

Respondent testified on his behalf and also had several exhibits admitted into evidence. After the hearing, both parties submitted Proposed Findings of Fact, conclusions of Law and Decision.

On August 6, 2003, the ALJ certified and transmitted the record to the Acting Deputy Administrator of DEA. The record included, among other thing, the Recommended Rulings, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, the findings of act and conclusions of law proposed by all parties, all of the exhibits and affidavits, and the transcript of the hearing sessions.

II. Final Order

The Acting Deputy Administrator does not adopt the Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge. The Acting Deputy Administrator has carefully reviewed the entire record in this matter, as defined above, and hereby issues this final rule and final order prescribed by 21 CFR 1316.67 and 21 CFR 1301.46, based upon the following findings of fact and conclusions of law.

The Government adduced substantial evidence at the hearing that in 1998 and 1999, Respondent was diverting Demerol, a Schedule II controlled substance, for his own use. At the hearing, Pam Runyon-Dean (Ms. Runyon-Dean) testified on behalf of the Government. Ms. Runyon-Dean was a medical assistant at Respondent's clinic, the MediCenter, in Pigeon Forge, Tennessee from May 1995 until January 1999. After completing training to become a medical assistant, she did her externship at the MediCenter.

Ms. Runyon-Dean testified about her observations of the Respondent's diversion of Demerol. As the result of a complaint, the Tennessee Health Related Board (HRB) initiated an investigation of Respondent. Marianne Cheaves, an HRB investigator, met with Ms. Runyon-Dean and another employee of the MediCenter, and suggested that Ms. Runyon-Dean maintain notes of events occurring there. Since Ms. Runyon-Dean already utilized a daily planner, she used it to write her notes, which she then transferred on to lined notebook pages. The notes were later faxed to Investigator Cheaves. Entries were written on the date when incidents occurred.

Ms. Runyon-Dean testified that Demerol and other controlled substances at the MediCenter were stored in a safe in a closet. The dispensing of controlled substances was recorded on a drug log, usually by a medical assistant. There were no other

procedure to keep track of controlled substances at the MediCenter.

On September 22, 1998, and again on September 29, 1998, Ms. Runyon-Dean recorded in her log Respondent's requests for tuberculin syringes, which he claimed were necessary to give his daughter allergy shots at home. On October 6, 1998, Ms. Runyon-Dean observed that Respondent's speech "became more slurred, his eyes were glassy and droopy, he was real groggy and sleepy." Ms. Runyon-Dean also wrote that Respondent went to the Pigeon Forge Drugstore and picked up a bottle of Demerol, and later spent "a lot of time in the restroom." On the same day, Ms. Runyon-Dean, who was solely responsible for keeping the employees' restroom clean, noticed several Kleenex tissues in the employee's restroom trash can that had small spots of blood on them.

On the same day, Ms. Runyon-Dean recorded in her log a conversation with another employee, Sherry Linsey. After Ms. Lindsey learned that Ms. Runyon-Dean provided syringes to Respondent, she stated that Respondent's daughter did not receive allergy injections. Ms. Runyon-Dean never witnessed Respondent's daughter receive an allergy shot at the MediCenter and the medical record at the MediCenter for Respondent's daughter did not corroborate any recommendations for allergy shots. At the hearing, Respondent testified that his daughter suffers from allergies and that Ms. Lindsey should not have made the above statements because she doesn't know his daughter's condition. However, Respondents presented no documentary evidence of his daughter's condition.

On October 9, 1998, Ms. Runyon-Dean reported in her log that she went into the employee's restroom after Respondent came out and found blood spots on the commode seat. She had to wipe the spots before she could use the commode. When she threw away her paper towel, Ms. Runyon-Dean saw a wrapper in the trash can from one of the MediCenter's 3cc syringes. It was the only thing she saw in the trash can. Ms. Runyon-Dean testified that the trash can was empty prior to Respondent's use of the restroom that day because she had cleaned the facility that morning. Ms. Runyon-Dean did not notice blood spots prior to Respondent going into the restroom. She also thought it odd to find a 3cc syringe in the employee's restroom because there was no medication in the room and the room was not used to give injections.

On October 11, 1998, Ms. Runyon-Dean again observed that Respondent

spent a lot of time in the restroom, and again noticed throughout the day blood spots on Kleenex in the trash can along with blood spots on the commode and sink in the employees' restroom. At the end of the day, she saw Respondent emerge from the employee's restroom and drop a bloody Kleenex into a trash can next to the drug closet.

Respondent testified that the bloody tissues could have been from anybody, including staff or patients. However, Ms. Runyon-Dean testified that aside from these occasions, she never saw blood on the lid of the commode of the employees' restroom and on the occasions where she saw blood, she knew no one had used the restroom other than Respondent. Ms. Runyon-Dean further testified that initially, she would clean the employees' restroom once or twice a day; however, after the change in Respondent's behavior, she would sometimes have to clean the restroom five or six times per day as other employees alerted her that there was blood in the restroom that needed to be cleaned up.

On October 13, 1998, Ms. Runyon-Dean also noted in her log a meeting between Sheri Linsey and Respondent about Demerol that was missing from the drug safe. Respondent told the staff that if the drug was missing, then the drug would no longer be kept in the office. This account was corroborated by Respondent's testimony. Ms. Runyon-Dean noted that the staff agreed with the Respondent's decision to keep the drug out of the office. Ms. Runyon-Dean further noted, however, that the reason the drug was missing was that Ms. Lindsey (unbeknownst to Respondent) had taken the drug out of the safe the previous Friday afternoon and hid it in the front office to keep it from Respondent. Ms. Runyon-Dean testified that Ms. Lindsey told her that she hid the bottle of Demerol from Respondent because she felt that he was taking it for personal use. Ms. Runyon-Dean also noted that after a few days, a bottle of Demerol was back in the drug safe.

On October 19, 1998, Ms. Runyon-Dean noted in her log that Respondent called her in the morning, and his speech was slurred and he would lose his train of thought in the middle of a sentence. Respondent came into the MediCenter later that day, and Ms. Runyon-Dean again noted that Respondent's speech was slurred. Ms. Runyon-Dean also noted that as the day progressed, Respondent became more and more sleepy, groggy and glassy eyed, and his speech became more slurred, to a point where his words were very drawn out.