

BOARD ORDER #E-08-015
SOAH DOCKET NO. 515-10-2554

RE: IN THE MATTER OF
EMMANUEL KANU
(PHARMACIST LICENSE #34077)

BEFORE THE TEXAS STATE
BOARD OF PHARMACY

TABLE OF CONTENTS

Tab: 1	Board Order – Recommendation of Administrative Law Judge
Tab: 2	Board Order – Recommendation of Staff
Tab: 3	Proposal for Decision

*BOARD ORDER #E-08-015
SOAH DOCKET NO. 515-10-2254*

RE: IN THE MATTER OF
EMMANUEL KANU
(PHARMACIST LICENSE #34077)

BEFORE THE TEXAS STATE
BOARD OF PHARMACY

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 34077, issued to Emmanuel Kanu.

After proper and timely notice was given, the matter was heard in public hearing on April 13, 2010, before Renee M. Rusch, 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. Board staff filed exceptions on July 1, 2010. Judge Rusch issued a response to the exceptions on July 21, 2010, with no changes to the Proposal for Decision. The Board, after consideration of the 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 Proposal for Decision and does not adopt Conclusions of Law, Numbers (13) and (14), of the Administrative Law Judge, as noted herein. A copy of the 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. Emmanuel Kanu (Respondent) holds Pharmacist License No. 34077 issued by the Texas State Board of Pharmacy (Board) on July 29, 1993.
2. On January 22, 2010, Board Staff (Staff) mailed its complaint and notice of hearing to Respondent's counsel by United States Postal Service certified mail, return receipt requested.

3. The notice of hearing and complaint contained a statement of the time, place, and nature of the hearing; a statement of the legal authority under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. All parties appeared and participated in the hearing held on April 13, 2010. The record closed on May 6, 2010.
5. On July 7, 2008, in Cause No. 1120937, in the 228th District Court, Harris County, Texas, following a plea of guilty by Respondent, the district court deferred adjudication of guilt and placed Respondent on community supervision for three years for the felony offense of Delivery or Offer to Deliver a Dangerous Drug, Cephalexin.
6. Cephalexin is an antibiotic that is commonly used to treat ear infections and respiratory infections.
7. Respondent complied with all of the terms of his community supervision and, on March 24, 2009, was granted early release from community supervision on the recommendation of his probation officer.
8. Since 2005, Respondent has been the national president of a humanitarian organization called the Arondizougu Patriotic Union of North America (APUNCNA), whose mission is to assist people living in Arondizougu, an impoverished collection of villages in southeastern Nigeria.
9. There is a high prevalence of diabetes and malaria in Arondizougu, and medical care is virtually non-existent for poor people, except as provided by medical missionaries.
10. Under Respondent's leadership, APUNCNA has been committed to establishing a clinic in Arondizougu (the clinic) to provide basic medical services, such as immunizations, prenatal care, diabetes treatment, and treatment for trauma.
11. Construction of the clinic began in 2005 or 2006.
12. The criminal offense described in Finding of Fact No. 5 arose from Respondent's attempt to ship 537 containers of drugs: the antibiotic Cephalexin, insulin, glyburide, metformin, and Celebrex (collectively, the drugs), from Houston, Texas, to his brother-in-law in Lagos, Nigeria, for subsequent delivery to the clinic.
13. The drugs listed in Finding of Fact No. 12 are typically used for treating infections, diabetes, and high blood pressure.

14. When Respondent attempted to ship the drugs to the clinic in March 2007, the clinic was already providing medical services on a limited basis.
15. A person in Nigeria could obtain most, if not all, of the drugs listed in Finding of Fact No. 12 without a prescription.
16. In February 2007, Respondent obtained the drugs as a donation from an individual named John Bosco, whom he had never met before and from whom he did not obtain any contact information or information about the source of the drugs.
17. Respondent performed a cursory check of the drugs to confirm that they had not reached their expiration dates.
18. Respondent did not use his pharmacist license in committing the offense described in Finding of Fact No. 5.
19. As a licensed pharmacist, Respondent should have been familiar with the law governing the proper delivery of drugs for charitable purposes, and he should have known not to accept drugs from an unknown source for shipment to the clinic.
20. At the time Respondent committed his offense, his desire to help his Nigerian countrymen overrode his good judgment.
21. Respondent committed a serious offense that is directly related to the licensed occupation.
22. Respondent does not have a prior criminal record.
23. Respondent does not have a prior disciplinary history with the Board.
24. Until fall 2007, Respondent had been employed for approximately 15 years as a pharmacist with the Harris County Hospital District (the District) in Houston, Texas.
25. The District terminated Respondent's employment in fall 2007 during the course of the criminal investigation of Respondent; however, neither the District nor anyone else ever established that Respondent obtained any of the drugs from District inventory.
26. Respondent has never been terminated from any other job.

27. Shortly after the District terminated his employment, Respondent obtained employment with a pharmacy staffing company called Pharmistat, L.L.C. As a contractor for Pharmistat, Respondent travels throughout Texas to work at pharmacies to which Pharmistat assigns him.
28. At the time of the hearing, Respondent was still working as a contractor for Pharmistat.
29. Respondent has taken the necessary training to become certified as a hospital-based inpatient pharmacist.
30. Respondent is a responsible person who supports himself, his family, and three students who are pursuing higher education in Nigeria.
31. Respondent is a respected leader in the Nigerian immigrant community in the United States.
32. Respondent has shown remorse for his criminal offense and is determined not to make the same mistake again.
33. The public's health and safety will not be at risk if Respondent is allowed to continue working as a pharmacist.

CONCLUSIONS OF LAW

1. The Texas State Board of Pharmacy (Board) has jurisdiction over this matter pursuant to the Texas Pharmacy Act, TEX. OCC. CODE ANN. ch. 565.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, under TEX. GOV'T CODE ANN. ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by TEX. GOV'T CODE ANN. ch. 2001.
4. Staff had the burden of proof by a preponderance of the evidence.
5. Respondent's criminal offense constituted a violation of TEX. HEALTH & SAFETY CODE § 483.042.

6. The Board may discipline a licensee who has been placed on deferred adjudication community supervision for a felony. TEX. OCC. CODE ANN. § 565.001(a)(6)(B).
7. The Board may discipline a license holder who has violated a provision of TEX. HEALTH & SAFETY CODE ch. 483. TEX. OCC. CODE ANN. § 565.001(a)(9)(A).
8. Authorized discipline includes license revocation and suspension, probated suspension, restrictions, reprimand, and imposition of an administrative penalty. TEX. OCC. CODE ANN. § 565.051.
9. The crime committed by Respondent is directly related to the duties and responsibilities of a pharmacist, pursuant to 22 TEX. ADMIN. CODE § 281.63(i)(6).
10. The Board has adopted Rule 281.64, entitled Sanctions for Criminal Offenses, which constitutes a guideline concerning sanctions for certain enumerated convictions and deferred adjudication community supervisions. 22 TEX. ADMIN. CODE § 281.64.
11. Based on the foregoing Findings of Fact, mitigating factors outweigh the seriousness of Respondent's crime to such an extent that the guideline contained in Board Rule 281.64 should not be followed. Board Order No. E-08-006, entered August 11, 2009.
12. In reaching a decision on the imposition of a disciplinary sanction, the Board shall determine the person's fitness to perform the duties and discharge the responsibilities of the licensed occupation, pursuant to TEX. OCC. CODE ANN. § 53.022 and 53.023 and 22 TEX. ADMIN. CODE § 281.63(g) and (h).
13. *Based on the foregoing Findings of Fact and Conclusions of Law, revocation of Respondent's license is not justified.*
14. *Based on the foregoing Findings of Fact and Conclusions of Law, the Board should suspend Pharmacist License No. 34077 held by Respondent for three years, with the suspension probated for two years and six months, and he should be assessed an administrative penalty of \$5,000.*

The Board rejects Conclusions of Law, Numbers 13 and 14 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 34077 held by Emmanuel Kanu (hereinafter referred to as "Respondent") shall be, and such license is hereby suspended for six (6) months, with such period to commence upon the entry of this Order. It is further ORDERED that Respondent:

- (a) shall not practice pharmacy in this state or have access to prescription drugs during the period pharmacist license number 34077 is suspended; and
- (b) shall upon the entry of this Order, surrender to the BOARD, Enforcement Division, pharmacist license number 34077 and any renewal certificate and personal identification card pertaining to pharmacist license number 34077.

It is further ORDERED that immediately following the initial six-month suspension period, pharmacist license number 34077 held by Respondent shall be suspended for two (2) years and six (6) months. It is further ORDERED that such suspension be probated under the conditions that Respondent abide by and obey the terms of this Order, all Federal laws and laws of the State of Texas with respect to pharmacy, controlled substances, dangerous drugs, and all rules and regulations adopted pursuant to the above-mentioned statutes.

It is further ORDERED that Respondent shall pay a probation fee of one thousand two hundred dollars (\$1,200). This probation fee is due ninety (90) days after Respondent's probationary period begins.

It is further ORDERED that 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 any cost associated with compliance with the terms of this Order shall be the responsibility of Respondent.

It is further ORDERED that Respondent shall allow the staff of the BOARD, Enforcement Division, to directly contact Respondent on any matter regarding the enforcement of this Order.

It is finally ORDERED that failure to comply with any of the terms and conditions in this Order constitutes a violation and shall be grounds for further disciplinary action against the Texas pharmacist license held by Respondent.

Board Order #E-08-015
Emmanuel Kanu
Page 8

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.

MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

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

Kerstin E. Arnold
General Counsel
Texas State Board of Pharmacy

*BOARD ORDER #E-08-015
SOAH DOCKET NO. 515-10-2554*

RE: IN THE MATTER OF
EMMANUEL KANU
(PHARMACIST LICENSE #34077)

BEFORE THE TEXAS STATE
BOARD OF PHARMACY

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 34077, issued to Emmanuel Kanu.

After proper and timely notice was given, the matter was heard in public hearing on April 13, 2010, before Renee M. Rusch, 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. Board staff filed exceptions on July 1, 2010. Judge Rusch issued a response to the exceptions on July 21, 2010, with no changes to the Proposal for Decision. The Board, after consideration of the 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 Proposal for Decision and does not adopt Conclusions of Law, Numbers (11), (13) and (14), of the Administrative Law Judge, as noted herein. A copy of the 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. Emmanuel Kanu (Respondent) holds Pharmacist License No. 34077 issued by the Texas State Board of Pharmacy (Board) on July 29, 1993.
2. On January 22, 2010, Board Staff (Staff) mailed its complaint and notice of hearing to Respondent's counsel by United States Postal Service certified mail, return receipt requested.

3. The notice of hearing and complaint contained a statement of the time, place, and nature of the hearing; a statement of the legal authority under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. All parties appeared and participated in the hearing held on April 13, 2010. The record closed on May 6, 2010.
5. On July 7, 2008, in Cause No. 1120937, in the 228th District Court, Harris County, Texas, following a plea of guilty by Respondent, the district court deferred adjudication of guilt and placed Respondent on community supervision for three years for the felony offense of Delivery or Offer to Deliver a Dangerous Drug, Cephalexin.
6. Cephalexin is an antibiotic that is commonly used to treat ear infections and respiratory infections.
7. Respondent complied with all of the terms of his community supervision and, on March 24, 2009, was granted early release from community supervision on the recommendation of his probation officer.
8. Since 2005, Respondent has been the national president of a humanitarian organization called the Arondizougu Patriotic Union of North America (APUNCNA), whose mission is to assist people living in Arondizougu, an impoverished collection of villages in southeastern Nigeria.
9. There is a high prevalence of diabetes and malaria in Arondizougu, and medical care is virtually non-existent for poor people, except as provided by medical missionaries.
10. Under Respondent's leadership, APUNCNA has been committed to establishing a clinic in Arondizougu (the clinic) to provide basic medical services, such as immunizations, prenatal care, diabetes treatment, and treatment for trauma.
11. Construction of the clinic began in 2005 or 2006.
12. The criminal offense described in Finding of Fact No. 5 arose from Respondent's attempt to ship 537 containers of drugs: the antibiotic Cephalexin, insulin, glyburide, metformin, and Celebrex (collectively, the drugs), from Houston, Texas, to his brother-in-law in Lagos, Nigeria, for subsequent delivery to the clinic.
13. The drugs listed in Finding of Fact No. 12 are typically used for treating infections, diabetes, and high blood pressure.

14. When Respondent attempted to ship the drugs to the clinic in March 2007, the clinic was already providing medical services on a limited basis.
15. A person in Nigeria could obtain most, if not all, of the drugs listed in Finding of Fact No. 12 without a prescription.
16. In February 2007, Respondent obtained the drugs as a donation from an individual named John Bosco, whom he had never met before and from whom he did not obtain any contact information or information about the source of the drugs.
17. Respondent performed a cursory check of the drugs to confirm that they had not reached their expiration dates.
18. Respondent did not use his pharmacist license in committing the offense described in Finding of Fact No. 5.
19. As a licensed pharmacist, Respondent should have been familiar with the law governing the proper delivery of drugs for charitable purposes, and he should have known not to accept drugs from an unknown source for shipment to the clinic.
20. At the time Respondent committed his offense, his desire to help his Nigerian countrymen overrode his good judgment.
21. Respondent committed a serious offense that is directly related to the licensed occupation.
22. Respondent does not have a prior criminal record.
23. Respondent does not have a prior disciplinary history with the Board.
24. Until fall 2007, Respondent had been employed for approximately 15 years as a pharmacist with the Harris County Hospital District (the District) in Houston, Texas.
25. The District terminated Respondent's employment in fall 2007 during the course of the criminal investigation of Respondent; however, neither the District nor anyone else ever established that Respondent obtained any of the drugs from District inventory.
26. Respondent has never been terminated from any other job.
27. Shortly after the District terminated his employment, Respondent obtained employment with a pharmacy staffing company called Pharmistat, L.L.C. As a contractor for Pharmistat, Respondent travels throughout Texas to work at pharmacies to which Pharmistat assigns him.

28. At the time of the hearing, Respondent was still working as a contractor for Pharmistat.
29. Respondent has taken the necessary training to become certified as a hospital-based inpatient pharmacist.
30. Respondent is a responsible person who supports himself, his family, and three students who are pursuing higher education in Nigeria.
31. Respondent is a respected leader in the Nigerian immigrant community in the United States.
32. Respondent has shown remorse for his criminal offense and is determined not to make the same mistake again.
33. The public's health and safety will not be at risk if Respondent is allowed to continue working as a pharmacist.

CONCLUSIONS OF LAW

1. The Texas State Board of Pharmacy (Board) has jurisdiction over this matter pursuant to the Texas Pharmacy Act, TEX. OCC. CODE ANN. ch. 565.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, under TEX. GOV'T CODE ANN. ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by TEX. GOV'T CODE ANN. ch. 2001.
4. Staff had the burden of proof by a preponderance of the evidence.
5. Respondent's criminal offense constituted a violation of TEX. HEALTH & SAFETY CODE § 483.042.
6. The Board may discipline a licensee who has been placed on deferred adjudication community supervision for a felony. TEX. OCC. CODE ANN. § 565.001(a)(6)(B).
7. The Board may discipline a license holder who has violated a provision of TEX. HEALTH & SAFETY CODE ch. 483. TEX. OCC. CODE ANN. § 565.001(a)(9)(A).

8. Authorized discipline includes license revocation and suspension, probated suspension, restrictions, reprimand, and imposition of an administrative penalty. TEX. OCC. CODE ANN. § 565.051.
9. The crime committed by Respondent is directly related to the duties and responsibilities of a pharmacist, pursuant to 22 TEX. ADMIN. CODE § 281.63(i)(6).
10. The Board has adopted Rule 281.64, entitled Sanctions for Criminal Offenses, which constitutes a guideline concerning sanctions for certain enumerated convictions and deferred adjudication community supervisions. 22 TEX. ADMIN. CODE § 281.64.
11. *Based on the foregoing Findings of Fact, mitigating factors outweigh the seriousness of Respondent's crime to such an extent that the guideline contained in Board Rule 281.64 should not be followed. Board Order No. E-08-006, entered August 11, 2009.*
12. In reaching a decision on the imposition of a disciplinary sanction, the Board shall determine the person's fitness to perform the duties and discharge the responsibilities of the licensed occupation, pursuant to TEX. OCC. CODE ANN. § 53.022 and 53.023 and 22 TEX. ADMIN. CODE § 281.63(g) and (h).
13. *Based on the foregoing Findings of Fact and Conclusions of Law, revocation of Respondent's license is not justified.*
14. *Based on the foregoing Findings of Fact and Conclusions of Law, the Board should suspend Pharmacist License No. 34077 held by Respondent for three years, with the suspension probated for two years and six months, and he should be assessed an administrative penalty of \$5,000.*

The Board rejects Conclusions of Law Numbers 11, 13 and 14, 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.").

Additionally, the Board is changing the ALJ's recommended sanction for three reasons. First, unlike the ALJ, the Board is authorized to determine the penalty for a violation of the Texas Pharmacy Act (Act). Second, revocation is the appropriate remedy under the Board's rules relating to disciplinary sanctions. Third, a consistent precedent must be enforced.

Courts have found that the Board may change a finding of fact or conclusion of law if it complies with Section 2001.058(e) of the Administrative Procedure Act. Granek v. Texas State Board of Medical Examiners, 172 S.W.3d 761, 780 (Tex.App.-Austin, 2005), Grotti v. Texas State Bd. of Medical Examiners, No. 03-04-00612-CV, WL 2464417, 9 (Tex. App.-Austin Oct. 6, 2005), Pierce v. Texas Racing Commission, 212 S.W.3d 745, 752 (Tex.App.-Austin 2006, pet. denied), and Brown v. Texas State Board of Dental Examiners, 281 S.W.3d 692, 697 (Tex.App.-Corpus Christi 2009).

Pursuant to Sections 551.002, 554.001, 554.002, 565.001, and 565.051 of the Act and Section 281.60 of the Rules, the Board has the responsibility to assess sanctions against licensees who are found to have violated the Act. No such authority has been granted to the ALJ.

Respondent's commission of a felony involving the delivery of a dangerous drug, which was directly related to the duties and responsibilities of a pharmacist, is a serious violation of the Act warranting severe disciplinary action. Disciplinary action for violations of the Act that involve criminal offenses is based on punishing the violator and deterring others from violations of this nature. The ALJ did not properly apply the factors set forth in Sections 281.64(c)(2)(A)(i) and 281.63(g) of the Rules, which indicate that revocation of Respondent's pharmacist license is appropriate. Section 281.64(c)(2)(A)(i) states that Respondent's pharmacist license should be revoked because he is currently on probation for a felony offense involving the delivery of a dangerous drug that occurred two years ago. In adopting Section 281.64, the Board considered the mitigating factors in Section 281.63(g) in the light most favorable to the licensee and "determined that the nature and seriousness of certain crimes outweigh other factors to be considered in §281.63(g) . . . and necessitate the disciplinary action" set forth in Section 281.64. Because this offense was a felony involving delivery of a dangerous drug it is of a very serious nature and of great concern to the Board due to its relation to a pharmacist's responsibility to ensure that a dangerous drug is dispensed pursuant to a legitimate prescription. Additionally, sufficient time has not passed since the criminal action occurred. Section 281.62 indicates that a revocation is the appropriate sanction and the mitigating factors listed above by the ALJ in the Findings of Fact do not outweigh the seriousness of the offense and the aggravating factors to the extent that a revocation would not be appropriate.

Section 281.64(d)(2)(A)(i) of the Rules memorializes a precedent that has been established by the Board regarding felonies involving the delivery of a controlled substance. A consistent precedent must be enforced. It would be unfair for one licensee to receive a different sanction than other licensees merely because the ALJ had a different opinion than the Board.

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 34077 held by Emmanuel Kanu (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 34077 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 34077 is revoked; and
- (2) shall surrender to the BOARD, Enforcement Division, the wall certificate for pharmacist license number 34077 and any renewal certificate and personal identification card pertaining to pharmacist license number 34077 within thirty (30) days after the entry of this Order.

Board Order #E-08-015
Emmanuel Kanu
Page 8

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.

MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

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

Kerstin E. Arnold
General Counsel
Texas State Board of Pharmacy

EXHIBIT A

SOAH DOCKET NO. 515-10-2254

**TEXAS STATE BOARD OF
PHARMACY,
Petitioner**

v.

**EMMANUEL KANU,
LICENSE NO. 34077,
Respondent**

§ **BEFORE THE STATE OFFICE**
§
§
§
§ **OF**
§
§
§ **ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Staff of the Texas State Board of Pharmacy (Staff/Board) seeks to revoke the pharmacist license held by Emmanuel Kanu (Respondent) and assess an administrative penalty of up to \$5,000 based on Respondent's being placed on three years' deferred adjudication community supervision in 2008 for the felony offense of delivery or offer to deliver a dangerous drug, Cephalexin.¹ Respondent does not dispute that he is subject to discipline by the Board, but he challenges the appropriateness of the sanctions Staff proposes. Respondent urges the Board to consider mitigating factors and suspend his license for 60 days, followed by a period of probated suspension. He does not challenge the assessment of an administrative penalty of up to \$5,000.

Based on the evidentiary record developed at the hearing on the merits, the Administrative Law Judge (ALJ) recommends that Respondent's license be suspended for three years, with two years and six months of the suspension probated, and that he be assessed an administrative penalty of \$5,000.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

This Proposal for Decision concerns both a motion for summary disposition and a hearing on the merits. On February 24, 2010, Staff filed a motion for summary disposition,

¹ According to the Board's expert witness, Allison Benz, P.Ph., M.S., Cephalexin, a dangerous drug, is an antibiotic that is frequently used to treat ear infections and respiratory infections. Ms. Benz testified that dangerous drugs are different from scheduled or controlled substances, which pose a potential for abuse and are, therefore, more strictly regulated.

which Respondent opposed. Staff did not file a written reply. In order to give Staff an opportunity to respond to Respondent's arguments, the ALJ issued an order converting the hearing on the merits, scheduled to commence at 9:00 a.m. on April 13, 2010, to an oral argument hearing on the motion. Staff promptly requested that the hearing on the merits be convened immediately after the oral argument hearing. Concluding that Staff's request had merit and that granting it would lead to the creation of a more complete record for the Board to consider, the ALJ ordered that both oral argument on Staff's summary disposition motion and the hearing on the merits be held on April 13, 2010.

On April 13, 2010, ALJ Renee M. Rusch convened the oral argument hearing in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Caroline Hotchkiss and Julie Hildebrand, Litigation Counsel. Respondent was represented by his attorney, Dan Lype. Pursuant to Staff's request, the hearing on the merits convened immediately after the oral argument hearing. The record closed on May 6, 2010, upon the parties' submission of final closing briefs.

No party contested notice or jurisdiction. Those matters are addressed in the findings of fact and conclusions of law.

II. LEGAL ISSUES RAISED BY STAFF'S MOTION FOR SUMMARY DISPOSITION AND RESPONDENT'S OPPOSITION THERETO

A. Relevant Undisputed Facts

On July 7, 2008, in Cause No.1120937, in the 228th District Court, Harris County, Texas, Respondent plead guilty to, and was placed on three years' deferred adjudication community supervision for, the felony offense of delivery or offer to deliver a dangerous drug, Cephalexin, an antibiotic. Respondent was required to pay court costs, but he was not required to perform any active community service. Approximately eight and one-half months later, on March 24, 2009, Respondent was granted early release from community supervision by the Harris County Community Supervision and Corrections Department.²

² Resp. Ex. 2. Respondent committed his offense on March 17, 2007.

Respondent's offense constituted a violation of TEX. HEALTH & SAFETY CODE § 483.042,³ which makes it illegal to deliver or offer to deliver a dangerous drug unless a pharmacist delivers or offers the drug under a valid prescription and with a label containing certain required information.

