

“Respondent specifically testified that he is not at his registered address when controlled substances arrive and that controlled substances are left unguarded at the registered location and can be left unsecured for up to two days due to his absence from the clinic.” Gov’t Posthearing Brief, at 24. Without entering a specific finding on the issue, it would be difficult to characterize this argument as anything other than a clear misstatement of the Respondent’s testimony. The Respondent testified that, because he has prohibited employees at PCCS from opening shipments of controlled substances, and because he is not in the practice every day, it is possible that a *future* shipment of controlled substances *could* be left unsecured, but that he is in the process of divining a solution to the issue and intends to contact DI McRae to seek her counsel on the matter. Tr. 569–71, 675–77. The Respondent also testified that he felt that he could place an order for controlled substances so as to avoid a shipment from being delivered on a day that he is absent. Tr. 689. Given this testimony, and the specified remedial steps outlined above, the Government’s contention that the Respondent replied at this hearing that he “does not have a system in place to prevent . . . future diversion”⁹⁹ is simply not what the man said.¹⁰⁰

Turning to the alleged post-inspection violations, the record establishes that the Respondent disposed of approximately ten vials of Demerol in May of 2011 and that, despite learning of thefts of controlled substances which occurred as late as February or March of 2011, the Respondent failed to notify the Miami Field Division Office of such thefts and to file a DEA Form 106 reporting the thefts, in violation of 21 C.F.R. § 1301.76(b).¹⁰¹ Under the circumstances presented here, where the Respondent first became aware of the recordkeeping deficiencies in the course of an audit that was conducted by DI McRae, that the Respondent did not submit a report of theft to DEA during active enforcement proceedings, based on the litigation theory of his counsel that a former employee may have perpetrated diversion, is not

evidence that persuasively militates in favor of revocation. While post-inspection violations can raise “a serious question as to whether [the] Respondent can be trusted to responsibly discharge his obligations as a registrant,” they do not compel revocation on their own, *Battershell, N.P.*, 76 Fed. Reg. at 44368–69 (declining to revoke registration despite post-inspection violations), and clearly do not do so in this case.

In whole, the Respondent has expressed contrition for his negligence and has corrected every violation represented to him, but for the unlicensed disposal, which was brought to the attention of the DEA by the Respondent himself, and the failure to report thefts, which were brought to the Government’s attention during this proceeding as a potential defense investigated and tendered by Respondent through counsel. While the post-inspection violations are relevant considerations, on this record, they are not dispositive to the public interest inquiry. *Battershell, N.P.*, 76 Fed. Reg. at 44368–69. Rather, the record has a whole shows that the Respondent has transgressed profoundly in his failure to understand and execute his obligations as a registrant, acknowledged his failings without discernible reservation, made a committed and sustained effort to come into compliance with the requirements of the CSA, DEA, and state law, and has outlined a reasonable approach to maintaining that compliance. Thus, the Respondent has successfully demonstrated, that he can be entrusted with continued registration. *Jeri Hassman, M.D.*, 75 Fed. Reg. at 8236. These proceedings are non-punitive,¹⁰² and current Agency precedent requires no more to lodge successful rebuttal to the Government’s prima facie case.

Accordingly, the Respondent, consistent with the direction set forth in the OSC issued in this matter, has successfully shown cause why his Certificate of Registration should not be revoked, and thus, the Government’s petition to revoke the Respondent’s Registration should be DENIED. However, the record in this matter justifies the IMPOSITION OF SPECIFIED CONDITIONS ON THE RESPONDENT’S REGISTRATION, *to wit*: (1) the Respondent must comply with all regulatory obligations relative to the prescribing, dispensing, storage, and handling of controlled substances under his COR; (2) the Respondent, at his own expense, shall submit regular

reports at sixty-day intervals (or such other interval as directed by DEA) to a designated DEA official, from an independent pharmacy contractor, pre-approved by a designated DEA official, reflecting monthly regulatory compliance inspections; and (3) within thirty days of the issuance a final Agency order in this case, the Respondent will execute a document memorializing an irrevocable consent for any and all agents of DEA to inspect any and all records related to the handling and prescribing of controlled substances for a period of one year. The Respondent is placed on notice that the failure on his part to timely and correctly submit all documentation required by these conditions, and to comply scrupulously with all requirements set forth in these enumerated conditions, will constitute an independent basis for administrative enforcement proceedings.

Dated: March 1, 2012.

John J. Mulrooney, II,
Chief Administrative Law Judge.

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DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m., Thursday, April 17, 2014.

PLACE: U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC

STATUS: Open.

MATTERS TO BE CONSIDERED: Approval of January 14, 2014 minutes; reports from the Chairman, the Commissioners, and senior staff; Short Intervention For Success Program; Proposed Rulemaking Revising Conditions of Release update.

CONTACT PERSON FOR MORE INFORMATION: Jacqueline Graham, Staff Assistant to the Chairman, U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC 20530, (202) 346–7001.

Dated: April 3, 2014.

J. Patricia W. Smoot,
Acting General Counsel, U.S. Parole Commission.

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⁹⁹ Gov’t Posth’g Brf. at 23.

¹⁰⁰ *C.f.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) (a prosecutor “may strike hard blows [but is not] at liberty to strike foul ones”).

¹⁰¹ 21 C.F.R. § 1301.76(b) provides, in relevant part: “The registrant shall notify the Field Division Office of the Administration in his area, in writing, of the theft or significant loss of any controlled substances within one business day of discovery of such loss or theft. The registrant shall also complete, and submit to the Field Division Office in his area, DEA Form 106 regarding the loss or theft.”

¹⁰² See *Jackson*, 72 Fed. Reg. at 23853; *Leo R. Miller, M.D.*, 53 Fed. Reg. 21931, 21932 (1988).