• March 19, 1996, 7:00 p.m., Folsom Community Center, 52 Natoma Street, Folsom, CA 95630.

• March 20, 1996, 1:00 p.m., Red Lion Sacramento Inn, 1401 Arden Way (at Business 80), Sacramento, CA 95815.

• March 21, 1996, 7:00 p.m., Auburn Holiday Inn, 120 Grass Valley Highway, Auburn, CA 95603.

• March 27, 1996, 2:00 p.m., Best Western Placerville Inn, 6850 Greenleaf Drive, Placerville, CA 95667.

• March 28, 1996, 7:00 p.m., Stockton Hilton, 2323 Grand Canal Boulevard, Stockton, CA 95207.

The public hearings will be held at the following locations:

• April 9, 1996, 7:00 p.m., Stockton Hilton, 2323 Grand Canal Boulevard, Stockton, CA 95207.

• April 10, 1996, 7:00 p.m., Auburn Holiday Inn, 120 Grass Valley Highway, Auburn, CA 95603.

• April 11, 1996, 7:00 p.m., Folsom Community Center, 52 Natoma Street, Folsom, CA 95630.

• April 16, 1996, 7:00 p.m., Best Western Placerville Inn, 6850 Greenleaf Drive, Placerville, CA 95667

• April 17, 1996, 7:00 p.m., Red Lion Sacramento Inn, 1401 Arden Way (at Business 80), Sacramento, CA 95815.

ADDRESSES: Written comments should be addressed to Mr. Alan R. Candlish, Study Manager, CC–102, Bureau of Reclamation, 7794 Folsom Dam Road, Folsom CA 95630; telephone: (916) 989–7255.

FOR FURTHER INFORMATION CONTACT: Mr. Alan R. Candlish, Study Manager, CC–102, Bureau of Reclamation, 7794 Folsom Dam Road, Folsom CA 95630, telephone: (916) 989–7255; Mr. Gene Robinson, Sacramento Metropolitan Water Authority, 5620 Birdcage Street, Suite 180, Citrus Heights, CA 95610–7632, telephone: (916) 967–7692; or Mr. David M. Haisten, Activity Manager, MP–700, Bureau of Reclamation, 2800 Cottage Way, Sacramento CA 95825–1898, telephone: (916) 979–2338.

SUPPLEMENTARY INFORMATION

Requests to Testify

Written or telephone requests to present oral comments at the April 1996 public hearings should be addressed to Ms. Lynnette Wirth, MP–140, Bureau of Reclamation, 2800 Cottage Way, Sacramento, CA 95825–1898, (916) 979–2837. Registration cards for presenting oral comments will also be at each public hearing.

Oral comments at each hearing will be limited to 5 minutes. The hearing officer may allow any speaker to provide additional oral comment after all persons wishing to comment have been heard. Speakers not present when called will lose their privilege in the scheduled order, and will be recalled at the end of the scheduled speakers. Written comments from those unable to attend or those wishing to supplement their oral presentation at the hearing should be received by Reclamation by April 18, 1996, for inclusion in the hearing record. Written comments received after April 18, 1996, will not be included in the hearing record but will be included in the public comment period which will close on May 3, 1996. All written comments should be addressed to Mr. Alan R. Candlish, Study Manager, CC–102, Bureau of Reclamation, 7794 Folsom Dam Road, Folsom CA 95630, telephone: (916) 989–7255.

Dated: February 29, 1996.

Franklin E. Dimick,

Acting Regional Director.

[FR Doc. 96–5184 Filed 3–5–96; 8:45 am]

BILLING CODE 4310–94–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 94–34 and 92–78]

AML Corporation, d/b/a G & O Pharmacy, and G & O Pharmacy Revocation of Registration

On July 23, 1992, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to G & O Pharmacy (Respondent), DEA Registration, AG2999691, of Paducah, Kentucky, notifying it of an opportunity to show cause as to why DEA should not revoke its DEA Certificate of Registration, and deny any pending applications, under 21 U.S.C. 823(f) and 824(a)(4), as being inconsistent with the public interest. Specifically, the Order to Show Cause alleged in substance, that: (1) in July 1990, an individual had overdosed on Demerol received from the owner-manager pharmacist of the Respondent, Randall Lockhart, without benefit of prescription; (2) accountability audits conducted of the Respondent by DEA investigators in 1990 revealed shortages of Schedules II and III controlled substances; (3) the Respondent had filled at least 217 call-in prescriptions not authorized by the physicians whose names appeared on the Respondent's records; and (4) at least one individual, on multiple occasions, had received controlled substances from Mr. Lockhart without seeing the physician listed on the call-in prescriptions.

