

*BOARD ORDER #E-09-009*  
*SOAH DOCKET NO. 515-10-0513*

RE: IN THE MATTER OF  
TERRY LOUIS GREEN  
(PHARMACIST LICENSE #30700)

BEFORE THE TEXAS STATE  
BOARD OF PHARMACY

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On this day came on to be considered by the Texas State Board of Pharmacy (hereinafter referred to as "Board") the matter of pharmacist license number 30700, issued to Terry Louis Green (hereinafter referred to as "Respondent").

After proper and timely notice was given, the matter was heard in public hearing on January 27, 2010, before Cassandra J. Church, Administrative Law Judge, State Office of Administrative Hearings, who issued a Proposal for Decision, containing Findings of Fact and Conclusions of Law, which was properly served on all parties. All parties were given an opportunity to file exceptions and replies. On May 5, 2010, Respondent filed exceptions; and Board staff responded on May 19, 2010. On May 25, 2010, Respondent filed a supplement to its exceptions; and Board staff responded on May 26, 2010. On June 8, 2010, Judge Church issued an Amended Proposal for Decision. The Board, after consideration of the Amended Proposal for Decision and argument of the parties, makes and adopts the following Findings of Fact and Conclusions of Law of the Administrative Law Judge contained in the Amended Proposal for Decision and does not adopt Conclusion of Law, Number (9), of the Administrative Law Judge, as noted herein. A copy of the Amended Proposal for Decision is attached as Exhibit "A" and incorporated by reference as though fully set forth herein. All proposed Findings of Fact and Conclusions of Law submitted by any party which are not specifically adopted herein are denied.

**FINDINGS OF FACT**

1. On November 1, 1998, the Texas State Board of Pharmacy (Board) issued pharmacist's license No. 30700 to Terry L. Green (Respondent).
2. On November 24, 2008, Respondent was convicted in Case No. 4:06CR00232-004, in the U.S. District Court, Southern District of Texas, of the felony offense of

- knowingly and intentionally using a communication facility (the telephone) to dispense and distribute hydrocodone, a Schedule III controlled substance, under 21 U.S.C. § 843(b) (Comprehensive Drug Abuse Prevention and Control Act of 1970) (the Conviction).
3. Respondent's sentence included a period of probation which is scheduled to expire in November 2011. He was not incarcerated.
  4. Respondent has no criminal history other than the Conviction and has not re-offended since he ceased his criminal conduct in June 2002.
  5. Respondent was an adult when he committed the criminal acts.
  6. Seven and one-half years has elapsed since the last date of criminal activity, June 2002.
  7. Respondent had a good work history before the criminal activity and was not barred from practicing as a pharmacist as a condition or requirement of the Conviction.
  8. Respondent worked as a pharmacist between 2002 and an unknown date at or near the time of the Conviction without incident.
  9. Due to a period of house arrest after the Conviction, Respondent's employment after the Conviction has been limited to employment as a temporary, or PRN, pharmacist in Brownsville, Texas.
  10. Respondent's employer, Paula Fraser, R. Ph., stated that Respondent was an honest, capable pharmacist, and effective at counseling patients and that she would re-hire him if available.
  11. Respondent did not establish that he fully disclosed the Conviction to Mrs. Fraser before she employed him, but he did disclose it fully at some time during his employment.
  12. Respondent displayed remorse for his criminal activities and an understanding of the factors that led to his criminal conduct.
  13. Respondent is meeting the terms of his probation and has paid required costs and a fine assessed in connection with the Conviction.
  14. Respondent presented character recommendations from two family members, his wife, Catherine Green, and his brother, Darrell Green.
  15. Mrs. Green and Darrell Green stated that Respondent had good character and personal integrity, and stated that they were confident he would not re-offend.

16. Fewer than five years have passed since the disposition of Respondent's criminal case.
17. Staff became aware of Respondent's criminal conduct in 2004 but did not attempt to restrict his practice of pharmacy until after the Conviction.
18. On September 28, 2009, Staff issued Respondent a complaint in which it listed the Conviction as a basis for disciplinary action and requested revocation of Respondent's pharmacist's license and assessment of a \$5,000 administrative penalty.
19. On September 28, 2009, the Staff of Board issued Respondent a notice of hearing, to which it attached the complaint, informing him of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be held; the particular sections of the statutes and rules involved; and included a short, plain statement of the matter asserted.
20. On December 12, 2009, Administrative Law Judge (ALJ) Cassandra J. Church granted a partial summary disposition motion by Staff, in which Respondent's actions were found to violate TEX. OCC. CODE ANN. ch. 565, and also limited the scope of the contested case hearing to facts and issues relating to the proposed sanction and administrative penalty
21. All parties appeared and were represented at the hearing on sanctions held January 27, 2010, in Austin, Texas. Staff was represented by Caroline Hotchkiss, staff attorney; Respondent was represented by Dan Lype, attorney.
22. The record of the contested case hearing closed February 19, 2010, upon receipt of the parties' written closing argument.
23. A Proposal for Decision (PFD) was issued on April 20, 2010.
24. On May 5, 2010, Respondent filed exceptions to the PFD; Staff of the Board responded on May 19, 2010, and both parties filed supplements.