B. The Parties' Positions

Staff alleges that Respondent's conduct violated two provisions of the Texas Pharmacy Act, TEX. OCC. CODE ANN. (Code) §§ 565.001(a)(6)(B) and 565.001(a)(9)(A), and the Board's rules. Code § 565.001(a)(6)(B) provides, in relevant part, that the Board may discipline a license holder who has been convicted of, or placed on deferred adjudication community supervision for, a felony. Section 565.001(a)(9)(A) authorizes the Board to discipline a license holder who has violated a provision of TEX. HEALTH & SAFETY CODE ch. 483 (among other statutes). In its motion for summary disposition, Staff argued that an evidentiary hearing was unnecessary, as the Board rule set forth at 22 TEX. ADMIN. CODE (TAC) § 281.64, entitled Sanctions for Criminal Offenses, mandates that Respondent's license be revoked without consideration of any factors other than the nature of his offense, the date of the disposition of the criminal case, and the length of time that has passed since Respondent was placed on deferred adjudication.⁴

³ Indictment dated October 3, 2008 (Staff's Ex. D). TEX. HEALTH & SAFETY CODE § 483.011(2) defines a dangerous drug as a drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of the Texas Controlled Substances Act.

⁴ 22 TAC § 281.64(c)(2)(A)(i)(II)-(IV) provides, [T]he board has determined that the nature and seriousness of certain crimes outweigh other factors to be considered in § 281.63(g) of this title (relating to Considerations for Criminal Offenses) and necessitate the disciplinary action listed below. The following sanctions apply to individuals with the criminal offenses as described below:

- ...
- (2) Felony offenses:
 - (A) Drug-related offenses, such as those listed in Chapter 481 or 483, Health and Safety Code:
 - (i) Offenses involving manufacture, delivery, or possession with intent to deliver, fraud, or theft of drugs:
 - ...
 - (II) 0-5 years since disposition—denial or revocation;
 - (III) 6-10 years since disposition—denial or revocation;
 - (IV) 11-20 years since date of disposition—denial or revocation.

Respondent, however, sought a contested case hearing at which the ALJ would consider evidence regarding mitigating factors. Respondent argues that Board Rule 281.64 is inconsistent with the provisions of Code chapter 53, the Pharmacy Act, and other provisions of the Texas Administrative Code, especially 22 TAC § 281.63. Specifically, Respondent argues that the Board, in determining an appropriate sanction, must perform a case-by-case analysis in which it considers the aggravating and mitigating factors set forth in Code §§ 53.022 and 53.023(a) (the Chapter 53 factors).

The individualized analysis Respondent seeks comprises two parts: first, a determination of whether Respondent's crime relates to the practice of pharmacy,⁵ and, second, a determination of whether, notwithstanding the offense for which Respondent was placed on deferred adjudication, he is currently fit to be licensed to perform the duties and discharge the responsibilities of a pharmacist. The determination of fitness, in turn, involves consideration of multiple factors: (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 letters of recommendation.⁶

Staff maintains that the ALJ need not consider the Chapter 53 factors. Staff contends that Code § 53.002(4) expressly exempts the Board from the duty of performing the Chapter 53 analyses.⁷ Respondent rejects that argument, noting that Code § 53.002(4) only refers to license holders who are convicted, not to those placed on deferred adjudication. If the Legislature had intended that Chapter 53 not apply to a pharmacist who receives deferred adjudication,

⁵ Code § 53.022.

⁶ Code § 53.023(a); 22 TAC § 281.063(g).

⁷ Code § 53.002(4) provides in relevant part: "This chapter does not apply to . . . a person who . . . is licensed by . . . [the Board] . . . and has been convicted of a felony under Chapter 481 or 483 or Section 485.003, Health and Safety Code."

Respondent reasons, the Legislature would have included language to that effect in Section 53.002(4), but it did not do so. Staff counters that argument by citing § 53.021(e)(1), which, Staff contends, authorizes it to consider Respondent “to be criminally convicted”⁸ because he is licensed “to provide public health” services.⁹

Finally, Respondent argues that the Board has already established a precedent for not applying Rule 281.64 without consideration of the Chapter 53 factors. On August 11, 2009, the Board issued Order No. E-08-006 in SOAH Docket No. 515-09-2903, *Texas State Board of Pharmacy v. Nene Ubak Akpaffiog*. In rejecting ALJ Michael Borkland’s recommendation following a contested case hearing, the Board stated:

The ALJ did not properly apply the factors set forth in §§ 281.64(c)(2)(B)(i) and 281.63(g) of the Rules, which indicate that revocation of Respondent’s pharmacist license is appropriate. § 281.64(c)(2)(B)(i) states that Respondent’s pharmacist license should be revoked because she is currently on probation for a first degree felony offense that occurred less than two years ago. **This guideline, set forth in the rule, should only be deviated from if, after evaluating and balancing the evidence, the mitigating factors outweigh the seriousness of the offense and the aggravating factors.**¹⁰ [Emphasis added.]

C. ALJ’s Analysis of the Issues Raised by Staff’s Motion for Summary Disposition

Effective September 3, 2006, the Board adopted rules that incorporate the Chapter 53 factors.¹¹ In those rules, the Board ranked, in terms of importance to the Board, the factors listed in Code § 53.023. The Board ranked as the two highest factors (1) the extent and nature of the person’s past criminal activity and (2) the amount of time that has elapsed since the person’s last criminal activity. The Board prioritized the remaining factors, in this order: rehabilitation, age

⁸ Staff’s Brief on Applicability of Occupations Code Chapter 53 at 2.

⁹ *Id.* Code § 53.021(e)(1) provides that Subsection (c) of § 53.021 does not apply to a person who is the holder of a license that authorizes the person to provide public health, education, or safety services.

¹⁰ Board Order No. E-08-006 at 4. In that case, the licensee had plead guilty to, and been placed on deferred adjudication community supervision for 10 years, for the first degree felony of theft of more than \$100,000 by a governmental contractor. The licensee was still on community supervision at the time of the hearing.

¹¹ 22 TAC §§ 281.63(f), (g), and (h).

at time of crime, pre-crime and post-crime work activity and conduct, and other evidence of fitness, including recommendations.¹²

As a further refinement of its list of high-priority factors, the Board also adopted Rule 281.64, which provides mandatory sanctions for certain specified convictions and deferred adjudication community supervisions.¹³ Pursuant to Rule 281.64, the Board looks at only three factors: (1) the category of the crime, (2) the date of the disposition of the criminal case,¹⁴ and (3) the period of time that has elapsed since the disposition of the case.¹⁵ In essence, in adopting Rule 281.64, the Board made a blanket determination that it will not, with respect to individuals who have committed certain crimes, consider the Chapter 53 factors on a case-by-case basis.

Applying Rule 281.64(c)(2)(A)(i)(II) here, Staff concluded that Respondent is subject to mandatory revocation of his license. Respondent was convicted of a crime that involved the delivery of a dangerous drug, the antibiotic Cephalexin, and less than five years have passed since the district court signed and entered the Order of Deferred Adjudication. Therefore, according to Staff, revocation of Respondent's license is mandatory.¹⁶ Indeed, under Rule 281.64, revocation would be mandatory until at least 20 years have passed since the time the district court signed and entered the deferred adjudication order.

¹² 22 TAC § 281.63(g).

¹³ 22 TAC § 281.64.

¹⁴ In Rule 281.64, the Board apparently treats the court disposition date as corresponding to the date of the person's last criminal activity.

¹⁵ 22 TAC § 281.64(b) and (c). However, the Board has also adopted a rule that appears to limit the application of Rule 281.64. Rule 281.60(c)(1) states that the "standard sanctions" contained in the disciplinary guidelines 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. 22 TAC § 281.60(c)(1).

¹⁶ 22 TAC § 281.64(c)(2)(A)(i)(II). The rule provides for mandatory denial of an application or revocation of a license for 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 deferred dispositions entered by a court. 22 TAC §§ 281.64(a).

In addition, Staff has determined that Respondent is subject to an administrative penalty of up to \$5,000, because the basis of this disciplinary action against him was a felony deferred adjudication.¹⁷ Because Respondent agrees that an administrative penalty of up to \$5,000 is a reasonable sanction, this issue will not be discussed further here.

It is undisputed that the Board is authorized to take disciplinary action against Respondent on the facts presented here.¹⁸ The only legal issue in dispute is whether the ALJ should consider the Chapter 53 factors (as set forth in Board Rule 281.63) or only apply Board Rule 281.64. The ALJ's analysis of that issue comprises two parts: first, an analysis of Code §§ 53.002(4) and 53.021, and, second, consideration of precedent recently established by the Board.

