decision was proper. Therefore, he concluded summary disposition of this matter would not be appropriate. However, the Respondent did not deny that his state Physician's and Surgeon's Certificate had been revoked, or that he was, therefore, without authority to hand controlled substances in the State of California.

On November 15, 1995, Judge Bittner issued her Opinion and Recommended Decision, (1) finding that the Board had revoked the Respondent's Physician's and Surgeon's Certificate and that, therefore, the Respondent was without authority to handle controlled substances in California, (2) granting the Government's Motion for Summary Disposition, and (3) recommending that the Respondent's DEA Certificate of Registration be revoked. On December 18, 1995, the Respondent filed a Petition for Reconsideration of Recommendation of Administrative Law Judge to Revoke Respondent's DEA Certificate of Registration, and by ruling dated December 21, 1995, Judge Bittner denied his petition. On January 11, 1996, Judge Bittner transmitted the record of these proceedings and her opinion to the Deputy Administrator.

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

The Deputy Administrator finds that the parties do not dispute that (1) the Board revoked the Respondent's Physician's and Surgeon's Certificate by an order effective October 9, 1995, and (2) consequently, the Respondent is without authority to handle controlled substances in the State of California.

The Drug Enforcement Administration does not have statutory authority under the Controlled Substances Act to register or maintain the registration of a practitioner who is not duly authorized to handle controlled substances in the state in which he conducts his business. 21 U.S.C. 802(21), 823(f), and 824(a)(3). This prerequisite has been consistently upheld. See Dominick A. Ricci, M.D., 58 FR 51,104 (1993); James H. Nickens, M.D., 57 FR 59,847 (1992); Roy E. Hardman, M.D., 57 FR 49,195 (1992); Myong S. Yi, M.D., 54 FR 30,618 (1989); Bobby Watts, M.D., 53 FR 11,919 (1988).

Further, the Deputy Administrator finds that Judge Bittner properly granted the Government's motion for summary disposition. Here, the parties did not dispute that the Respondent was unauthorized to handle controlled substances in California.Therefore, it is well-settled that when no question of fact is involved, a plenary, adversary administrative proceeding involving evidence and cross-examination of witnesses is not obligatory. See Dominick A. Ricci, M.D., 58 FR at 51,104 (finding it well-settled that where there is no question of material fact involved, a plenary, adversarial administrative hearing was not required.); see also Phillip E. Kirk, M.D., 48 FR 32,887 (1983), aff'd sub nom *Kirk* v. *McMullen*, 749 F. 2d 297 (6th Cir. 1984); Alfred Tennyson Smurthwaite, M.D., 43 FR 11,873 (1978); *NLRB* v. *International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO*, 549 F.2d 634 (9th Cir. 1977).

Also, the Deputy Administrator finds that Judge Bittner appropriately denied the Respondent's petition for reconsideration. The Respondent asserted that, since he was licensed to practice medicine in Hawaii, the ''issue of whether [his] DEA registration should be revoked is not moot,'' and that the hearing in this matter should proceed as scheduled. However, as Judge Bittner noted, the Order to Show Cause proposed to revoke the Respondent's registration to handle controlled substances at his California place of business, and thus, the status of the Respondent's licenses in other jurisdictions has no bearing on the pending matter. On that basis, Judge Bittner denied the Respondent's petition, and the Deputy Administrator concurs with her decision.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824, and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration BC0495122, issued to Ying-Ming Chang, M.D., be, and it hereby is, revoked, and any application to renew this registration is hereby denied. This order is effective June 24, 1996.

Dated: May 17, 1996.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 96–13050 Filed 5–23–96; 8:45 am]

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[Docket No. 94–36]

Jeffrey Patrick Gunderson, M.D.; Revocation of Registration

On March 11, 1994, the Deputy Assistant Administrator (then Director), Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Jeffrey Patrick Gunderson, M.D., (Respondent) of Brunswick, Georgia, notifying him of an opportunity to show cause as to why DEA should not revoke his Certificate of Registration, BG1368516, under 21 U.S.C. 824(a), and deny any pending applications for registration as a practitioner under 21 U.S.C. 823(f), for the following reasons:

(1) On August 3, 1992, the Respondent was arrested in St. Paul, Minnesota, for felony possession of LSD, a Schedule I controlled substance, and, at the time of his arrest, he had in his possession LSD, marijuana, and Didrex;

(2) On September 9, 1992, the Respondent pled guilty in state court to a felony charge of possession of a controlled substance, and was convicted of this offense in November of 1992;

(3) In April of 1993, the Respondent was observed inhaling cocaine several hours prior to reporting for duty as an emergency room physician;

(4) On several occasions during 1993, the Respondent discussed plans to purchase and distribute cocaine with confidential informants; and

(5) During recent undercover operations, the Respondent was in possession of cocaine and LSD.