#### **IV. CONCLUSIONS OF LAW**

1. The Board has jurisdiction over this matter, pursuant to TEX. OCC. CODE ANN. subtitle J (Texas Pharmacy Act), including the authority to sanction violations of the Act and of the Board's administrative rules.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Respondent's Conviction violated TEX. OCC. CODE ANN. §§ 565.001(a)(6)(B) and (a)(9)(A).
5. Respondent's Conviction is directly related to his duties and responsibilities as a pharmacist, within the meaning of 22 TEX. ADMIN CODE § 281.63(i)(6).
6. Due to the Conviction, Respondent is subject to an administrative penalty of up to \$5,000, pursuant to 22 TEX. ADMIN. CODE §281.65(1)(U).
7. Due to the Conviction and to still being on probation for the Conviction, Respondent is subject to revocation of his pharmacist's license, pursuant to TEX OCC. CODE ANN. § 565.001 and 22 TEX ADMIN. CODE §§ 281.63 and 281.64.
8. Respondent did not establish that the mitigating factors in regard to his fitness to practice pharmacy outweigh the aggravating factors, within the meaning of TEX OCC. CODE ANN. §§ 53.022 and 53.023 and 22 TEX. ADMIN. CODE § 281.63.
9. *Based on the above Findings of Fact and Conclusions of Law, the Board should revoke Respondent's pharmacist license and assess Respondent an administrative penalty of \$5,000.*

*The Board rejects Conclusion of Law #9 because it is the Administrative Law Judge's (ALJ) recommended sanction rather than a true conclusion of law. The ALJ improperly characterized her recommended sanction as a conclusion of law. Pursuant to §281.60 of the Texas Pharmacy Board Rules (Rules), the ALJ's recommended sanction should not have been characterized as a conclusion of law. Courts have held that an ALJ's recommended sanction is not the same as a finding of fact or conclusion of law. Granek at 781 ("Board is not required to give presumptively binding effect to an ALJ's recommendations regarding sanctions in the same manner as with other findings of fact and conclusions of law"), Grotti at 9 ("the mere labeling of a recommended sanction as a finding of fact is insufficient to presumptively bind the Board and implicate §2001.058(e)), Brown at 697 ("The Board, not the ALJ, is the decision maker concerning sanctions in this case.").*

### CONSTRUCTION

It is the intent of the Texas State Board of Pharmacy that any Findings of Fact that are properly construed as Conclusions of Law should be treated as Conclusions of Law and that any Conclusions of Law that are properly construed as Findings of Fact should be treated as Findings of Fact.

**ORDER OF THE BOARD**

THEREFORE, PREMISES CONSIDERED, the Texas State Board of Pharmacy (hereinafter referred to as "BOARD") does hereby ORDER that pharmacist license number 30700 held by Terry Louis Green (hereinafter referred to as "Respondent") shall pay an administrative penalty of five thousand dollars (\$5,000) due ninety (90) days after the entry of this Order.

It is further ORDERED that effective thirty (30) days after the entry of this Order, pharmacist license number 30700 held by Respondent shall be, and such license is hereby revoked.

It is finally ORDERED that Respondent:

- (1) shall not practice pharmacy in this state or have access to prescription drugs during the period pharmacist license number 30700 is revoked; and
- (2) shall surrender to the BOARD, Enforcement Division, the wall certificate for pharmacist license number 30700 and any renewal certificate and personal identification card pertaining to pharmacist license number 30700 within thirty (30) days after the entry of this Order.

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*Terry Louis Green*  
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Passed and approved at the regular meeting of the Texas State Board of Pharmacy on the 10th day of August 2010.

THIS ORDER IS A PUBLIC RECORD.

SIGNED AND ENTERED ON THIS 10th day of August 2010.

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MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

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Gay Dodson, R.Ph.  
Executive Director/Secretary  
Texas State Board of Pharmacy

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Kerstin E. Arnold  
General Counsel  
Texas State Board of Pharmacy

# EXHIBIT A

SOAH DOCKET NO. 515-10-0513

TEXAS STATE BOARD OF  
PHARMACY,  
Petitioner

V.

TERRY L. GREEN,  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

## AMENDED PROPOSAL FOR DECISION

The Staff of the Texas State Board of Pharmacy (Staff/Board) seeks to revoke the pharmacy license and impose an administrative penalty of \$5,000 against Terry L. Green (Respondent) for a 2008 federal felony conviction for using a telephone to dispense a controlled substance. Conviction for a felony violates the Texas Pharmacy Act. Respondent did not dispute the allegations regarding violation of the Pharmacy Act, but did dispute the appropriateness of the proposed sanctions. Respondent contended that, based on mitigating factors, the Board should suspend Respondent for 60 days, followed by a four-year probated suspension. Respondent did not dispute assessment of a \$5,000 administrative penalty.

### I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

In October 2009, Staff moved for summary disposition on all allegations of violation and also on the proposed sanctions.<sup>1</sup> Respondent conceded that the violation alleged could be found against Respondent as a matter of law, but contended there were disputed factual and legal issues in regard to the proposed sanctions.<sup>2</sup> On December 22, 2010, the ALJ granted a partial summary disposition in favor of Staff on the violation, but denied it in regard to the proposed sanction,<sup>3</sup> and limited the scope of the hearing to evidence and argument in regard to those proposed sanctions.

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<sup>1</sup> Motion for Summary Disposition, October 9, 2009.

<sup>2</sup> Respondent's Response, October 23, 2009.

<sup>3</sup> Order No. 3, December 22, 2009.

The hearing on the proposed sanctions was held January 27, 2010, before ALJ Cassandra J. Church at the State Office of Administrative Hearings (SOAH) in Austin, Texas. Staff Attorney Caroline Hotchkiss represented the Board and Respondent was represented by Dan Lype, attorney. The record closed on February 19, 2010, upon receipt of written closing argument from the parties. Notice and jurisdiction were undisputed so appear only in the Findings of Fact and Conclusions of Law below.

A Proposal for Decision was issued on April 20, 2010. On May 5, 2010, Respondent filed exceptions; Staff of the Texas State Board of Pharmacy responded on May 19, 2010.<sup>4</sup> On May 28, 2010, the ALJ notified the Board and parties that she would be recommending changes to the PFD, pursuant to 1 TEX. ADMIN. CODE § 155.507.

Respondent's exceptions focused on the analysis in the PFDS of the sanctions, particularly consideration of the aggravating or mitigating factors. In his exceptions, Respondent contended the PFD erred in the following ways: (1) it did not follow the Board's precedent in applying mitigating factors to individual cases; (2) it failed to consider the factors in light of Respondent's individual situation, as required by the Occupations Code; and, (3) it retroactively imposed a substantive rule by applying a strict application of the Board's rule on mitigation factors, Rule 281.64.<sup>5</sup> In response, Staff contended the following: (1) the Board has not considered individual factors in cases resolved since the adoption of the Rule 281.64; and (2) Rule 281.64 complies with requirements of the Occupations Code. Staff did not respond to the issue of whether Rule 281.64 constituted a substantive rather than a procedural rule.

Based on the argument and authority presented, the ALJ concluded that the Board has, at least in some cases, considered individual mitigating factors in cases considered after the passage of Rule 281.64. Accordingly, it would unfairly prejudice Respondent and provide an insufficient recommendation to the Board to exclude an individual analysis of the aggravating and mitigating

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<sup>4</sup> On May 25 2010, to supplement its exceptions, Respondent filed a copy of a recent PFD in SOAH Docket No. 515-10-0512 (May 10, 2010). Staff responded on May 26, 2010. These additional filing were considered as part of the argument in this case.

<sup>5</sup> 22 TEX. ADMIN. CODE § 281.64. (Effective date September 3, 2006, as amended).

factors applicable to Respondent's individual circumstances. In addition, she is persuaded that the Occupations Code, applicable to the Board, contemplates an individual analysis and that a recommendation to the Board that did not follow the Occupations Code in that regard would be insufficient.

The ALJ is not persuaded that a penalty matrix fixing penalties for certain classes of violations constitutes a change in substantive law, nor that the Board is prohibited from treating the passage of time from the date of a criminal disposition as an additional relevant factor in setting a sanction. However, the ALJ concurs with Respondent that the Occupations Code specifies that one of the mitigating factors that a regulatory board must consider is the passage of time since the offense. The date of the offense and the date of the disposition of the case based on that offense are not interchangeable. The amended discussion and analysis below are based on the above-stated conclusions. In addition, the ALJ has added Findings of Fact in regard to the individual factors appearing in the Occupations Code.

## II. DISCUSSION

### A. Background Facts

The Board issued a pharmacist license to Respondent on November 1, 1988. After working for large pharmacies, Respondent opened his own business, the Millennium Pharmacy (Millennium) in Houston, Texas. He operated Millennium between about mid-1998 and June 30, 2002. Between 2000 and June 2002, Respondent filled and dispensed prescriptions for products containing hydrocodone that Dr. Alonzo Peters telephoned in. Respondent acknowledged that at the time he dispensed the drugs, they were being illegally prescribed and dispensed by Dr. Peters. In June 2002, he closed Millennium. He was licensed and continued to practice as a pharmacist though an unspecified date in 2008 or 2009. He had no Board enforcement actions or complaints against him from their period.

In 2007, Respondent was arrested by federal officials in connection with his activities at Millennium. He assisted the prosecution in trials of others involved in the prescribing incidents. On

November 24, 2008, based on a guilty plea, Respondent was convicted of one count of knowingly and intentionally using a communication device (a telephone) to illegally dispense and distribute a controlled substance under 21 USC § 843(b) (Comprehensive Drug Abuse Prevention and Control Act of 1970). Respondent was placed on probation for three years, through November 2011. His sentence also included a six-month period of limited house arrest and use of an electronic monitoring device. Respondent also had to pay a \$2,000 fine and court costs, which he has done. The court did not impose any occupational restrictions on Respondent's practice as a pharmacist.<sup>6</sup>

Respondent's conviction on the federal drug felony also violated provisions of the Texas Pharmacy Act in regard to drug offenses.<sup>7</sup> On September 28, 2009, Staff filed a complaint against Respondent, seeking revocation of his license and also assessment of a \$5,000 administrative penalty. Respondent countered that a brief suspension followed by a longer period of probation, as well as the administrative penalty, would be sanctions more consistent with the Occupations Code and with the Board's treatment of similarly-situated persons than those sought by Staff.

#### **B. Parties' Positions on Sanctions**

As well as differing on the appropriate level of sanction, the parties also disagreed on the applicable law. Staff contended that Respondent was subject to the sanctions rule that went into effect in 2006 as the disposition date occurred after the new rules were adopted. Those rules, as will be discussed further below, mandate revocation of Respondent's license for the violation committed. Respondent contended that the Board's mandatory-revocation rule was void because it does not conform to requirements in the Occupations Code for a regulatory agency's review of disciplinary measures. Respondent also contended that after passage of that rule, the Board continued to treat similarly-situated pharmacists more leniently in a significant number of cases.

In addition, Respondent contended that because the criminal activity occurred before and during 2002, Respondent's case should be reviewed under the pre-2006 sanctions rule because the

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<sup>6</sup> Staff Ex. 3, Resp. Ex. 10.

<sup>7</sup> TEX. OCC. CODE ANN. §§ 565.001(a)(6)(B) and (a)(9)(A).

2006 change was a substantive rule change that should only be applied prospectively. That is, the 2006 rules should apply only to conduct that occurred after the effective date of the rule change. Respondent also contended that the 2006 change increased significantly the sanctions which he might face. In contrast, Staff contended that the sanctions rule was a procedural one, so could be applied to pending cases, and also that it did not significantly change the sanction to which Respondent would have been subject before 2006.

### C. Current Law Regarding Sanctions

The Board's determination of the appropriate sanction for a pharmacist convicted of a crime is governed by provisions of the Occupations Code,<sup>8</sup> the Texas Pharmacy Act,<sup>9</sup> and administrative rules adopted by the Board.<sup>10</sup>

In the event a regulated person is convicted of a crime, the Occupations Code requires the licensing authority to first determine whether the crime relates to the licensed occupation,<sup>11</sup> and then ascertain whether that person is, notwithstanding the conviction, still fit to be licensed to perform the duties and discharge the responsibilities of the occupation.<sup>12</sup> To determine fitness, a regulatory agency subject to the Occupations Code must consider a list of additional or, as they are commonly termed, mitigating factors. Those factors include: (1) the extent and nature of the person's past criminal activity, (2) the age of the person when the crime was committed, (3) the amount of time that has elapsed since the person's last criminal activity, (4) the conduct and work activity of the person before and after the criminal activity, (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release, and (6) other evidence of the person's fitness, including recommendations. The Board is subject to the Occupations Code.<sup>13</sup>

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<sup>8</sup> TEX. OCC. CODE ANN. §§ 53.022 and 53.023.

<sup>9</sup> TEX. OCC. CODE ANN. chs. 565 and 566.

<sup>10</sup> 22 TEX. ADMIN. CODE §§ 281.60 – 281.65.

<sup>11</sup> TEX. OCC. CODE ANN. § 53.022.

<sup>12</sup> TEX. OCC. CODE ANN. § 53.023(a).

<sup>13</sup> The Occupations Code excludes, along with other medical professionals, persons licensed by the Board who are convicted of certain state drug felonies. TEX. OCC. CODE ANN. § 53.002(4).

Under its own rule-making authority, the Board adopted the language of Chapter 53 of the Occupations Code.<sup>14</sup> For its enforcement purposes, the Board also prioritized the list of mitigating factors that appears in the Occupations Code.<sup>15</sup> The Board ranked highest the two factors of the person's criminal history and the amount of time that has elapsed since the person's last criminal activity. As will be discussed later, the Board treats the disposition date of the crime as the date of the person's last criminal activity. Those two were followed by, in order, rehabilitation, age, post-crime work activity and conduct, and other evidence of fitness, including recommendations.

Piggy-backing on its list of high-priority factors, the Board also adopted a penalty-matrix rule which provides mandatory sanctions for certain specified convictions.<sup>16</sup> In adopting its penalty matrix, the Board took its analysis a step further and determined that the nature and seriousness of the specified crimes and time since the disposition of the criminal case outweighed all the other mitigating factors. In essence, the Board removed all other mitigating factors as ones they consider on a case-by-case basis for some categories of cases. That is, in applying its penalty matrix to an individual case, the Board looks solely at three facts: (1) the category of the crime, (2) the date of the disposition of the criminal case, and (3) the period of time that has elapsed since the disposition of the case. In addition, the Board may revoke a license and also impose other disciplinary actions, in particular, assess an administrative penalty, in the same case.<sup>17</sup> However, the Board has also adopted a rule that appears to limit the application of the penalty matrix. That rule states that the standard sanctions apply to cases involving a single violation of the Texas Pharmacy Act and in which there are no aggravating or mitigating factors that apply in a particular case.<sup>18</sup>

Applying the current penalty matrix, Staff concluded that Respondent is subject to automatic revocation of his license.<sup>19</sup> Respondent was convicted of a crime that involved the delivery of scheduled drugs and less than five years had passed since the date of disposition, the sentencing date,

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<sup>14</sup> 22 TEX. ADMIN. CODE §§ 281.63(f) and (g).

<sup>15</sup> 22 TEX. ADMIN. CODE § 281.63(g).

<sup>16</sup> 22 TEX. ADMIN. CODE § 281.64.

<sup>17</sup> 22 TEX. ADMIN. CODE § 281.64(b) and (c).

<sup>18</sup> 22 TEX. ADMIN. CODE § 281.60(c)(1).

<sup>19</sup> 22 TEX. ADMIN. CODE § 281.64(c)(2)(i)(II).

so revocation of his license, in their view, is mandatory.<sup>20</sup> In addition, Staff also determined that Respondent was subject to an administrative penalty of \$5,000 because the basis of the disciplinary action was a felony conviction.<sup>21</sup> Because Respondent agrees that a \$5,000 administrative penalty is a reasonable sanction, this issue will not be discussed further here.

#### **D. Prior Law Concerning Sanctions**

The Board adopted the enforcement provisions outlined above effective September 3, 2006. These amendments occurred after Respondent's criminal actions, but before the disposition of his case, which took place in 2008. Neither party discussed the prior law in detail, but Carol Fisher, Director of Enforcement, stated that the Board had been more flexible under its previous rules. In fact, she stressed that one purpose of the amended rules was to make the Board's sanctions more uniform. Mrs. Fisher has been the Board's enforcement director since 2000 and was offered by Staff as an expert on the Board's enforcement policy and practice.

#### **E. Board's Treatment of Mitigating Factors**

Notwithstanding the language in the rules outlined above and Staff's assertions that the Board no longer considered individual factors, Respondent presented credible support for his argument that it had done so in some cases since 2006. First, in a case decided by the Board in August 2009, the Board's concluded that the ALJ had weighed the factors incorrectly, and substituted its analysis of the factors in arriving at the final sanction.<sup>22</sup> In addition, in another case, heard in the same month as this case, Mrs. Fisher apparently analyzed individual factors in regard to another pharmacist who was involved in the prescribing scheme created by the same physician with whom Respondent was involved.<sup>23</sup> Taking these two cases together, they offer credible support to Respondent's position

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<sup>20</sup> 22 TEX. ADMIN. CODE § 281.64(c)(2)(A)(i)(II). The rule provides for mandatory denial of an application or revocation of a license for periods of up to 20 years after the date of disposition for conviction of any offense that involves the manufacture, delivery, or possession with intent to deliver, fraud, or theft of drugs. The mandatory penalties apply to convictions, deferred adjudications, or a deferred disposition entered by a court. 22 TEX. ADMIN. CODE §§ 281.64(b) and (c)(2).

<sup>21</sup> 22 TEX. ADMIN. CODE § 281.65(1)(U).

<sup>22</sup> Board Order #E-08-006 (August 11, 2009) (SOAH Docket No. 515-09-2903).

<sup>23</sup> SOAH Docket No. 515-10-0512.

that the Board and Staff have considered individual factors in cases heard since 2006.

This position is further supported by Agreed Orders presented by Respondent at the hearing. Board orders cited by Respondent include a February 2009 order for a 90-day suspension for a pharmacist dispensing drugs listed in the Texas Controlled Substances Act.<sup>24</sup> The prohibited dispensing took place in 2004 and the Board's enforcement action commenced in June 2007. The Board entered an order in the same month against the pharmacy involved that included a 5-year suspension.<sup>25</sup> The Board commenced enforcement proceedings in June 2007. Respondent also pointed to a November 10, 2009, agreed order in which the Board suspended a pharmacist's license for 30 days and assessed an administrative penalty of \$2,000.<sup>26</sup> The prohibited conduct included felony convictions in 2004 for theft, insurance fraud, tampering with government records, and also falsifying in 2006 his application to the Board in regard to his convictions. The Board commenced the enforcement action in that case in August 2008.

An additional order cited included a February 6, 2008, agreed order in which the Board suspended the pharmacist's license for five years, and probated the suspension.<sup>27</sup> The pharmacist in that case pled guilty to the felony offense of possession of a controlled substance, hydrocodone, by Misrepresentation, Fraud, Forgery, Deception, or Subterfuge that took place between April and December 2003. The Board commenced enforcement action in May 2007. Respondent also cited to similar cases in which the Board in 2006 entered into agreed orders for brief suspension periods, followed by a lengthier period of probation with conditions required.<sup>28</sup> As these were summary reports, the date of the commencement of the Board's enforcement action in those two cases is not known.

The Board supplied a number of cases for consideration of its contention that the Board had consistently revoked the pharmacist licenses held by persons with criminal convictions similar to Respondent's. Most of those involved persons who had been convicted of crimes involving drugs,

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<sup>24</sup> Resp. Ex. 3 (Agreed Board Order #J-04-031-A, February 10, 2009).

<sup>25</sup> Resp. Ex. 4 (Agreed Board Order #J-04-031-B, February 10, 2009).

<sup>26</sup> Resp. Ex. 5 (Agreed Board Order #E-08-008, November 10, 2009).

<sup>27</sup> Resp. Ex. 6 (Agreed Board Order #E-07-029, February 6, 2009).

<sup>28</sup> Resp. Exs. 7 and 8.

but had been sentenced to periods of incarceration.<sup>29</sup>

#### **F. Application of Mitigating Factors in the Instant Case**

At the hearing, Mrs. Fisher stated that Staff, including herself, did not review or consider any evidence of individual mitigating factors that may apply in Respondent's case.<sup>30</sup> She stated that the Board had "already considered" mitigating factors that are applicable to Respondent's case when it adopted the penalty-matrix rule in 2006. She did not discuss under what circumstances Staff would consider it appropriate to determine whether individual aggravating or mitigating factors should be considered in a particular case.<sup>31</sup> She also stated that the Board treated the conviction date as the equivalent of the date when criminal activity occurred for purposes of imposing sanctions.

Mrs. Fisher also stated that if Respondent's conviction had occurred before Rule 281.64 was amended, Staff's evaluation likely would have differed. She said that a person with such a conviction might have faced a suspension with a period of probation. However, Staff and the Board no longer have discretion to impose such a sanction due to the rule change which was adopted in 2006. On April 7, 2008, Respondent disclosed his pending conviction. However, Staff had learned of Respondent's conduct in 2004 but deferred enforcement action until 2009, pending the development and resolution of the federal action. Staff deferred state disciplinary action at the request of federal authorities.

Mrs. Fisher discussed aggravating factors that she believed could apply in Respondent's situation, such as his age at the time of his crime, and the potential for harm to the public. She also stated that an eight-year work history as a pharmacist without any enforcement incidents would be "highly relevant" to determination of sanctions. However, Mrs. Fisher was not familiar with Respondent's work history since June 2002, the last period when the last criminal activity occurred. Taken as a whole, all her testimony regarding individual factors was academic in light of the fact that she also testified unequivocally that Staff considered that a drug-related conviction, as defined in

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<sup>29</sup> Staff Exs. 4 through 12.

<sup>30</sup> 22 TEX. ADMIN. CODE § 281.65(1)(U).

<sup>31</sup> See 22 TEX. ADMIN. CODE §§ 281.60, 281.62, and 281.63(f).

the Board's rules, was a sufficient basis to revoke Respondent's license. In sum, there was no evidence that Mrs. Fisher or any staff members involved in reviewing Respondent's case evaluated or considered any factors unique to Respondent's circumstances.