The express language of § 53.002(4) provides that Chapter 53 does not apply to pharmacists *convicted* of violating HEALTH & SAFETY CODE chapter 483. Since Respondent was not convicted, but instead, was placed on deferred adjudication, the inquiry thus turns to an analysis of Code §§ 52.021(c)-(e). Subsection (c) states that, except as provided in subsection (d) or (e), a licensing authority may not consider a person to have been convicted of an offense if the person entered a guilty plea or nolo, the judge deferred further proceedings without entering an adjudication of guilt and placed the person under supervision, and at the end of the supervision, the judge dismissed the proceedings and discharged the person. Subsection (d) authorizes a licensing authority to consider a person to have been convicted of an offense regardless of whether the proceedings were dismissed and the person was discharged, *if after consideration of the factors in Sections 53.022 and 53.023(a)*, the licensing authority determines that the person may pose a continued threat to public safety or his employment might create an opportunity to repeat the prohibited conduct. Subsection (e) goes on to state that subsection (c) does not apply to an applicant or licensee who provides law enforcement, public health, education, or safety services.

¹⁷ 22 TAC § 281.65(1)(U).

¹⁸ Code §§ 565.001(a)(6)(B) and 565.001(a)(9)(A); 22 TAC § 281.63.

Although Staff did not cite any legal authority supporting its assertion that the duties a pharmacist performs constitute public health services, the ALJ has determined that various statutory provisions, read in combination, likely support that conclusion.¹⁹ The ALJ believes, however, that Staff is incorrect when it asserts that Subsection (e) provides that a pharmacist's being placed on deferred adjudication is the equivalent of his being convicted. That interpretation would render Section 53.002, which expressly deals with convictions, totally meaningless, a result not supported by the Code Construction Act, which provides that "in enacting a statute, it is presumed that . . . the entire statute is intended to be effective."²⁰ Subsection (e) merely provides that Subsection (c) does not apply. Subsection (e) does not refer to Subsection (d). If the Legislature had intended to exclude (d), it could have said so, but it did not. And Subsection (d) expressly requires that a licensing authority consider the Chapter 53 factors before treating a deferred adjudication as a conviction. Moreover, Subsection (d) requires that the licensing authority consider the Chapter 53 factors as they relate to "the person." Thus, Subsection (d) appears to require that the licensing authority apply the Chapter 53 factors to specific persons on a case-by-case basis, rather than apply them to hypothetical persons across-the-board.

Notwithstanding the foregoing analysis of Code § 53.021(c)–(e), the ALJ does not believe the disposition of Staff's motion for summary disposition necessarily depends on either § 53.021(d) or, more generally, the apparent conflict between Board Rule 281.64 and Code §§ 53.021 – 53.023(a). In a recent Board Order, the Board itself considered the Chapter 53 factors, as reflected in Rule 281.63(g) and (h), in a case that, on its face, fell squarely within the ambit of Rule 281.64. In Board Order No. E-08-006, entered on August 11, 2009, the Board characterized Rule 281.64 as "a guideline" that should be followed unless "after evaluating and balancing the evidence, the mitigating factors outweigh the seriousness of the offense and the aggravating factors."²¹

¹⁹ See, e.g., Code § 551.002(a) and HEALTH & SAFETY CODE §§ 12.031 and 81.003.

²⁰ TEX. GOV'T CODE § 311.021(2).

²¹ Board Order No. E-08-006 at 4. In that case, the licensee had plead guilty to, and been placed on deferred adjudication community supervision for 10 years, for the first degree felony of theft of more than \$100,000 by a government contractor. The licensee was still on community supervision at the time of the hearing.

In light of the foregoing analysis and Board precedent, the ALJ concludes that Staff's motion for summary disposition should be denied. Staff's motion for summary disposition is, therefore, denied. In this Proposal for Decision, the ALJ will analyze the evidentiary record in light of the Chapter 53 factors, as set forth in Board Rule 281.63(g) and (h).

III. DISCUSSION AND ANALYSIS OF THE EVIDENCE

A. Staff's Evidence

Staff submitted three exhibits,²² copies of legal authority of which Staff asked the ALJ to take official notice, and the testimony of two witnesses.

Staff's first witness, Officer Terry Robertson, has been an officer with the Houston Police Department for 27 years. In March 2007, she was part of an anti-terrorism contraband taskforce that worked with U.S. Customs and Border Protection, a law enforcement agency that is part of the U.S. Department of Homeland Security. She worked with agents from Customs and Border Protection on the investigation that led to Respondent's indictment.

Staff's other witness, Board employee Allison Benz, R.Ph., M.S., testified as an expert on the Pharmacy Act and Board rules. Ms. Benz received a Bachelor of Science degree in Pharmacy from the University of Texas in 1988 and a Master of Science degree in Pharmacy Administration from the same institution in 1994. She is licensed as a pharmacist in Texas and California and has experience working as a pharmacist in community settings. She is currently the Director of Professional Services at the Board and works with the Board when it engages in rulemaking. She became familiar with Respondent's case by reviewing the indictment against him.

²² Staff's Ex. A, Respondent's license summary; Staff's Ex. B, the Court's Order of Deferred Adjudication and Conditions of Community Supervision; and Staff's Ex. D, Indictment dated October 3, 2008.

B. Respondent's Evidence

Respondent submitted 18 exhibits and six Agreed Orders of which he asked the ALJ to take official notice.²³ Respondent testified on his own behalf and presented the testimony of three additional witnesses: Michael Orji, Tracy Harrison Goen, M.D., and Juliet Kanu.

Respondent has been licensed as a pharmacist in Texas since 1993. He testified that he had been employed as a pharmacist with the Harris County Hospital District (the District) for approximately 15 years before the District terminated his employment while he was under criminal investigation in fall 2007.²⁴ He has never been terminated from any other job. Since 2005, he has been the national president of the Arondizuogu Patriotic Union of North America (APUNCNA), which he described as a humanitarian organization formed by Nigerian immigrants to help people in need in eastern Nigeria.

Michael Orji preceded Respondent as the national president of APUNCNA, and they were both officers of APUNCNA's Houston branch between 1995 and 2000. He has known Respondent for approximately 40 years and is familiar with his character and activities on behalf of APUNCNA.

Tracy Harrison Goen, M.D., worked at a mission hospital in southwestern Nigeria from 1999 until 2005. He was also involved in founding a school and orphanage there. Until approximately one year ago, he traveled back and forth to Nigeria every two to three months.

²³ Respondent's documentary evidence included five letters of recommendation, apparently written in 2007. Resp. Exs. 7 - 11. The letters predate the deferred adjudication order, are not addressed to the Board or anyone in particular, and contain no indication that writers were aware of Respondent's criminal offense. In the letters, the writers stated, essentially, that Respondent is a good person and has good social skills. Given these limitations, the ALJ did not find the letters helpful, and she accorded them no weight.

The Agreed Board Orders, Resp. Exs. 14 - 19, are discussed in Section III.C.6 of this Proposal for Decision.

²⁴ The only evidence provided concerning the basis for the termination was Respondent's testimony that the District "lost faith" in him because he was under criminal investigation.

Dr. Goen testified as an expert witness on charitable work in Nigeria, but has never met Respondent and is not familiar with the nature of his criminal offense.²⁵

Juliet Kanu has been married to Respondent for eight years and is the mother of their three children. Mrs. Kanu is a licensed specialist in school psychology; she works for the Sheldon Independent School District in Houston. She testified about Respondent's character, the effect his deferred adjudication has had on him, his support of his family, and the contributions he makes to the community.

C. Discussion of the Evidence

1. Background Information Regarding Respondent's Criminal Offense

Mr. Orji testified that he and Respondent immigrated to the United States from the state of Imo, which is located in the southeastern part of Nigeria. Between 1967 and 1970, Imo was ravaged by a civil war (often called the Nigerian-Biafran war). Approximately 100,000 people currently live in the "town" of Arondizuogu, which Mr. Orji described as a collection of villages. According to Mr. Orji, Arondizuogu is "an impoverished place" that lacks infrastructure and is "backwards by western standards." Although there is a high prevalence of diabetes and malaria in the area, medical care is virtually non-existent, with most medical care being provided by missionaries.

According to Mr. Orgi, wealthy people in Nigeria have access to medicine, but poor people do not. Many drugs that are available only by prescription in the United States are available without prescription in Nigeria.

²⁵ At the time of the hearing, Dr. Goen was not licensed to practice medicine in Texas. He testified that he contracted encephalitis in Nigeria, self-medicated, and became addicted to pain killers. Upon returning to the United States, he went into rehabilitation. He surrendered his medical license to the Texas Medical Board approximately 14 months before the hearing.

APUNCNA, Mr. Orji stated, is a humanitarian organization founded in 1991 by Nigerian immigrants who moved to the United States between 1970 and 1995, acquired good educations and jobs here, and are committed to helping those less fortunate back in Nigeria. APUNCNA's primary activities are fundraising and making material donations to the people in eastern Nigeria. Since 2000, under Respondent's leadership, APUNCNA has been committed to establishing, in Arondizuogu, a medical clinic, called the Chief Ogbonnaya Uche Memorial Health Center and AIDS Awareness Clinic (the clinic), to provide basic medical services, such as immunizations, prenatal care, diabetes treatment, and treatment for trauma.

Mr. Orji testified that the clinic is located in a remote area of Arondizuogu where there are no paved roads. The clinic is located approximately 600 miles from the Nigerian capital, Lagos, and approximately 100 miles from the capital of Imo state. Without the clinic, someone needing medical treatment would have to travel days for care.

Before Respondent became the national president of APUNCNA, Respondent stated, the clinic was located in someone's home. When Respondent became national president, he made it a goal to construct a building to house the clinic. Construction began in 2005 or 2006.²⁶ In March 2007, when Respondent attempted to ship the drugs at issue, the clinic was already providing some medical services. Because of donations from APUNCNA contributors, the clinic has been able to hire two part-time doctors. At the time of the hearing, the clinic was scheduled to open officially on April 19, 2010.

Beginning in 2000, Respondent posted fliers in the Houston community in order to raise funds and donations for the clinic. Respondent included his cell phone number on the fliers. One Saturday in February 2007, Respondent testified, he received a phone call from a man who identified himself as John Bosco. Mr. Bosco told Respondent that he wanted to donate to the clinic some pharmaceuticals that were nearing their expiration date and were about to be destroyed. Respondent instructed Mr. Bosco to meet him at a rental property Respondent owned. There, Mr. Bosco handed Respondent a box, the dimensions of which were

²⁶ Respondent provided photographs showing the clinic during various stages of its construction. Resp. Exs. 13a - f.

approximately 24 inches by 18 inches by 6-8 inches. Inside the box were containers of medications used for treating infections, diabetes, and high blood pressure: the antibiotic Cephalexin, insulin, glyburide metformin, and Celebrex.²⁷ Except for the Celebrex, all of the medications were generic drugs. According to Respondent, Mr. Bosco did not provide him with any contact information or disclose the source of the drugs. After Mr. Bosco left, Respondent made a cursory inspection to determine that the drugs could still be used, but he did not examine the drugs critically. According to Respondent, he was excited about Mr. Bosco's donation and considered it to be a "gift from heaven."

Approximately three weeks later, Respondent packed the box of drugs, as well as clothes and water bottles, in a container, which he delivered to a shipping company called Hunt Global for shipment to his brother-in-law, Uche Dukes, in Lagos, Nigeria. According to Respondent, he told Hunt Global that he was shipping medicines and personal effects, but he did not state that the medicines were prescription drugs or identify them by name. He does not recall filling out any forms or being asked to fill out any forms when he dropped the shipment off with Hunt Global. Respondent testified that he identified Mr. Dukes as the intended recipient of the drugs with the intention that either Mr. Dukes or Respondent himself would personally deliver them to the clinic. He denied that he shipped the drugs to Mr. Dukes for sale in Nigeria.

Houston Police Department Officer Terry Robertson testified that Respondent's shipment was intercepted by Customs and Border Protection at George Bush International Airport in Houston. She described the shipment as comprising a large cardboard box that contained two suitcases and some miscellaneous personal effects. One of the suitcases contained 537 containers of pharmaceuticals. The waybill for the shipment reflected that Respondent was the shipper, Hunt Global was the freight forwarder, and Mr. Dukes was the intended recipient. Officer Robertson said the waybill indicated that the shipment consisted of children's and men's clothing and baby food and was worth under \$2,500.

²⁷ No evidence was presented regarding the nature of the containers, *i.e.*, whether they were glass or plastic, or how the drugs were labeled.

In Officer Robertson's opinion, Respondent was not completely honest and forthcoming during the criminal investigation. She characterized him as being "vague and evasive." Investigators asked Respondent for a copy of the flier he said he had posted and information that might help them track Mr. Bosco's phone call, but Respondent did not provide either the flier or requested information. Respondent, stated Officer Robertson, told investigators that the pharmaceuticals were worth approximately \$3,000; however, the drugs were appraised at \$697,000 during the course of the investigation.²⁸

An individual named Robert Lunsford, who was, at the time, an investigator for the Board, worked with the Harris County Hospital District in an effort to determine whether any of the drugs had come from a District pharmacy or warehouse. According to Officer Robertson, the District "believed" some of the drugs may have come from its inventory, as a District audit "revealed some discrepancies." However, neither the District nor the Board investigator who assisted the District was ever able to establish that any of the containers of drugs in the shipment had come from District inventory.²⁹

Officer Robertson's testimony communicated more than the mere words she uttered. Throughout her testimony, she referred to Respondent, not as "Mr. Kanu," but as "Kanu." After Respondent's counsel had concluded cross-examination and the ALJ was in the process of excusing Officer Robertson as a witness, she asked if she could make additional statements, apparently to bolster her testimony. Officer Robertson's additional comments, taken in conjunction with her prior testimony, created the impression that Respondent stole the drugs and attempted to ship them to Nigeria for corrupt reasons (although Officer Robertson never said so expressly).³⁰

²⁸ No party introduced into the record copies of the flier Respondent said he posted, the waybill that accompanied the shipment, or any appraisals that were performed of the drugs contained in the shipment.

²⁹ In Officer Robertson's opinion, Respondent violated two sections of the Code of Federal Regulations by failing to file an accurate shipper's declaration and misrepresenting or concealing facts. Respondent was not, however, charged with either of those offenses. Therefore, the ALJ did not consider them here.

³⁰ The ALJ believes that she was not alone in forming that opinion, as counsel asked subsequent witnesses questions about "suggestions" or "inferences" one could draw from Officer Robertson's testimony.

Respondent denied that he obtained any of the drugs from his employer, the Harris County Hospital District, or that he did not cooperate fully in the criminal investigation. Respondent asserted that he did not use his pharmacist license to obtain the drugs, but he conceded that, as a licensed pharmacist, he should have known better than to accept and ship the drugs in the manner he did. He maintained that this was the only time he tried to ship drugs from the United States directly to the clinic.

At the hearing, Respondent estimated the value of the drugs to have been approximately \$8,000,³¹ but he admitted that he did not provide that estimate to Hunt Global. He has no idea how anyone involved in the investigation came up with the \$697,000 figure Officer Robertson referenced in her testimony. He has participated in inventories of several pharmacies, and based on that experience, estimates the total inventory of a typical pharmacy to be worth approximately \$200,000.

According to Respondent, many drugs that are available only by prescription in the United States, are available without prescription in Nigeria. Respondent claimed he did not know it was illegal for him to accept Mr. Bosco's drug donation and ship it to Nigeria, as he attempted to do in March 2007, but he knows better now.

2. Fact Witnesses' Perceptions of Respondent's Criminal Conduct

Respondent's wife, Juliet Kanu, described Respondent's work on behalf of APUNCNA as "selfless" and consuming as much time as a part-time job. In her opinion, Respondent exercised poor judgment when he accepted the drugs from Mr. Bosco and attempted to ship them to Nigeria. She believes Respondent became "excited" and "did not think things through," because he was eager to help the people of Arondizuogu. She said people in Nigeria die of treatable diseases because they do not have access to basic medications. She corroborated the testimony of Respondent and Mr. Orji that, in Nigeria, one does not need a prescription to buy many, if not most, drugs, but instead, can simply walk in off the street and purchase them at a

³¹ This is his estimate of what a pharmacy would be charged if it purchased the drugs from a manufacturer or distributor.

chemist's shop. She testified, too, that it would not make sense for someone in Nigeria to buy American-made drugs, as they cost much more than drugs imported from countries such as India.

