers' license for the State of California. However, during a subsequent investigation by the Ohio Medical Board, it was revealed that the Respondent also had obtained driver licenses in New York and Michigan.

Pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator may revoke a DEA Certificate of Registration and deny any pending applications for renewal of such registration if she determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered in determining the public interest:

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

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health or safety.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight she deems appropriate in determining whether a registration should be revoked or an application for registration denied. *See* Henry J. Schwartz, Jr., M.D., 54 FR 16,422 (1989).

First, pursuant to 21 U.S.C. 824(a)(1), a registration may be revoked if the registrant has materially falsified an application for registration. DEA has previously held that in finding that there has been a material falsification of application, it must be determined that the applicant knew or should have known that the response given to the liability question was false. *See,* James C. LaJavic, D.M.D., 64 FR 55962, 55964 (1999); Martha Hernandez, M.D., 62 FR 61,145 (1997); Herbert J. Robinson, M.D., 59 FR 6304 (1994).

As noted above, in August of 1983, the Respondent was charged with unlawful possession of PCP, a Schedule II controlled substance. On or about November 30, 1983, the charge was disposed of through a Nolo plea and the Respondent was placed on probation for a period of three years. Yet, a review of the Respondent's DEA renewal applications for 1998 and 2001 reveal ''no'' responses to the liability question which asked whether the applicant has ever been convicted of a crime in connection with controlled substances under State or Federal law. In light of this evidence, as well as the Respondent's failure to provide evidence to the contrary, the Deputy Administrator is left to conclude that the Respondent knew or should have known that his ''no'' response to a liability question on a DEA registration application was false, and therefore he materially falsified his application for

registration. Accordingly, grounds exist to revoke the Respondent's registration pursuant to 21 U.S.C. 824(a)(1). Thomas E. Johnston, D.O., 45 FR 72311, 72312 (1980); *see* also Bobby Watts, M.D. 58 FR 46995 (1993).

Next, the Deputy Administrator must consider whether Respondent's continued registration would be inconsistent with the public interest. As to factor one, the recommendation of the appropriate State licensing board or professional disciplinary authority, there is no evidence in the record of any actions, adverse or otherwise, regarding any professional license held by the Respondent. Similarly, with respect to factors two and three, there is no evidence in this matter with respect to Respondent's dispensing of controlled substances, or of any conviction under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

With regard to factor four, compliance with applicable State, Federal, or local laws relating to controlled substances, the Deputy Administrator agrees with Judge Randall's finding that the Respondent violated California State law by unlawfully (1) being under the influence of controlled substances in the 1980's, to include marijuana, (2) possessing PCP, (3) being under the influence of PCP, and (4) violating probation given as a result of these infractions.

With regard to factor five, other conduct which may threaten the public health or safety, the Deputy Administrator is troubled by the extent and ease with which the Respondent has engaged in dishonest conduct. In addition to his material falsification of DEA registration applications, the Respondent provided false statements to a DEA investigator when he denied any previous arrests on drug charges and claimed to have a drivers' license only in California when he also held drivers' licenses in two additional jurisdictions. The Respondent repeated the same denials in his September 2002 letter to DEA, despite evidence to the contrary.

The Respondent further demonstrated questionable candor when he provided false responses to questions on applications for medical licensure in Ohio and Virginia. His false responses to questions on State professional license applications further support the revocation of his DEA Certification of Registration. *See, Bernard C. Musselman, M.D.,* 64 FR 55965 (1999).

As referenced above, the Respondent did not testify during the hearing. The Deputy Administrator may draw a negative inference from Respondent's failure to testify during an administrative hearing. *See, Michael G. Sargent, M.D.,* 60 FR 22076 (1995); *Raymond A. Carlson, M.D.,* 53 FR 7425 (1988); *Antonio C. Camacho, M.D.,* 51 FR 11654 (1986). The negative inference which is drawn from Respondent's failure to testify is that he was unwilling to be forthright and completely honest with the Administrative Law Judge and the Drug Enforcement Administration. *See Antonio C. Camacho, M.D., supra.* In light of the Respondent's demonstrated lack of candor regarding his previous conduct, a similar inference is drawn here.

On May 24, 2004, counsel for the Respondent filed exceptions to the Opinion and Recommended Ruling of Judge Randall. The Respondent argued in relevant part that: (1) The evidence in this proceeding did not establish that he materially falsified a DEA registration application; (2) Judge Randall should not have relied on arrest reports which were insufficient to prove a conviction; (3) there was only one reliable document in the record which established that Respondent did not falsify his DEA application; and (4) the Government's unproven assertions do not meet its burden of proving that the Respondent's continued registration is not consistent with the public interest.

The Respondent's arguments relate primarily to the reliability of evidence regarding the disposition of his arrest for possession of PCP and the impact of that event on his subsequent responses to questions on DEA registration applications. As noted above, the Deputy Administrator agrees with Judge Randall's finding that evidence of Respondent's arrest and subsequent conviction on a controlled substance charge was established by a preponderance of evidence. While the Respondent subsequently raised questions regarding the reliability of arrest reports admitted into the record, the fact remains that he provided no similar evidence during the hearings to rebut these reports. Meanwhile, in addition to the arrest reports, the record contains corroborating testimony of the Respondent's ''Nolo'' plea to the charge of possession of PCP and the Government also provided documentary evidence regarding the disposition of the charges. Having addressed the Respondent's central contention regarding the reliability of evidence surrounding his criminal conviction, the Deputy Administrator does not find it necessary to address the remaining arguments raised in the Respondent's exceptions.

In light of allegations regarding his prior arrests and conviction related in part to substance abuse, Respondent's failure to testify at the administrative hearing or provide evidence regarding these matters severely compromises any favorable consideration of his continued registration with DEA. As noted by Judge Randall, ''* * * DEA does not have any evidence that the Respondent takes responsibility for his past misconduct. Further, the DEA does not have any evidence that the Respondent wants to provide assurances that his future handling of controlled substances would be consistent with the public interest.''

The Deputy Administrator finds that the Respondent has demonstrated conduct which raise questions regarding his character and ultimately, his fitness to possess a DEA Certificate of Registration. The Respondent has been involved in a series of arrests and at least one criminal conviction related primarily to substance abuse. Although many of these incidents occurred nearly two decades ago, the Respondent by choosing not to testify at the hearing or provide any evidence on his behalf has left the record bereft of any information that would support his continued registration with DEA. To exacerbate matters further, the Respondent falsified two DEA applications, two State professional licensing applications, and was not forthright regarding his arrests or conviction in a discussion with a DEA investigator or and in a subsequent letter to the agency. Given the totality of the circumstances, the only conclusion to be reached here in Respondent's continued registration would be inconsistent with the public interest and his DEA Certificate of Registration should be revoked.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration, BH4678833, previously issued to David A. Hoxie, M.D., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications to renew or modify said registration be denied. This order is effective September 20, 2004.

Dated: July 27, 2004.

Michele M. Leonhart,

Deputy Administrator.

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