

UNITED STATES DEPARTMENT OF JUSTICE
Drug Enforcement Administration

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In The Matter of))
MDMA SCHEDULING) Docket No. 84-48
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MOTION TO STRIKE PORTIONS OF THE EXCEPTIONS
FILED BY DEA STAFF

The Exceptions¹ filed by the DEA staff in this proceeding on June 13, 1986, contain numerous allegations of "bias" leveled personally against the Administrative Law Judge. Exceptions, pp. 2, 31-35. Participants Drs. Grinspoon, Greer, et al. respectfully request the Administrator to order that all allegations of "bias" against the Administrative Law Judge be stricken from the DEA staff's Exceptions and that the staff be directed to refile its Exceptions without any such references.

The grounds upon which this request is made are the following:

1. The DEA staff has no basis whatsoever for alleging "bias." The Administrative Law Judge, pursuant to

¹ Government's Exceptions to the Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, filed June 13, 1986 ["Exceptions"].

21 C.F.R. § 1316.52, is designated by the Administrator. The Administrative Law Judge's duty includes the obligation "to conduct a fair hearing." If agency counsel seriously questions the integrity of the Administrative Law Judge, and therefore questions the fundamental fairness of the hearing process including the Judge's preparation of the recommended decision in this case, agency counsel should request the Administrator to remove the Judge, and appoint a new presiding officer. In the present case, the fact is that no grounds exist for questioning either the integrity of the ALJ or the fairness of the proceeding. Agency counsel's complaint is simply (1) that the ALJ ruled against agency counsel and (2) that agency counsel believe the ALJ did not give sufficient weight to evidence and arguments presented by agency counsel. That provides no basis for an accusation of bias. The disrespectful, discourteous, and wholly groundless attack on the integrity of the Administrative Law Judge in reality amounts purely to an improper effort on the part of agency counsel to influence the Administrator's decision.

2. 21 C.F.R. § 1316.51(b) provides that participants in a hearing "shall conduct themselves in accordance with judicial standards of practice and ethics." In the Model Code of Professional Responsibility, adopted by the American Bar Association, Disciplinary Rule 7-106(C)(6) bars "discourteous conduct which is degrading to a tribunal." Ethical Consideration 7-22 requires respect for judicial

rulings. Disciplinary Rule 8-102(B) forbids false accusations against judges. In this regard, the California Supreme Court has observed that "an attorney commits a direct contempt when he impugns the integrity of the court by statements made in open court either orally or in writing." In re Buckley, 514 P.2d 1201 (Cal. 1973). Agency counsel has no evidence whatsoever of "bias" on the part of the Administrative Law Judge. Agency counsel has legal criticisms of the ALJ's opinion in this proceeding. In essence, agency counsel disagrees with the opinion and has counter arguments to the arguments that the ALJ found persuasive. But, for agency counsel to attack and impugn the integrity of the Administrative Law Judge solely on the ground that agency counsel disagrees with the judge's opinion is unprofessional and irresponsible, certainly bordering on if not actually constituting a violation of the ABA's Model Code of Professional Responsibility.

3. In the present case, agency staff's allegations that the Administrative Law Judge is "biased" are highly prejudicial to participants Drs. Grinspoon, Greer, et al. The massive amount of detail in the record in the present case demonstrates the correctness of our position that MDMA belongs in Schedule III:

- The extensive statistical evidence and direct testimony on the issue of potential for abuse demonstrates that MDMA is not a hallucinogen, is in fact different from MDA and amphetamines, has only shown a low to moderate level of abuse over the years, and is unlikely to be seriously

abused because of the effects it produces.

- On the other side, MDMA does have a major potential for therapeutic utility. It is clear that research into this potential will be stopped by placing MDMA in Schedule I.

The ALJ who sat through the extensive testimony in this case and who has reviewed the record in detail has reached certain conclusions about the evidence in the record. That judgment is entitled to substantial weight and deference. Agency counsel is attempting to convince the Administrator not to accord appropriate weight to the ALJ's judgment by attacking the personal integrity of the ALJ and alleging that the ALJ is somehow "biased."

Such conduct is simply indefensible. One can recognize it as a desperate attempt to shore up a weak case. But it is plainly advanced for one purpose only: to influence the Administrator to reject the ALJ's judgments and opinion through the use of highly prejudicial and inflammatory allegations which have no basis in fact. The Administrator cannot and should not permit such unfounded attacks on the personal integrity of the ALJ to be a part of the decisionmaking process. Nor should he sanction such misconduct on the part of lawyers on the staff of the DEA.

For the reasons set out above, participants Drs. Grinspoon, Greer request the following:

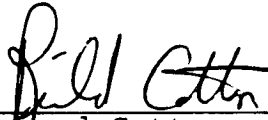
- (1) that the Administrator order that the unfounded allegations of "bias" attacking and impugning the personal integrity of the Administrative Law Judge, be

stricken from the Exceptions filed by agency counsel in the present case;

(2) that the Administrator direct agency counsel to file a new set of exceptions deleting such personal attacks on the Administrative Law Judge; and

(3) that the Administrator not take these unfounded, improper and highly prejudicial allegations into consideration in his review of the opinion and recommended decision of the Administrative Law Judge.

Respectfully submitted,



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et al.

CERTIFICATE OF SERVICE

I certify that on June 27, 1986, a copy of the foregoing Response of Drs. Grinspoon and Greer, et al, to the Government's Exceptions to the Opinion of the Administrative Law Judge, Motion to Strike Portions of the Exceptions Filed by DEA Staff, and Request for Opportunity for Oral Presentation to the Administrator, on Behalf of Drs. Greer and Grinspoon, Professors Bakalar and Roberts was mailed, postage prepaid, to the following:

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