Respondent, through counsel, filed a timely request for a hearing, and the case was docketed as G & O Pharmacy, Docket No. 92–78. Following prehearing procedures, a hearing was held in Louisville, Kentucky, on March 10 and 11, 1993. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, counsel for both parties submitted proposed findings of fact, conclusions of law and argument.

Subsequently, on December 16, 1993, counsel for the Government filed a motion to reopen the proceedings. The motion alleged that Mr. Lockhart had transferred the ownership of Respondent G & O Pharmacy to AML Corporation (AML). Further, the motion alleged that AML had applied for and received a DEA registration, BA3838553, to operate the Respondent, and that DEA had not been notified, pursuant to 21 CFR 1301.62 and 1307.14(b), that G & O Pharmacy had ceased doing business under the previous ownership or that Mr. Lockhart had transferred ownership to another entity. The Respondent did not answer the motion, and on January 12, 1994, Administrative Law Judge Mary Ellen Bittner issued an order reopening the proceedings in Docket No. 92–78.

On March 11, 1994, an Order to Show Cause was issued to AML d/b/a/ G & O Pharmacy, alleging that the Respondent's continued registration was inconsistent with the public interest on the same basis as stated in the July 1992 order in Docket No. 92–78, with the addition of the allegation that Mr. Lockhart had improperly transferred ownership of Respondent without notifying the DEA as required. The Respondent requested a hearing, and on June 1, 1994, Judge Bittner issued an order consolidating the two cases. On November 17, 1994, Judge Bittner conducted a hearing in the consolidated proceedings in Louisville, Kentucky. At this hearing, AML was represented by counsel, and both parties called witnesses to testify and introduced documentary evidence. Following the hearing, both the Government and the Respondent, AML, filed further proposed findings of fact, conclusions of law and argument.

On May 31, 1995, Judge Bittner issued her Opinion and Recommended Ruling, recommending that the Respondent's DEA registration be revoked and that any pending applications be denied. AML and G & O Pharmacy filed exceptions to her opinion, and on July 17, 1995, the Government filed a response to these exceptions. On July 19, 1995, Judge Bittner transmitted the record of these proceedings and the

parties' filings to the Deputy Administrator.

The Deputy Administrator has considered the record and the filings by the parties in their 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 the Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, with noted exceptions, 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 Respondent is a pharmacy in Paducah, Kentucky. Randall Lockhart is a registered pharmacist in the Commonwealth of Kentucky, and he has practiced pharmacy since 1959. His wife, Cynthia Lockhart, is a registered nurse who worked at the Respondent's location. In March or April of 1989, Mr. Lockhart bought a 50% ownership in Oehlschlaeger Corporation (Oehlschlaeger), owner of the Respondent pharmacy, and in February of 1990, he bought the remaining 50% ownership interest. Mr. Lockhart continued to work as the pharmacist at G & O Pharmacy.

At the hearing before Judge Bittner, Mr. Lockhart testified that in July 1990, he had received a telephone call from a local dentist (Dentist), requesting injectable Demerol for a planned surgical procedure he was to perform with the assistance of another dentist, Dr. Heine. Mr. Lockhart further testified that he had told the calling Dentist that he had twenty-four vials of Demerol on hand, but that he would either have to write a prescription if the Demerol was for the use of a single patient, or provide a DEA order form, if he wanted the substance for general office use. Demerol is the brand name for meperidine hydrochloride, a Schedule II controlled substance.

Although in dispute, Mr. Lockhart testified that the Dentist then appeared at the pharmacy, gave Mrs. Lockhart what appeared to be a prescription for Demerol, and obtained all twenty-four vials from the pharmacy, telling Mrs. Lockhart that he would return the next day with the requisite DEA order form. The next day, Mr. Lockhart called Dr. Heine and requested that either he or the Dentist provide the required paperwork for the transfer of the Demerol, and that Dr. Heine told him that the Dentist was a drug addict, and that ''he wouldn't do a surgical procedure with him in a 100 years.'' Mr. Lockhart testified that that was the first time he had ever heard the Dentist referred to as a drug addict. Mr. Lockhart then testified that, upon further investigation, he found out that the Dentist was in a hospital emergency room following an overdose.