Mrs. Fisher also contended that the Board has consistently revoked licenses held by persons who delivered or possessed with intent to deliver controlled substances, as well as the licenses of persons who improperly dispensed controlled substances. She stated that the Board considered Respondent's conviction to constitute the delivery of controlled substances or, its equivalent. Respondent disputed that characterization of his conviction, asserting that, in the federal scheme, it was not the equivalent of actual delivery of controlled substances. Neither party expanded on this point.

Respondent presented evidence regarding the mitigating factors set forth in the Occupations Code, which the Board has substantially incorporated in its rules.<sup>32</sup> Respondent stated that he felt remorse regarding his criminal activities and that he had taken responsibility for those acts. He said that he had always considered the prescribing doctor's behavior to be questionable due to the large volume of narcotic prescriptions, but initially did not think it was illegal. He later came to understand that it was illegal and realized that he had rationalized his acceptance of the prescriptions. He said that Millennium was the first business that he had owned and that he got caught up in receiving money from the phone-in prescriptions as a way to finance and support the overall pharmacy's operations.

In June 2002, he closed Millennium and told Dr. Peters that he wanted to get out of the prescribing relationship with him. After he closed Millennium, Respondent continued to practice as a pharmacist, without incident, until some point during or after his criminal proceeding. After his period of electronic monitoring ended, Respondent was employed on a limited basis as a PRN, *i.e.*, temporary, pharmacist.

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<sup>32</sup> 22 TEX. ADMIN. CODE §§ 281.63(a), (f), and (g).

Respondent also testified as to his family and personal history and his struggle to get a college education and to succeed in the business world. He was in the U.S. Navy as a submariner and completed his high school education while in the military, before going to college.

In January 6, 2010, letter, Respondent's federal probation office, Kim B. Ceppie, Sr., stated that Respondent was meeting all the terms of his probation and was cooperating with him. Respondent has paid required costs and the fine imposed by the court. Respondent did not present other recommendations from any persons in the federal community justice system

Respondent offered the testimony of Paula Fraser, R. Ph., a pharmacy owner, who had employed Respondent as a pharmacist in her pharmacy in Brownsville, Texas, for about six to eight months in 2008. She stated Respondent was reliable, honest, a competent pharmacist, and followed through on his commitments. While in her employ, he supervised the technicians and counseled patients. She stated that it is hard to find pharmacists who will counsel patients, particularly in a pediatric clinic. However, the credibility of her testimony suffered somewhat when it was revealed that Respondent may not have fully disclosed the nature of his conviction to her at the time she had employed him. She stated she might not have hired him had she known more about the nature of the conviction at that time, but having known and worked with him, she would re-hire him if he were available. However, Respondent later stated that he had fully disclosed his criminal history to Mrs. Fraser before she employed him.

Respondent also presented the testimony of Darrell Green, Respondent's brother, and Catherine Green, Respondent's wife. Mr. Green, a former professional football player, owns and operates a work force firm in Ashburn, Virginia that trains and places ex-offenders in jobs. He said that he viewed Respondent's remorse as sincere and that, having grown up in the same family, he is assured that Respondent knows that his criminal behavior was unacceptable and that he now must work to regain the respect of those who know him. He said Respondent is fundamentally a person of integrity, despite his criminal conduct.

Mrs. Green owns and operates a motor skills gym for children. Mrs. Green noted that the couple had paid taxes on all his work as a pharmacist and had not tried to conceal or launder money he had received from the narcotics prescriptions. She also said she had observed him refuse to fill prescriptions presented to him that were not in order or were questionable. Although he has had little work as a pharmacist since his conviction and house arrest, Respondent has declined to take unemployment. She said that he has served as an on-call pharmacist as needed, has paid the court-ordered fines, and complied with the terms of his probation. She also stated that he is a person who knows right from wrong and who is deeply remorseful about his criminal activity.

### G. ALJ's Analysis

Staff was persuasive in arguing that the penalty-matrix rule regarding sanctions constituted a procedural change rather than a substantive one. A regulatory board has broad authority to create and change its regulatory scheme. Although it was not entirely clear, the Board's rule appears to contemplate imposing the 2006 rules provisions on pharmacists whose disposition date occurred after the effective date of the rules. Further, although the severity of the sanctions were increased in 2006, the fundamental provisions of the Occupations Code that grant regulatory agencies authority to sanction regulated persons for criminal conduct have been in place since 1999.<sup>33</sup> The ALJ is not persuaded that Respondent's interest in a particular scheme of discipline administered by the regulatory board governing his professional licensure rises to the level of a vested right.

However, the record of other decided cases suggests that the application of the rule has been less consistent than suggested by Staff in this case. The sample of Board orders included in the record show that the Board appears to have used a case-by-case analysis in a number of disciplinary actions resolved after the 2006 amendments.<sup>34</sup> In addition, Respondent's assertion that the Board appears to be applying its standards inconsistently was supported by comparing Mrs. Fisher's testimony in the two dockets heard in January 2010. The ALJ is unable to reconcile Staff's

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<sup>33</sup> See TEX. OCC. CODE ANN. ch. 53.

<sup>34</sup> That being said, many of the cases that Respondent presented were all agreed orders. The ALJ will not speculate as to why the parties settled their differences. However, there are other factors involved in settlements, such as the potential hazards of litigation, which may not be present in a fully-litigated case leading to a Board order. As such, settlements do not necessarily set agency policy, although they illustrate Respondent's argument.

apparently differing approaches in these two cases, which casts considerable doubt on representations by Staff as to what constitutes the Board's practice or policy.

Staff failed to present any credible evidence that Respondent would have been subject to identical or even substantially-similar sanctions had Staff initiated its disciplinary action before the 2006 rules change, at the time it learned of Respondent's conduct. Mrs. Fisher's testimony strongly suggested that he would not have been. Also, Board decisions or agreed orders that involve pharmacists who were incarcerated following their convictions were not relevant because there is a specific provision of the Occupations Code that mandates revocation of a regulated person's license upon incarceration.<sup>35</sup>

It is also something of a concern that the Board deferred enforcement action for a total of five years, from 2004 until 2009, because of the pending federal investigation and prosecution. Had Staff proceeded with its enforcement action in 2004, Respondent would clearly have fallen under the prior rule and policies of the Board. While deferring to a federal criminal action may protect the public and conserve state resources, this policy had a particularly harsh impact in Respondent's case. Indeed, although Staff knew of Respondent's conduct in 2004, it permitted him to continue to practice as a pharmacist for an additional five years. Staff apparently did not consider Respondent to be a potential threat to the public during those five years, but considers him to be so today.

In short, the evidence of the Board's policy on sanctioning is sufficiently inconsistent to prevent the ALJ from conclusively determining that the Board intends to universally apply the 2006 penalty matrix. The most credible evidence of the Board's practice to date is the history of its actions in prior cases, which, as described above, appears to look at sanctioning on a case-by-case basis.

The Board's history in resolving recent cases convinced the ALJ to re-examine her conclusions in regard to Staff's application of the individual factors. The ALJ is persuaded that, at least in some cases, the Board follows the guidance of Rule 281.63, which harmonizes with the

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<sup>35</sup> TEX. OCC. CODE ANN. § 53.021(b).

Occupations Code provisions in regard to aggravating and mitigating factors. Accordingly, the ALJ offers the following analysis of the factors.

Respondent had no criminal history prior to the federal conviction; he has not re-offended. Although he has had a limited work history since his conviction, he practiced pharmacy without incident during a six-year period between 2002 and 2008. His criminal conduct persisted over an approximate two-year period. However, he ended the criminal conduct himself and then fully cooperated with federal authorities investigating the case. He was an adult at the time he committed his crimes. A total of eight years has passed since his criminal conduct. Evidence of Respondent's rehabilitative effort came primarily from Respondent himself and Respondent's relatives. There was no reason to doubt that Respondent is sincerely remorseful for his criminal activity. Nor was there a reason to doubt that his brother and his wife, although likely to be loyal, were in a position to accurately observe and assess his basic character. Respondent has been compliant with the terms of his probation. Notwithstanding the above, Respondent has not yet completed his probationary period, which will not expire for approximately a year and one-half, in November 2011.

Taken as a whole, the mitigating factors do not necessarily outweigh the aggravating factors. The crime in question relates directly to the practice of pharmacy. Respondent was an adult at the time he committed the crimes; this was not a youthful indiscretion. Although Respondent has come to understand the reasons why he rationalized his conduct, the fact is that his conduct persisted over an approximate two-year period. The strong character recommendations from his brother and his wife carried some weight, but less than such testimonials would have carried from unrelated persons without personal loyalties. Mrs. Fraser's testimony was indicative of Respondent's good practices as a pharmacist. However, her association with him was fairly brief. Although federal authorities did not restrict Respondent's practice of pharmacy as a condition of probation, they did extend that period of probation through the end of 2011. In sum, although Respondent presented credible evidence on the mitigating factors, the ALJ cannot conclude that they outweigh the nature and seriousness of the crime, and the extent to which the continued practice of pharmacy might offer Respondent an opportunity to engage in similar activities.

The ALJ is unclear what to make of Mrs. Fisher's testimony that, in Staff's view, the crime of which Respondent was convicted was the equivalent of the manufacture, delivery, or possession with intent to delivery, fraud, or theft of drugs, per Rule 281.64(c). While on its face, the conviction is not for any of those acts, neither is the conviction for simple possession, the other drug-related crime listed. However, this may be a distinction without a difference as the Board's penalty matrix provides for revocation of the license held by persons who are still on probation for both a manufacturing/delivery drug crime and also for other felony offenses.<sup>36</sup>

Under a strict application of the Board's rules, revocation appears to an appropriate penalty. Under an analysis of the mitigating and aggravating factors in the Occupations Code and Rule 281.64, Respondent failed to establish that the mitigating factors outweighed the aggravating factors. Thus, revocation of Respondent's license is warranted.

When also taking into consideration past Board orders for crimes committed before 2006, as well as the fact that Staff concluded that Respondent posed no public threat between 2004 and 2009, a suspension of Respondent's license for a fixed period along with the administrative penalty of \$5,000 would appear to be within the range of sanctions that have been applied by the Board.

#### **H. Summary and Recommendation**

The finding of violation were resolved by the uncontested summary disposition motion, thus the ALJ recommends that the Board find that Respondent's conviction violated §§ 565.001(a)(6)(B) and (a)(9)(A) of the Occupations Code. Respondent did not contest the assessment of a \$5,000 administrative penalty. The ALJ further recommends that the Board find that the violations found are directly related to Respondent's duties and responsibilities as a pharmacist, within the meaning of 22 TEX. ADMIN CODE § 281.63(i)(6). Based on the application of current Board rules and also application of the mitigating and aggravating factors in Respondent's case, it is the ALJ's recommendation that the Board revoke Respondent's pharmacy license and also impose a \$5,000

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<sup>36</sup> 22 TEX. ADMIN. CODE § 281.64(c)(2)(A)(i) and (C).