On April 15, 1994, the Respondent, through counsel, filed a timely request for a hearing, and following prehearing procedures, a hearing was held in Atlanta, Georgia, on October 26, 1994, before Administrative Law Judge Mary Ellen Bittner. At the hearing, both parties called witnesses to testify and introduced documentary evidence, and after the hearing, counsel for both sides submitted proposed findings of fact, conclusions of law and argument. On October 31, 1995, Judge Bittner issued her Opinion and Recommended Ruling, recommending that the Respondent's DEA Certificate of Registration be revoked and any pending applications for registration be denied. On December 1, 1995, Judge Bittner transmitted the record of these proceedings to the Deputy Administrator, after noting that neither party had filed timely exceptions to her decision. However, on December 20, 1995, Judge Bittner transmitted the Respondent's request for consideration of exceptions filed on December 18, 1995. A copy of Judge

Bittner's letter and the Respondent's exceptions were transmitted to Government counsel, who did not respond.

The Deputy Administrator has considered the record in its entirety, including the Respondent's exceptions, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts, in full, the Findings of Fact Conclusions of Law, and Recommended Ruling of the Administrative Law Judge his adoption is in no matter diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Deputy Administrator finds that, pursuant to stipulations made by the parties before Judge Bittner, the following facts are not in dispute: (1) Lysergic acid diethylamide (LSD) is a Schedule I hallucinogenic substance pursuant to 21 CFR 1308.11; (2) Marijuana is a Schedule I hallucinogenic substance pursuant to 21 CFR 1308.11; and (3) Didrex is the trade name for a stimulant containing benzphetamine hydrochloride, a Schedule III substance pursuant to 21 CFR 1308.13.

The Deputy Administrator also finds that the Respondent is primarily an emergency room physician, and that at the time of the events at issue, he lives and worked on St. Simons Island, Georgia. He is licensed to practice his specialty in the State of Georgia. The Respondent is registered with DEA as a practitioner, and he has been assigned DEA registration number BG1368516.

It is undisputed that the Respondent was arrested early in the morning on August 18, 1992, in St. Paul, Minnesota. The relevant portions of the arrest report state that: (1) The arresting officer followed the Respondent because he made a turn over the center median after driving out of a Denny's Restaurant parking lot; (2) the arresting officer noted that when the Respondent got out of his car, his eyes were red and his speech was slurred; (3) arresting officer asked the Respondent to sit in the patrol car because the Respondent had stated he was lost, could not find his hotel, and did not have his driver's license; (4) when the arresting officer asked the Respondent what was in his pockets, the Respondent pulled out, among other things, a bag containing marijuana and a piece of tin foil containing a white sheet of paper with 43 ''hits'' of LSD; and (5) when the arresting office asked what the sheet of paper was, the Respondent replied, ''something I'm not supposed to have,'' and that ''it's some kind of psychedelic drug.'' The Respondent was arrested and charged with felony possession of a controlled substance.

Also, at the time of his arrest, the Respondent had in his possession a prescription bottle containing Didrex with a label noting that the prescription had been written by the Respondent for a third party, LW. The Respondent later explained that LW was his girlfriend, that he had used her suitcase for his trip to St. Paul, and that the prescription bottle was in her suitcase when he borrowed it.

Before Judge Bittner, the Respondent, testified that at the time of his arrest, he was in Minnesota for a reunion of his college football team, that he had been to a party and then to a restaurant, and that he was on his way back to his hotel to get his luggage and to leave for the airport. The Respondent stated that he had found the LSD and the marijuana while cleaning out the rental car prior to turning it in at the airport, that he had put it in his pocket, and that he was arrested with the substances in his pocket. He also testified that the prescription bottle had fallen out of his girlfriend's suitcase, that he had found the bottle while cleaning out the truck of the car, and that he had put it in his pocket.

On September 9, 1992, the Respondent pled guilty to possession of LSD in state court. On November 17, 1992, pursuant to a state statute permitting a stay of adjudication, the Respondent was sentenced to five years' probation, fined more than $4,200.00, and ordered (1) to verify completion of chemical treatment; (2) to abstain from (the consumption of) non-prescription drugs; and (3) to follow all recommendations of the Georgia Professional Licensing Board.