Mr. Lockhart testified that he subsequently contacted the Inspector of the Kentucky Board of Pharmacy (Kentucky Board) for advice, and that the Inspector advised him to contact the DEA office in Louisville. Mr. Lockhart wrote to the DEA, and following the DEA's advice, also wrote to the Board of Dentistry concerning these events.

Paducah Police Department Officers (Officers) interviewed the Dentist, who stated that he had not written the prescription Mr. Lockhart had for the Demerol. The Dentist also stated that on fifteen to twenty previous occasions he had received controlled substances from Mr. Lockhart merely by asking, and that he had obtained ''basically whatever I wanted [a]s long as it wasn't Schedule II.'' He also stated that he had taken fictitious prescriptions for Percocet to Mr. Lockhart, which he had filled. Percocet contains oxycodone, a Schedule II controlled substance.

The Dentist also told the Officers that he had been a substance abuser since 1985, and that he was sure Mr. Lockhart knew what he intended to do with the drugs he obtained from the Respondent, although he later stated that he had assumed Mr. Lockhart knew of his substance abuse problem. However, at the hearing before Judge Bittner, Mr. Lockhart denied knowing that the Dentist was a substance abuser at the time of this incident.

A DEA diversion investigator (Investigator) testified that the Paducah Police Department had advised him in September of 1990, of the incident with the Dentist, and that on October 10, 1990, a DEA special agent served a federal search warrant on the Respondent. Pursuant to this warrant, DEA personnel seized controlled substance prescriptions and other records.

The Investigator testified that he had used the seized records to conduct an accountability audit of the Respondent's Schedule II controlled substances for the period May 28, 1989, to October 10, 1990, and for various Schedule III through V controlled substances for the period May 1, 1989, through October 10, 1990. In her opinion, Judge Bittner summarized the significant audit results, and the summaries demonstrate that Mr.Lockhart had significant shortages of Dilaudid 4 mg., Meperidine, Mepergan Fortis, Valium 10 mg., APAP #3, Tylenol #3, Lortab 5 mg. and 7.5 mg., and Didrex 50 mg., as well as a significant overage of Demerol 100 mg.

Mr. Lockhart testified before Judge Bittner that he did not think that the DEA audit accurately reflected shortages and overages, but that he was unable to verify the numbers. He also testified that he had not conducted an inventory when he had purchased an interest in the Respondent pharmacy, and that there could have been shortages at that time. The Inspector testified that Mr. Lockhart's records had been seized in a search conducted by the Paducah police officers prior to the DEA search, and that the Officers had not returned them. It is undisputed that the Paducah police executed a search warrant for the Respondent's controlled substance records in August 1990. However, Mr. Lockhart did not indicate that he ever advised the DEA Investigator, at either the time of the DEA search or audit, that G&O's records may have been incomplete.

The Investigator testified that during the October 1990 search, he had noticed that the Respondent had filled disproportionately more call-in prescriptions than other pharmacies. Therefore, he obtained copies of these prescriptions from the Respondent pharmacy. The Investigator then interviewed the physicians (or their office personnel) listed on the prescriptions to verify the authorization for each prescription under review. In ten cases,the physician or office personnel working for the physician, indicated that the person named on the prescription was not his or her patient, and that patient records were not maintained for that named individual. In total, the Investigator testified that he was unable to verify approximately 198 prescriptions purportedly authorized by twenty different doctors. Many of the prescriptions were dated after the time Mr. Lockhart became the 100 percent owner of the pharmacy. All of these prescriptions were dispensed by either Mr. Lockhart or Mr. Oehlschlaeger, another pharmacist and co-owner working at the Respondent pharmacy prior to Mr. Lockhart's becoming the sole owner. Judge Bittner found the Investigator's testimony credible.

However, Mr. Lockhart testified that all of the allegedly unauthorized prescriptions were authorized, and that ''almost all [of these unauthorized prescriptions were] what [amounted] to refill prescriptions.'' He also testified that he had routinely received oral prescriptions from the physicians who had denied authorizing the prescriptions under review.