administrative penalty.<sup>37</sup>

### III. FINDINGS OF FACT

1. On November 1, 1998, the Texas State Board of Pharmacy (Board) issued pharmacist's license No. 30700 to Terry L. Green (Respondent).
2. On November 24, 2008, Respondent was convicted in Case No. 4:06CR00232-004, in the U.S. District Court, Southern District of Texas, of the felony offense of knowingly and intentionally using a communication facility (the telephone) to dispense and distribute hydrocodone, a Schedule III controlled substance, under 21 U.S.C. § 843(b) (Comprehensive Drug Abuse Prevention and Control Act of 1970) (the Conviction).
3. Respondent's sentence included a period of probation which is scheduled to expire in November 2011. He was not incarcerated.
4. Respondent has no criminal history other than the Conviction and has not re-offended since he ceased his criminal conduct in June 2002.
5. Respondent was an adult when he committed the criminal acts.
6. Seven and one-half years has elapsed since the last date of criminal activity, June 2002.
7. Respondent had a good work history before the criminal activity and was not barred from practicing as a pharmacist as a condition or requirement of the Conviction.
8. Respondent worked as a pharmacist between 2002 and an unknown date at or near the time of the Conviction without incident.
9. Due to a period of house arrest after the Conviction, Respondent's employment after the Conviction has been limited to employment as a temporary, or PRN, pharmacist in Brownsville, Texas.
10. Respondent's employer, Paula Fraser, R. Ph., stated that Respondent was an honest, capable pharmacist, and effective at counseling patients and that she would re-hire him if available.
11. Respondent did not establish that he fully disclosed the Conviction to Mrs. Fraser before she employed him, but he did disclose it fully at some time during his employment.
12. Respondent displayed remorse for his criminal activities and an understanding of the factors that led to his criminal conduct.

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<sup>37</sup> The Board's rules state that sanctions regulations are not appropriate subjects for proposed findings of fact or conclusions of law. *See* 22 TEX. ADMIN. CODE § 281.60. However, SOAH has not adopted the procedural rules of the Board, so SOAH's procedural rules apply. TEX. GOV'T CODE ANN. § 2003.050.

13. Respondent is meeting the terms of his probation and has paid required costs and a fine assessed in connection with the Conviction.
14. Respondent presented character recommendations from two family members, his wife, Catherine Green, and his brother, Darrell Green.
15. Mrs. Green and Darrell Green stated that Respondent had good character and personal integrity, and stated that they were confident he would not re-offend.
16. Fewer than five years have passed since the disposition of Respondent's criminal case.
17. Staff became aware of Respondent's criminal conduct in 2004 but did not attempt to restrict his practice of pharmacy until after the Conviction.
18. On September 28, 2009, Staff issued Respondent a complaint in which it listed the Conviction as a basis for disciplinary action and requested revocation of Respondent's pharmacist's license and assessment of a \$5,000 administrative penalty.
19. On September 28, 2009, the Staff of Board issued Respondent a notice of hearing, to which it attached the complaint, informing him of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be held; the particular sections of the statutes and rules involved; and included a short, plain statement of the matter asserted.
20. On December 12, 2009, Administrative Law Judge (ALJ) Cassandra J. Church granted a partial summary disposition motion by Staff, in which Respondent's actions were found to violate TEX. OCC. CODE ANN. ch. 565, and also limited the scope of the contested case hearing to facts and issues relating to the proposed sanction and administrative penalty.
21. All parties appeared and were represented at the hearing on sanctions held January 27, 2010, in Austin, Texas. Staff was represented by Caroline Hotchkiss, staff attorney; Respondent was represented by Dan Lype, attorney.
22. The record of the contested case hearing closed February 19, 2010, upon receipt of the parties' written closing argument.
23. A Proposal for Decision (PFD) was issued on April 20, 2010.
24. On May 5, 2010, Respondent filed exceptions to the PFD; Staff of the Board responded on May 19, 2010, and both parties filed supplements.

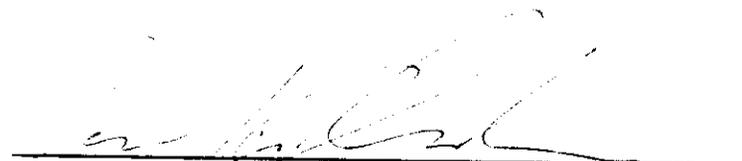
#### IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter, pursuant to TEX. OCC. CODE ANN. subtitle J (Texas Pharmacy Act), including the authority to sanction violations of the Act and of the

Board's administrative rules.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Respondent's Conviction violated TEX. OCC. CODE ANN. §§ 565.001(a)(6)(B) and (a)(9)(A).
5. Respondent's Conviction is directly related to his duties and responsibilities as a pharmacist, within the meaning of 22 TEX. ADMIN CODE § 281.63(i)(6).
6. Due to the Conviction, Respondent is subject to an administrative penalty of up to \$5,000, pursuant to 22 TEX. ADMIN. CODE §281.65(1)(U).
7. Due to the Conviction and to still being on probation for the Conviction, Respondent is subject to revocation of his pharmacist's license, pursuant to TEX OCC. CODE ANN. § 565.001 and 22 TEX ADMIN. CODE §§ 281.63 and 281.64.
8. Respondent did not establish that the mitigating factors in regard to his fitness to practice pharmacy outweigh the aggravating factors, within the meaning of TEX OCC. CODE ANN. §§ 53.022 AND 53.023 and 22 TEX. ADMIN. CODE § 281.63.
9. Based on the above Findings of Fact and Conclusions of Law, the Board should revoke Respondent's pharmacist license and assess Respondent an administrative penalty of \$5,000.

**SIGNED June 8, 2010.**

  
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**CASSANDRA J. CHURCH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**