Mr. Orji shared Mrs. Kanu's view that Respondent made a serious mistake when he attempted to ship the drugs to Nigeria. He believed Respondent made the mistake "out of compassion," not for personal gain. He also testified that it was not possible to ship a package from the United States directly to the clinic, as there is no regular postal service in the remote area where the clinic is located. Shipments, said Mr. Orji, normally go to Lagos, and from there, people use intermediaries to deliver them to remote locations.

According to Mr. Orji, were it not for Respondent's untiring efforts, the clinic would not exist. During the course of the clinic's construction, Respondent traveled to Nigeria multiple times at his own expense.

3. Expert Testimony Concerning Charitable Work in Nigeria

Dr. Goen, who worked at a missionary hospital in Nigeria for approximately five years, testified as an expert on charitable work in Nigeria. He described access to health care in Nigeria as "spotty" and testified that it is difficult "from a financial standpoint" for the average Nigerian to get access to insulin and other basic medications. Good medical care is costly, and most Nigerians have to decide whether to buy food or medications.

According to Dr. Goen, it would not make sense for anyone to ship drugs from the United States to Nigeria in hopes of making a profit. Pharmaceuticals cost much less in Nigeria than in the United States, although even those lower costs constitute a huge economic burden for the average Nigerian. In the larger cities, he testified, one can buy drugs wholesale. In the past, when Dr. Goen traveled to Nigeria, each traveler was allowed to bring in "two boxes" of pharmaceuticals per person without providing any documentation.

When asked what would happen if someone tried to ship prescription drugs to Nigeria from outside the country, Dr. Goen stated that he does not know. He said there is much

corruption in Nigeria, and many packages he sent were "gone through," with the result that their contents did not reach their intended destination. Dr. Goen testified that DHL Global now provides shipping services to destinations outside of Lagos and one or two other large cities, but otherwise, the chances of a package reaching its destination are "pretty slim."

On cross-examination, Dr. Goen admitted that he has never met Respondent, nor does he know anything about the nature of Respondent's criminal offense. He was not aware that Respondent had allegedly told Hunt Global that the shipment contained baby food and clothing, but that, in fact, it also included 537 containers of drugs, which Respondent did not disclose. But, he testified, that would not surprise him. According to Dr. Goen, there is so much corruption in Nigeria that if an official there thought a shipment contained anything of significant value, the shipper would have to pay a bribe in order for the shipment to reach its intended destination.

Dr. Goen was not aware Respondent obtained the drugs at issue from an unknown source. When Dr. Goen was a medical missionary in Nigeria, he himself often obtained drug donations from churches or humanitarian groups. If the drugs were in sealed containers and had not reached their expiration date, it "never crossed [his] mind" that they might be contaminated or otherwise unsafe for use. His main concern was to get needed items to the people who needed them.

4. Respondent's Evidence Concerning his Current Fitness

Respondent acknowledged that what he did in 2007 was wrong. The clinic now buys its prescription medications from companies in Nigeria, and Respondent has contacted American pharmaceutical manufacturers to explore whether they can ship drugs directly to the clinic. He has read materials that deal with the proper delivery of drugs for charitable purposes, but he admitted, on cross-examination, that he has not taken formal continuing education courses on this subject.

Shortly after the District terminated his employment in fall 2007, Respondent obtained employment with a pharmacy staffing company called Pharmistat, L.L.C. Respondent works as a contractor for Pharmistat and travels throughout Texas to work at pharmacies to which Pharmistat assigns him, for example, pharmacies in Wal-Mart and Kroger stores. He has taken the necessary training to become certified as a hospital-based inpatient pharmacist. After he disclosed his deferred adjudication on an employment application for a job as a hospital-based inpatient pharmacist, he never heard back from the potential employer. He assumes it was because of his deferred adjudication.

Respondent testified that it is common for people of Nigerian descent in the United States to send money to people in Nigeria. He and his wife have been sending money to help support three students who are pursuing higher education in Nigeria. If Respondent's pharmacy license is revoked, they will no longer be able to afford to do this. Respondent stated that he understands the Board's concerns about the conduct that led to his being placed on deferred adjudication, and he asks the Board to give him a second chance.

Mr. Orji testified that Respondent is highly regarded in the Nigerian community in Houston. According to Mr. Orji, Respondent is one of the few people whom you could call in the middle of the night and he would help you. He is known as a "man of peace" and "man of action." Mr. Orji learned about Respondent's criminal activities after the fact. He believes Respondent has learned from his mistake and will not repeat it. Respondent, Mr. Orji stated, has adopted the American values that support volunteerism and charitable work. Additionally, he takes seriously the high expectations Nigerians have of their own people, namely, that Nigerians living in the United States are expected to "give back."

Respondent's wife, Juliet Kanu, described him as a good father, responsible person, and someone who "takes care of his own." She testified that Respondent has worried about his fate as a pharmacist for the past three years. He has expressed remorse for his mistakes daily. He has not, however, told many other people in the community about his problems, because he is concerned "about judgment by the community." In Nigerian immigrant culture, Ms. Kanu explained, one's name is one's bond and honor is important.

According to Mrs. Kanu, Respondent has a reputation for being honest, hard-working, faithful, loyal, dependable, and someone who tries to do what is right. She does not believe Respondent would make the same mistake again. She believes the experience has made Respondent a better person. In her words, "He has backed down on his zeal a little bit and has more balance." She noted, too, that he has become more involved in the Knights of Columbus, a Catholic Church organization.

Based on Dr. Goen's understanding of Nigerian culture, he testified that Nigerians expect fellow Nigerians who have become educated and "achieved something" to help their immediate and extended families, including the village from which they came. When asked how Nigerians would respond to learning that one of their own had been prosecuted and punished for a criminal offense, Dr. Goen testified that such a revelation would bring a huge amount of shame. A Nigerian would not want something like that publicized, as the honor of one's family name is very important to Nigerians. Dr. Goen does not believe that a Nigerian's keeping the fact of a conviction private means that the person had not learned from his mistake.

5. Opinion of the Board's Expert Witness, Allison Benz, P.Rh. M.S.

Ms. Benz, the Board's Director of Professional Services, provided an overview of the Board's disciplinary guidelines.³² She testified that Rule 281.60, entitled General Guidance, was promulgated to promote consistency; provide guidance in the exercise of sound discretion; provide notice to license holders of the types of conduct that constitute violations of the Pharmacy Act and the types of disciplinary action that may be imposed; and provide a framework for analysis by ALJs in making recommendations. Rule 281.63, entitled Considerations for Criminal Offenses, establishes guidelines and criteria that apply to applicants and license holders who have criminal convictions or who have received deferred adjudications.³³ Pursuant to Rule 281.63(i)(6), Ms. Benz testified, a license holder who violates Health & Safety Code ch. 483, even if the offense did not occur while the licensee was on duty, is considered by

³² These guidelines are contained in 22 TAC ch. 281, subchapter C.

³³ Ms. Benz testified that Staff regards convictions and deferred adjudications as having the same effect.

the Board to lack integrity and good moral character. The Board has determined that a violation of Health & Safety Code ch. 483 directly relates to the duties and responsibilities of a pharmacist and indicates an inability or tendency for the person to be unfit for licensure.

In Rule 281.63(g), the Board prioritized the factors to be considered in determining whether a person is fit to perform the duties and discharge the responsibilities of a license holder. Applying the factors listed in this section to this case, Ms. Benz agreed that this was Respondent's only criminal offense, but she characterized Respondent's offense as one of the most serious a pharmacist could commit. Pharmacists, Ms. Benz said, are responsible for assuring that the drugs they dispense come from a reliable source and are properly dispensed to patients pursuant to a valid prescription, with appropriate steps taken to prevent drug interactions. Ms. Benz equated Respondent's offense to dispensing prescription drugs without a prescription.