While the G&O Pharmacy case was pending, Mrs. Lockhart called the Diversion Group Supervisor (Supervisor) at DEA's Louisville office to express her concern about the Respondent's Certificate of Registration. The Certificate was due to expire, and because of the pending proceedings, a renewal certificate had not been issued. Mrs. Lockhart feared suppliers would not fill orders because of the expired certificate. The Supervisor advised Mrs. Lockhart that the registration remained active on a day-to-day basis until a final order was issued by the DEA. The Supervisor also offered to call the Respondent's suppliers to explain the situation. Subsequently, the Investigator, a subordinate of the Supervisor's, did call a supplier and an insurance company and explained that the Respondent remained authorized to handle controlled substances on a day-to-day basis.

On May 31, 1993, Mr. Lockhart executed a renewal application for the respondent's Kentucky pharmacy license, listing Respondent's owner as Oehlschlaeger with himself as the president, and Mrs. Lockhart as the vice president, secretary, and treasurer. On August 11, 1993, Mr. Lockhart executed a renewal application for the Respondent's DEA registration. However, on October 4, 1993, Mrs. Lockhart executed articles of incorporation for AML, listing its business address as the same as the Respondent's, with herself as the incorporator. By letter dated October 13, 1993, Mr. Lockhart advised the Pharmacy Board of the transfer of ownership to AML with Mrs. Lockhart as the sole owner of AML's stock.

Before Judge Bittner, Mrs. Lockhart testified that she and her husband had talked about this transfer of ownership as early as in 1990, and that the primary reason for the transfer of ownership was Mr. Lockhart's health. He had had coronary bypass surgery approximately 9 years prior, and they had both agreed that he should taper his involvement in the business. However, Mr. Lockhart remained the primary pharmacist. Mrs. Lockhart testified that she intended to hire another pharmacist, but due to the uncertainty generated by these proceedings, she had waited to add additional staff until she could provide assurances of long-term employment. Mrs. Lockhart further testified that she had formed a new corporation, rather than merely having her husband transfer his stock from the prior corporation to her, because she wanted a corporate name of her own. The record contains no indication of how much money, if any, AML paid for the business.

On October 15, 1993, Mrs. Lockhart applied for a Kentucky pharmacy license for the Respondent, noting the change of ownership, listing a proposed acquisition date of October 26, 1993, and showing the corporate owner as ''AML Corp. DBA G&O Pharmacy.'' She also listed herself a President, Vice President, And Secretary/Treasurer, and her husband as Pharmacist in Charge.

That same day, Mrs. Lockhart executed an application for a DEA registration, listing herself as president of ''AML Corporation, doing business as G&O Pharmacy,'' located at the same address as the Respondent. AML was issued a Certificate of Registration, number BA3838553, effective November 15, 1993, with an expiration date of June 30, 1996.

The Investigator testified before Judge Bittner that he had first learned about the AML transaction on or about December 1, 1993, when the Louisville DEA office received copies of DEA order forms dated November 22, 1993, transferring Schedule II controlled substances from ''G&O Pharmarcy'' to AML. Mrs. Lockhart testified that she had mailed the DEA order forms. She also testified that her husband had mailed to the DEA the prior corporation's unused DEA order forms and the Respondent's expired DEA Certificate of Registration. Although Mrs. Lockhart testified that she had retrained possession of the return mail receipts for both sets of documents, such receipts were not offered into evidence and are not a part of the record. Further, the Investigator testified that he have not personally received any unused order forms from the Respondent, and that there was no record in his office that the forms had been received. Further, the record contains no other evidence to evidence to show that the unused order forms had been received by the DEA or that the DEA has been advised of the transfer of ownership of the Respondent as required by DEA regulations.

The Pharmacy Board Inspector testified that he had inspected the Respondent approximately two to four times per year, and that after Mr. Lockhart had become associated with the pharmacy, it had a ''clearner and neater appearance,'' and its recordkeeping had improved. The Inspector also testified that he had inspected the Respondent after AML had become its owner, and that as far as he knew it was not cited for any violations of Kentucky regulation and remained in good standing with the Pharmacy Board. Further, Mrs. Lockart testified before Judge Bittner, stating that the Respondent was an independent pharmacy, that it was the only pharmacy in the area that compound medications, and that physicians from a nearby hospital routinely called her husband to obtain advice on how to prepare pediatric medications.

Pursuant to 21 CFR 1301.62 and 1301.63, the cessation of business terminates a DEA registration, and a registrant is required to notify the agency promptly and in writing if it ceases doing business. The regulations also require a registrant intending to transfer its business interests to another business entity to provide specified information to the appropriate DEA Special Agency in Charge at least fourteen days in advance of the proposed transfer. Also, pursuant to 21 CFR 1307.14(b), an inventory of all controlled substances must be taken on the date of the transfer, but the regulation does not require filing of the inventory with the DEA.

Further, pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator may revoke a DEA Certificate of Registration if he determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires 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 appplicant'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., Docket No 88–42, 54 FR 16422 (1989)

In this case, the Deputy Administrator finds factors one, two, four, and five relevant in determining whether the Respondent's continued registration would be inconsistent with the public interest. As to factor one, ''recommendation of the appropriate State licensing board,'' per the Inspector's testimony, the Respondent AML's state licenses are in order, and no adverse actions are pending.

As to factor two, the Respondent's ''experience in dispensing * * * controlled substances,'' it has previously been found that the improper filling of prescriptions by a pharmacist working in a pharmacy could serve as a basis for revoking the DEA Certificate of Registration for that pharmacy. See, e.g., Medic-Aid Pharmacy, Docket No, 89–12, 55 FR 30043 (1990). Also, the regulations implementing the Controlled Substances Act specify that a prescription for a controlled substance ''shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use, and the name, address and registration number of the practitioner.'' 21 CFR 1306.05(a). Also, a pharmacist may dispense directly a Schedule II controlled substance ''only pursuant to a written prescription signed by the prescribing individual practitioner. * * *'' 21 CFR 1306.11(a). The regulations also prohibit practitioners from issuing prescriptions in order ''to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.'' 21 CFR 1306.04(b).

It is undisputed that the document left by the Dentist when he took the Demerol in July of 1990, even if he had, in fact, signed it and left it with Mrs. Lockhart, would not have been an adequate document to record the transfer of 24 dosage units of Demerol for in-office use. However, the Deputy Administrator agrees with Judge Bittner's conclusions regarding this incident, when she wrote:

> Assuming *arguendo,* that Mr. Lockhart did not examine the ''prescription,'' and that neither of the Lockharts anticipated that [the Dentist] would take the Demerol without leaving proper documentation, this incident standing alone might not warrant revoking [the] Respondent's DEA registration.

However, this incident does not stand alone, for the record contains other evidence of Mr. Lockhart's dispensing practices. Although Mr. Lockhart testified about flaws in the DEA audit, especially following the Paducah Police search, Judge Bittner noted that ''Mr. Lockhart apparently did not think it necessary to advise the DEA auditors that his records might be incomplete, which prompts the inference, which I make, that he was not seriously concerned about the matter.'' Further, Judge Bittner found that ''[the] Respondent adduced no persuasive evidence to explain the shortages.'' Rather, she noted, and the Deputy Administrator concurs, that the evidence demonstrated that the shortages were substantial, for ''some shortages of Schedule III through V controlled substances were in the thousands of dosage units, amounting to more than fifty percent of the total for which [the] Respondent was accountable.'' The Deputy Administrator also concurs with Judge Bittner's conclusion, that ''these shortages constitute a basis for revoking [the] Respondent's DEA registration.'' See Val Gene Tatum, d/b/a/ Val's Pharmacy, 56 FR 16117 (1991), aff'd sub nom Val G. Tatum v. DEA, 9th Cir. No. 91–70328 (January 16, 1992; unpublished).

As for the evidence of unauthorized dispensing, the Investigator testified that approximately 198 prescriptions were unauthorized, and in 10 cases, he had interviewed doctors or their office personnel, who had stated that the individuals named on the prescriptions were not their patients. Although the Investigator's testimony concerning his conversations with these medical personnel was hearsay, the Deputy Administrator concurs with Judge Bittner's findings and conclusions as to the reliability of this evidence: ''I find that the hearsay evidence introduced through [the] Investigator [ ] is more reliable than Mr. Lockhart's testimony, and therefore conclude that [the] Respondent filled controlled substance prescriptions without authorization from physicians. This conduct is further grounds for revoking [the] Respondent's DEA registration.'' Also significant, and as noted by Judge Bittner, Mr. Lockhart ''proffered no explanation as to why various doctors denied authorizing the prescriptions at issue.''

As to factor four, the Respondent's ''[c]ompliance with applicable State, Federal, or local laws relating to controlled substances,'' the Deputy Administrator finds significant the Government's evidence of noncompliance with DEA regulations by Mr. Lockhart when he transferred ownership of G & O Pharmacy to AML. Specifically, 21 CFR 1305.14 states, in relevant part: ''If the registration of any purchaser terminates (because the purchaser * * * ceases legal existence * * *) * * * he shall return all unused order forms for [Schedules I and II] substance[s] to the nearest office of the Administration.'' Although Mrs. Lockhart testified that she believed Mr. Lockhart had sent unused DEA order forms to the DEA via registered mail, AML's counsel did not introduce the registered mail receipt, and the DEA Investigator testified that such forms were not received by the DEA.

Furthermore, in this case, 21 CFR 1307.14(b) required Mr. Lockhart to provide the Special Agent in Charge in his area specific information at least 14 days in advance of the date of the proposed transfer of his ownership in the pharmacy. Unrefuted evidence exists to establish that Mr. Lockhart had failed to inform the DEA of his transfer of ownership in compliance with this regulation.

The Deputy Administrator also takes into account Judge Bittner's finding: ''Neither Mr. nor Mrs. Lockhart impressed me as credible witnesses. Their testimony appeared tailored to suit [the] Respondent's defenses rather than to accurately reflect relevant events. . . . In contrast, Investigator [ ] appeared to be forthright and to exhibit good recall, and I therefore credit [his] testimony.'' Thus, the Deputy Administrator concludes that preponderating evidence exists to establish that Mr. Lockhart failed to comply with the cited regulations in effectuating the transfer of ownership of G & O Pharmacy.

As to factor five, ''[s]uch other conduct which may threaten the public health or safety,'' the Deputy Administrator finds significant the continued pattern of Mr. Lockhart's noncompliance with the Controlled Substances Act and the implementing regulations. Specifically, in neither hearing before Judge Bittner did Mr. Lockhart present any evidence of his acknowledging past misconduct by taking responsibility for (1) any of the documented shortages of controlled substances; (2) his customer's having obtained controlled substances without authorization from physicians; or (3) his failure to transfer his ownership in the pharmacy in a manner which would have been in compliance with DEA regulations. Mr. Lockhart's conduct fails to reflect the acceptance of responsibility needed to continue as a registered handler of controlled substances.

As for the transfer of ownership of the Respondent, Judge Bittner wrote that ''the preponderance of the record establishes, and I find, that the transfer * * * was not a bona fide transaction, but rather a stratagem to obtain a new DEA registration.'' However, Mrs. Lockhart testified about the efforts she made to insure AML was clearly a distinct entity from Mr. Lockhart's corporation. Specifically, she testified that on behalf of AML, she had opened a bank account, obtained a federal employer tax identification number, procured insurance for AML, and paid Mr. Lockhart a salary as an employee.

After reviewing this evidence, the Deputy Administrator has determined that he need not make a finding as to the viability of this ownership transaction. Even assuming, arguendo, that the transfer was a bona fide transaction, revocation of AML's registration is still appropriate. For, previously it has been found that revocation of the DEA registration remained appropriate despite a transfer of ownership, where there has been no change in the control exerted by the prior pharmacist who had engaged in misconduct related to the dispensing of controlled substances. Specifically, ''[t]he close connection between the former and current owners leads the Administrator to believe that the transfer has not, and will not, alter the way business is conducted at the pharmacy.'' Absecon Pharmacy, Docket No. 88–76, 55 FR 9029 (1990). Here, the new owner, Mrs. Lockhart, is not a registered pharmacist, is the wife of the former owner, and continues to employ Mr. Lockhart as the ''Pharmacist in Charge.'' Mr. Lockhart continues to hold unrestricted authorization to order and dispense controlled substances. Further, AML did not provide any evidence to demonstrate that any precautions had been taken to provide assurances that controlled substances would not be improperly dispensed in the future by Mr. Lockhart. The Deputy Administrator finds that the risk of diversion by Mr. Lockhart remains, even though G & O Pharmacy is currently under the ownership of AML. Since Mr. Lockhart remains the primary pharmacist of the Respondent, his past misconduct continues to justify the revocation of the Respondent's DEA Certificate of Registration.

The Respondent AML raised several exceptions to Judge Bittner's opinion. First, AML asserted that it was denied procedural due process through the consolidation of the two cases, for AML argued that:

> Due process requires that any denial, revocation, or suspension of AML's registration be based upon the acts and omissions . . . of AML, not a predecessor in interest to its business. Further, fundamental due process requires that AML have notice and an opportunity to confront witnesses and contest the grounds upon which the government seeks to revoke its DEA certificate of registration.

However, the Deputy Administrator notes that the Order to Show Cause issued to AML Corporation on March 11, 1994, specifically set out the allegations of Mr. Lockhart's acts of misconduct, mirroring the notice given to G & O Pharmacy in July 0f 1992. By letter dated April 5, 1994, AML's counsel entered his appearance, requested a hearing, and responded to the allegations in the show cause order paragraph by paragraph. Thus, AML had notice of the acts which might constitute the basis for revoking AML's registration.

Further, by order dated June 1, 1994, Judge Bittner ordered G & O's counsel to provide AML's counsel copies of documents from the March 1993 hearing, and she ordered the Government to provide AML's counsel exhibits and a copy of the transcript from that hearing. Judge Bittner, concurrent with the June 1994 order, provided AML's counsel with copies of the Administrative Law Judge's exhibits and the record to date in the G & O case. Also, AML received a hearing, witnesses appeared, and documentary evidence was received. AML thus received notice and had an opportunity to confront witnesses and ''contest the grounds upon which the government seeks to revoke its DEA Certificate of registration''.

The only reference in the record which even arguably could be viewed as restricting AML's access to witnesses, was the following from the hearing transcript of AML's proceedings:

> [Judge Bittner]: My understanding is that we agreed this morning, prior to the commencement of the hearing, that we weren't going back into the prior case.
>
> Mr. SHANNON: [AML's counsel] Yes, Judge. And I was just getting ready to say I can probably obviate any of the objections. All I want the record to reflect is that [the Investigator] conducted the investigation of Oehlschlaeger, Inc., [.] AML Corporation was not audited. They were not in existence.

The Deputy Administrator certainly is not conceding that AML was denied an opportunity to confront and cross-examine witnesses from the preceding hearing. However, even assuming *arguendo*, that AML's access to witnesses was somehow restricted, on the record AML's counsel seems to have affirmatively waived his right to ''go back into the prior case,'' at the hearing before Judge Bittner. Thus, given the complete record of AML's notice, opportunity and access to evidence, and AML's own actions before Judge Bittner, the Deputy Administrator finds that AML's procedural due process rights were not violated by the manner in which these proceedings were conducted.

Further, AML objected to the fact that Judge Bittner did not consider all factors listed in 21 U.S.C. 823(f). As has been previously noted, the Deputy Administrator may review those factors in the disjunctive, and he need not make a finding as to each factor. However, as requested by AML, the Deputy Administrator notes that the record contains no evidence to indicate that AML has been convicted of any federal or state law violations. The remainder of AML's exceptions have been previously addressed.

G & O Pharmacy also filed exceptions to Judge Bittner's opinion. Specifically, G & O objected to Judge Bittner's placing reliance upon the results of the DEA audit. The reliability of the audit results has been addressed by the Deputy Administrator, and needs no further comment here. Second, the Respondent G & O asserts that Judge Bittner erred in admitting hearsay evidence during the administrative hearing. However, since the Respondent's hearing was conducted in accordance with applicable statutes and regulations, the Deputy Administrator declines to adopt the Respondent's exceptions based upon his challenged evidentiary rulings. See, e.g., Klinestiver v. Drug Enforcement Administration, 606 F.2d 1128, 1129–30 (D.C. Cir. 1979); Gary E. Stanford, M.D., No. 91–30, 58 Fed. Reg. 14,430 (1993). As to the probative value, reliability, and ''fairness of its use,'' the Deputy Administrator finds that Judge Bittner addressed these issues in her opinion, that he concurs with her findings, and that no further comment is required.

Therefore, after review of the entire record, the Deputy Administrator finds that the public interest is best served by revoking AML's Certificate of Registration. The Deputy Administrator notes that pursuant to 21 CFR 1301.62, the transfer of ownership of G & O Pharmacy to AML effectively terminated all authority granted under DEA Certificate of Registration AG2999691, previously issued to G & O Pharmacy. *See* 21 CFR 1301.62 and 1301.63. 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 BA3838553, previously issued to AML Corporation, is revoked and any pending applications denied at this time. This order is effective April 5, 1996.

Dated: February 29, 1996.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 96–5141 Filed 3–5–96; 8:45 am]

BILLING CODE 4410–09–M