The Respondent testified before Judge Bittner that, after his arrest in Minnesota, he had returned to Georgia and had reported for work. After about a week at work, he told his supervisor and other supervisory hospital staff about his arrest, and he agreed with them that he should voluntarily submit to a screening procedure. The Respondent stated that he went to Willingway Hospital (Willingway) for an evaluation, and that the was advised on the first day of the evaluation that he had a drinking problem and should enter the hospital's twenty-eight day treatment program. The Respondent entered the program and was discharged on October 18, 1992. However, the Respondent testified that after a lengthy delay, Willingway Hospital submitted an inaccurate evaluation report to the Georgia Board of Medical Examiners (Board) in December of 1992.

By letter dated July 15, 1993, the Georgia Department of Law advised the Respondent that the Georgia Attorney General took the position that state statutes required the suspension of his medical license for at least three months because of his entry of a guilty plea for possession of LSD in Minnesota. Further, the letter noted that the Impaired Physician's Committee recommended that the Respondent's license be placed on probation with the usual terms and conditions for an impaired physician. As an alternative, the letter provided that, if the Respondent voluntarily submitted to an evaluation at Anchor Hospital (Anchor), and if Anchor concluded that the Respondent was not impaired, then the Board would not require a probationary period.

According to a discharge summary, the Respondent was evaluated at Anchor from August 30, 1993, until September 2, 1993. The summary concluded that ''no definitive diagnosis of alcohol or substance dependence can be made.''

After notice and a hearing, the Board issued a final decision on July 11, 1994, finding that the Respondent had entered a plea to a felony charge of possession of LSD and was sentenced in Minnesota. The hearing officer noted that pursuant to Minnesota law pertinent to the Board's proceedings, ''conviction'' includes entering a ''plea of guilty * * * regardless of whether the adjudication of guilt or sentence is withheld or not entered thereon * * *.'' Thus, the Respondent's entry of a guilty plea provided grounds for the Board's sanction. Consequently, the Board suspended the Respondent's license to practice medicine in Georgia for three months and then placed his license on probation for four years following the suspension. Also, as part of the terms of the probation, the Respondent (1) was to be subject to random drug screening at the request of the Board, and (2) was to abide by all State and Federal laws relating to drugs. The Respondent testified before Judge Bittner that he was still fulfilling these probationary requirements.

A DEA task force officer (Officer) testified before Judge Bittner, stating that in the Spring of 1993, the Brunswick, Georgia, Police Department initiated an investigation of the Respondent, and that she participated in an undercover capacity. She testified that she had been assigned to the task force for approximately three and a half years. Specifically, the Officer testified that on April 21, 1993, she accompanied

a confidential informant (CI) to a tavern on St. Simon's Island to meet the Respondent, and that several hours later the CI, the Respondent, and the Officer went to the Respondent's residence. The Officer testified that, while there, she observed the Respondent use cocaine approximately two or three times, and she observed him search for some LSD, which he told her he had placed on his kitchen counter. The Officer testified that she saw the Respondent take ''the cocaine out of a plastic bag, pour it into his hand and snort it out of his hand * * *'' She stated she knew the substance was cocaine ''just from the appearance of it, through my experience; the way it was consumed. Also the fact that (the Respondent) did kiss me on the lips and it number out my face.'' Regarding the LSD, the Officer testified that on April 29, 1993, the CI telephone the Respondent, and in that taped conversation, the Respondent stated that he had found the LSD.

The Officer further testified that on July 21, 1993, the CI, wearing a recording device, went to another residence owned by the Respondent, under the surveillance of the Officer and other law enforcement personnel. According to the transcript of this transaction with the Respondent, the CI asked the Respondent if he would be interested in some ''kilos'' for ''17 a key,'' and the Respondent replied that he did not have that much money, and that his friends in the police department had warned him ''to be real careful'' because the police were watching him. The CI said that his source wanted a down payment of $4,000.00, to which the Respondent answered, ''Damn! I wish! I could (sic) I need to make some money, somewhere,'' and that he would think about it. The Respondent also said, ''I know four people that have been busted. I don't know who's turning everybody in but somebody is * * *. I don't do it around nobody anymore.'' The Respondent also informed the CI that he would be in Savannah, Georgia, the next weekend because his son was playing in a baseball game, and he suggested getting together with the CI on Friday night to ''party up there.'' However, before Judge Bittner, the Respondent testified that he did not agree to be involved ''in a kilogram deal * * * of controlled substances with the CI.''

The Officer further testified that on July 23, 1993, the Respondent met with the CI and another informant (Informant), at the Radisson Hotel in Savannah. The transcript of the tape recording made during that meeting revealed that, among other things, the Informant said he had recently ''got a pretty big * * * shipment from Columbia,'' and that the Respondent replied ''we may be able to do something,'' but that he would have to talk to a ''friend,'' and ''I'd like to make some money myself.'' Later, the Respondent expressed concern, stating ''I just can's deal with it with my job and stuff. You know I don't have time to do too much * * *. But, uh, I certainly would like to * * *.'' The Respondent also stated that, ''I'm certainly, uh, not opposed to making some money.'' The respondent also stated that he had connections in Minnesota through his high school and college friends, and he asked the Informant if he would ''be around tonight'' for a drink.

Finally, the Officer testified that in August of 1993, the CI visited the Respondent, and in the course of that conversation, he asked the Respondent if he was going to buy cocaine from the Informant. The Officer testified that the Respondent replied that ''his connection was retired, that he thought he could get cocaine distributed through, and he was no longer in the drug business. And so he had no way of getting rid of the cocaine.'' Significantly, Judge Bittner wrote that ''[the] Officer appeared candid and to exhibit good recall[,] and I therefore credit her testimony.''

The Respondent testified before Judge Bittner, stating that he first met the Officer on April 23, 1993, that he had not seen the CI for almost a year, and that he had invited the CI to his home in the hope of getting him to repay a loan. The Respondent denied using cocaine that evening.

The Respondent also testified that, when he knew the CI before, ''he never talked about drugs * * *'' but ''all of a sudden every time [the CI] called me * * * He was just, I mean, continually talking about drugs and * * I didn't know if he had just changed or what was going on.'' The Respondent also testified concerning the July 23, 1993 conversation, stating that he thought the CI was going to repay a loan, but that, when the Respondent went to the CI's room, he ''realized the position [he] was in—I mean, standing here with some Columbian [the Informant] and I didn't know if he had a gun or what else, he was talking about selling me drugs—all I wanted to do was to get out of the room.'' However, the Respondent testified that later that evening, he went in a cab to a bar with the Informant, and that after the Informant became inebriated, the Respondent left him in the bar. Later the same evening, the Respondent invited the Informant up to his room. The Respondent testified that, while the Informant was in his room, he was trying to ''grab'' his girlfriend, and then the Respondent testified that ''I told him specifically, word for word, I said, I don't know what [the CI] told you why I'm here. I said, I'm here to see my son play baseball and to get the $400.00 from [the CI] and then I threw [the Informant] out of my room.''

Finally, the Respondent testified that in August of 1993, he called a local police officer and told him that the CI had continued to call him and talk about drugs. Also in the record is an affidavit from a sergeant of the Brunswick Police Department, which corroborated the Respondent's testimony concerning his call to the police. The Respondent also testified that from August 18, 1992, until the date of the hearing, he had not purchased, sold, or used any controlled substances.

However, the Deputy Administrator notes Judge Bittner's statement that:

> At the outset, I note that I did not find (the) Respondent to be a credible witness. He did not appear forthright or candid, portions of his testimony are contradicted by the documentary evidence (,) and he appeared primarily concerned with tailoring his testimony to suit his defense. As noted above, I found [the] Officer ( ) to be a credible witness. Consequently, where (the) Respondent's testimony conflicts with that of (the) Officer ( ), I credit the latter.

The Respondent also offered into evidence letters from colleagues, attesting to his professional credentials, and his exemplary abilities as an emergency room physician. Other physicians who had monitored his practice also wrote, stating that he was complying with his conditions of probation. One of these letters was from the medical director of the Respondent's physicians' group, who wrote that ''at *no time* do I feel that (the Respondent) has ever been in an impaired position.'' He also noted that the Respondent had negative drug test results on November 6, 1993, November 19, 1993, January 7, 1994, and February 21, 1994.

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 application for registration as a practitioner, if he determines that the continued registration would be inconsistent with the public interest. Further 21 U.S.C. 824(a)(2) provides that conviction of a felony relating to any controlled substance is also grounds for revoking a DEA registration.

First, as to the Respondent's ''conviction'', the Respondent argued that he should not be considered ''convicted'' because, pursuant to his plea bargain, and under Minnesota law, if he successfully completes his

probation, the case will be dismissed. However, the Deputy Administrator agrees with Judge Bittner, who wrote, ''that provision of State law does not determine what is a ''conviction'' within the meaning of the Controlled Substances Act. This agency has previously held that a guilty plea is a conviction for purpose of these proceedings. Eric A. Baum, M.D., 53 Fed. Reg. 47272 (DEA 1988). I therefore find that (the) Respondent's conviction constitutes grounds for revoking his DEA registration pursuant to 21 U.S.C. 824(a)(2).''

Judge Bittner also found that the Respondent's continued registration was contrary to the public interest. In determining the public interest, Section 823(f) provides 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, 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 he deems appropriate in determining whether a registration should be revoked or an application for registration denied. See Henry J. Schwarz, Jr., M.D., 54 FR 16422 (1989).

In this case, the Deputy Administrator finds relevant factors one, four, and five in determining whether continuing the Respondent's registration would be inconsistent with the public interest. As to factor one, ''recommendation of the appropriate State licensing board,'' the record contains no direct recommendation from the Board to the DEA on this matter. However, it is significant that, after notification of the Respondent's entry of a guilty plea to possession of LSD in Minnesota, the Board suspended the Respondent's medical license for three months and placed it on probation for an additional four years.

As the factor four, the Respondent's ''(c)ompliance with applicable State, Federal, or local laws relating to controlled substances,'' and factor five, ''(s)uch other conduct which may threaten the public health or safety,'' the Deputy Administrator agrees with Judge Bittner's finding, given her credibility assessment of the Respondent and the Officer, that the Government has shown, by a preponderance of the evidence, that the Respondent consumed cocaine and searched for LSD in the presence of the officer on April 21, 1993. Although the Respondent argued that he would not engage in such conduct, given that he was providing random urine samples for drug screening, the Deputy Administrator finds his argument unpersuasive. The record shows that the first negative drug screening result was reported on November 6, 1993, and that the Board did not even issue its decision ordering random screening until July 11, 1994. Thus, there was no evidence of record showing that the Respondent was required to participate, or was voluntarily participating in, random drug testing on April 21, 1993.

Next, the Respondent testified that he was an unwilling participant in the CI's plan to distribute cocaine. However, the Deputy Administrator finds that the record supports an opposite conclusion. The transcripts of the Respondent's conversation with the CI and the Informant indicate the Respondent's actual desire to participate in the plan. The Respondent's reply to the CI's information concerning the 17 kilogram of cocaine transaction was ''I wish! * * * I need some money * * *'' Such a response showed his willingness to participate, if he had had the resources for the downpayment needed to obtain the controlled substance. Further, the Respondent's conversation with the Informant indicated that he did not participate in this proposed transaction because of a lack of means to distribute the controlled substance. The Deputy Administrator agrees with Judge Bittner's conclusion, that ''(t)hese statements are not those of someone who is uncertain as to why he is a party to a drug-related conversation.''

As to rehabilitation, the Deputy Administrator acknowledges the Respondent's evidence of his professional competency as an emergency room physician. Also, the Deputy Administrator notes that the Respondent argued that rehabilitative evidence exists, such as (1) a lack of positive urinalysis results, (2) the fact that he had never been in trouble before his illegal conduct in Minnesota, (3) the lack of substantiation of the allegations of drug or alcohol abuse, and (4) the Respondent's report of the CI's conduct to the local police. However, the Deputy Administrator also notes Judge Bittner's credibility finding, after observing the Respondent testify before her. Also, although the more recent drug testing evidence may show that the Respondent, while on probation and subject to random drug screening tests, has abstained from personal consumption of illegally obtained controlled substances, the Deputy Administrator is still concerned about the Respondent's willingness to participate in conversations concerning illegal drug transactions to others. Further, the Respondent showed no remorse concerning his prior documented misconduct. Rather, in his testimony before Judge Bittner, the Respondent continued to deny any intentional wrongdoing. In previous cases, when a Respondent failed to admit to the full extent of his involvement in documented misconduct involving controlled substances, the Deputy Administrator has then doubted such a Respondent's commitment to compliance with the Controlled Substances Act in future practice. See, e.g., Prince George Daniels, D.D.S., 60 FR 62,884 (1995). Given the totality of the circumstances in this case, the Deputy Administrator agrees with Judge Bittner's conclusion that he ''Respondent is not in a position to accept the responsibilities inherent in a DEA registration, and that his continued registration would be inconsistent with the public interest.''

The Respondent filed exceptions to Judge Bittner's opinion, taking exception with her finding concerning a felony ''conviction'' in Minnesota. The Deputy Administrator notes the Respondent's concern and made findings accordingly in this order. The remaining exceptions are of record and require no further comment.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823, and 28 C.F.R. 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration BG1368516, previously issued to the Respondent, be, and it hereby is, revoked, and that any pending applications to renew the same are hereby denied. This order is effective June 24, 1996.

Dated: May 17, 1996.

Stephen H. Greene,

Deputy Administrator.

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