Ms. Benz noted that Respondent's July 2008 deferred adjudication was recent. She initially testified that there was no evidence of rehabilitation or rehabilitative effort on Respondent's part, explaining that the rehabilitation factors generally are applicable only in cases where a licensee has an impairment involving substance abuse, which is not an issue here. On cross-examination, however, she stated that Respondent's work for APUNCNA may constitute community service and may even constitute evidence of rehabilitative efforts. She noted, too, that Respondent was a mature adult when he committed his offense; thus, his crime was not an act of youthful indiscretion. She stated that she did not have information about Respondent's conduct and work activity before and after he committed his criminal offense. Nor was she aware of the opinions of any prosecutors or probation officers regarding Respondent's criminal activity or rehabilitative efforts. Although she was aware that Respondent received early release from community supervision, she did not consider his early release to be a factor deserving consideration in assessing an appropriate sanction.

Ms. Benz testified that Rule 281.64 is the result of the Board's having looked at the Chapter 53 factors and deciding that even if all mitigating factors "were present perfectly," certain offenses are so serious that a prescribed sanction must apply without consideration of the

facts of the individual case. Pursuant to Rule 281.64(c)(2)(A)(i)(II), the sanction for a felony violation of Health & Safety Code ch. 483, in which the disposition occurred 0 – 5 years earlier, is revocation. Indeed, the prescribed penalty would be revocation unless more than 20 years had passed since disposition.³⁴ Additionally, pursuant to Rule 281.65, the Board can also assess an administrative penalty of up to \$5,000.

Ms. Benz characterized Rule 281.64 as a “guideline” for the ALJ and Board to use and noted that “there could be a situation” in which the Board would impose a different sanction. However, she also testified that Rule 281.64 precludes the ALJ and Board from taking any other factors into account in this proceeding. When Respondent’s counsel expressly asked her whether the Board’s current practice is to not consider mitigating factors, Ms. Benz did not answer the question asked. Instead, she repeated her assertion that revocation, pursuant to Rule 281.64, is the appropriate sanction in this case. She testified, too, that even if the Board were to take other factors into account, those factors are not sufficient to outweigh the seriousness of Respondent’s offense.³⁵

6. **Prior Agreed Board Orders**

Respondent introduced copies of six Agreed Board Orders that Respondent contends show that the Board has imposed much less severe sanctions on pharmacists who committed offenses that were more serious than Respondent’s.³⁶

³⁴ 22 TAC § 281.64(c)(2)(A)(i)(IV).

³⁵ On cross-examination, Respondent asked Ms. Benz to consider the factors set forth in Board Rule 281.62, entitled *Aggravating and Mitigating Factors*. Because Rule 281.62 expressly provides that the factors are not applicable in cases involving criminal conduct, the ALJ has not summarized Ms. Benz’s testimony on those issues here.

³⁶ On cross-examination, Ms. Benz was asked about the Agreed Board Orders, all of which were entered after September 3, 2006, the date Rule 281.64 went into effect. As Ms. Benz appeared to have no personal knowledge regarding the factors the parties considered in negotiating the orders, the ALJ has summarized only those portions of her testimony that appear to be directly relevant in this case.

Resp. Ex. 14 – Agreed Board Order No. B-07-029, in the Matter of Donald Joe Conoly, entered February 16, 2008: The Board imposed a five-year probated suspension and a \$2,000 “probation fee” on pharmacist Donald Conoly based his being placed on deferred adjudication in December 2004 after pleading guilty to the offense of Possession of a Controlled Substance, Hydrocodone, by Misrepresentation, Fraud, Forgery, Deception, or Subterfuge. While working as a pharmacist at an Albertson’s pharmacy, Mr. Conoly had fraudulently obtained 150 – 180 Hydrocodone tablets pursuant to unauthorized refills of prescriptions for his son. The trial court had placed Mr. Conoly on probation for four years and ordered him to pay a fine of \$2,000.

Resp. Ex. 15 – Agreed Board Order No. J-04-031-A, in the Matter of Kelley Latrece Lavallais, entered February 10, 2009: The Board suspended pharmacist Kelley Lavallais’ license for 90 days, imposed a five-year probated suspension, assessed a \$1,200 probation fee, and ordered \$15,000 in restitution on the basis that (1) beginning in 2004, Ms. Lavallais downloaded prescription drug orders from a web site and sold controlled substances and dangerous drugs pursuant to 737 invalid prescription drug orders³⁷ (issued by physicians located out-of- state) to various consumers in 43 states and Washington, D.C., and (2) Ms. Lavallais failed to maintain a daily log.³⁸

In Ms. Benz’s opinion, what distinguishes Respondent’s situation from the facts underlying this Board Order was the fact that, although Ms. Lavallais engaged in large scale distribution of controlled substances and dangerous drugs, she was not convicted or placed on deferred adjudication. In her opinion, had Respondent not received deferred adjudication, he might have been eligible for a probated suspension.

Resp. Ex. 16 – Agreed Board Order No. J-04-31-B, in the Matter of Strawberry Family Drug & Pharmacy, entered February 10, 2009: This case involved the pharmacy at which Ms. Lavallais was the pharmacist-in-charge. The Board imposed the same sanctions on the pharmacy as it

³⁷ The 10 physicians who wrote the prescriptions were located in different states from the states in which the patients were located.

³⁸ In that case, the physicians had not established a face-to-face relationship with the patients. Further, a prescription drug order issued without a proper physician-patient relationship is not a valid prescription.

imposed on Ms. Lavallais, except that it did not impose a period of actual suspension on the pharmacy.

Resp. Ex. 17 – Agreed Board Order No. E-08-008, in the matter of Wayne Murphy English, entered November 10, 2009: The Board suspended the pharmacist license of Wayne English for 30 days, imposed a three-year probated suspension, assessed a \$2,000 administrative penalty, and ordered that Mr. English pay a \$1,200 probation fee on these bases: (1) In 2004, Mr. English was convicted of the felony offenses of Theft, Insurance Fraud (filing false insurance claims on fraudulent prescriptions), and Tampering with Government Records (dispensing prescription drug based on fraudulent prescription); and (2) in November 2004 and again in November 2006, Mr. English submitted fraudulent renewal applications to the Board on which he failed to disclose his convictions.³⁹ Mr. English also had been the subject of a prior board order based on 219 counts of dispensing controlled substances and dangerous drugs pursuant to fraudulent prescriptions.

Ms. Benz testified that she considers Respondent's single offense of delivery of a dangerous drug to be more serious than Mr. English's offense of dispensing prescription drugs based on fraudulent prescriptions. She did not address Mr. English's prior board order, his convictions for Theft and Insurance Fraud, or his submission of two fraudulent renewal applications. She stated that what matters here is that Respondent received deferred adjudication for violating HEALTH & SAFETY CODE ch. 483, not the underlying conduct that constituted the violation. She also opined that the outcome in Mr. English's case would have been different if he had committed his offenses after September 3, 2006, when the current Board rules went into effect.⁴⁰

³⁹ Respondent, in contrast, did disclose his deferred adjudication on the renewal application he filed with the Board.

⁴⁰ In contrast, at the January 27, 2010, hearing in SOAH Docket No. 515-10-0513, *Texas Board of Pharmacy v. Terry L. Green*, Staff took the position that Rule 281.64 was procedural only, and, therefore, could be applied to cases involving conduct that occurred before September 3, 2006, the date the new rules became effective. In *Green*, Staff also asserted that Rule 281.64 did not significantly change the sanction to which a license holder would have been subject before September 3, 2006.

Resp. Ex. 18 – Agreed Board Order No. G-05-019, in the Matter of Jay L. Stearns, entered May 10, 2006: On January 25, 2005, pharmacist Jay Stearns pled guilty to and received deferred adjudication for the felony offense of Unlawfully Obtaining from a Legal Registered Pharmacist a Controlled Substance: Dihydrocodeinone, based on evidence that in March 2004, Mr. Stearns had entered into an Eckerd Drugs pharmacy computer a fraudulent prescription for Dihydrocodeineone purportedly authorized by a doctor, and dispensed the prescription to himself.⁴¹ Based on Mr. Stearns' guilty plea and deferred adjudication, the Board suspended his license for 45 days; imposed a probated suspension to run concurrently with his criminal probation; and required him to pay a \$1,200 probation fee and an administrative penalty of \$2,500. The Board also required Mr. Stearns to undergo random urinalyses.

Resp. Ex. 19 – Agreed Board Order No. A-03-010, in the Matter of Charles Berce, Jr., entered February 8, 2006: On 134 occasions between July 2001 and July 2003, Respondent Charles Berce, