

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1175

September Term, 2017

FILED ON: MAY 18, 2018

PETER F. KELLY, D.P.M.,
PETITIONER

v.

DRUG ENFORCEMENT ADMINISTRATION,
RESPONDENT

On Petition for Review of a Final Order
of the Drug Enforcement Administration

Before: ROGERS, KAVANAUGH, and PILLARD, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the Drug Enforcement Administration, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the petition for review of the Drug Enforcement Administration's decision be **DENIED**.

The DEA imposed a one-year suspension of Dr. Peter Kelly's registration to dispense controlled substances. We must uphold the DEA's action if substantial evidence supported the agency's factual determinations and if the agency's suspension of Kelly's registration was reasonable in light of the facts. *See Morall v. DEA*, 412 F.3d 165, 176-77 (D.C. Cir. 2005). Applying that deferential standard, we conclude that the DEA reasonably suspended Kelly's registration for one year.

Under 21 U.S.C. § 824(a)(4), the DEA may revoke or suspend a registration if the registrant acted in a way that renders continued registration "inconsistent with the public interest." By statute, the DEA must consider five factors to determine whether continued registration is in 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 and safety.

21 U.S.C. § 823(f).

In this case, the relevant facts are not seriously disputed. Kelly failed to establish an initial inventory of controlled substances. He also failed to maintain a complete and accurate biennial inventory of controlled substances. Kelly directed his office manager to administer controlled substances to patients when Kelly was not present. Kelly's insurance clerk, Vicki Mullen, used Kelly's registration number to commit prescription fraud over a period of several years. When Kelly discovered Mullen's fraud, Kelly did not fire her effective immediately. Rather, he kept her employed for five more weeks. To be sure, Kelly did make several adjustments during that five-week period to prevent Mullen from continuing to misuse the registration number. Kelly called local pharmacies to warn them about the potential misuse of his registration number, moved the office fax machine to a locked room, took away Mullen's keys to the office, and placed an advertisement to find a new insurance clerk. Kelly also immediately informed Mullen that she would be replaced. But Kelly allowed Mullen to remain in her job until a replacement was found and trained.

In light of those facts, the DEA determined that Kelly committed a recordkeeping violation and that Kelly aided and abetted the unlawful distribution of controlled substances when he directed his office manager to administer controlled substances. The DEA also determined that Kelly's decision to continue Mullen's employment for the five-week period constituted "conduct which may threaten the public health and safety." 21 U.S.C. § 823(f)(5). The DEA's conclusions were supported by substantial evidence in the record. Kelly argues that he did not put public safety at risk by retaining Mullen, but the DEA reasonably concluded otherwise given the severity of Mullen's conduct.

The DEA recounted the above facts in its decision imposing a one-year suspension. The DEA stated, moreover, that a one-year suspension is warranted based solely on Kelly's failure to terminate Mullen immediately. When the DEA determines that a registrant has engaged in misconduct, the DEA has broad discretion in choosing an appropriate sanction. And here, in light of the DEA's factual conclusions, there is no real dispute that some kind of sanction is appropriate, as Kelly's counsel acknowledged at oral argument. Kelly simply argues that the one-year suspension is too long. But given the nature and scope of Kelly's conduct, as thoroughly detailed by the DEA in its decision, we cannot conclude that a one-year suspension, although harsh, is outside the broad zone of reasonableness.

We deny the petition for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk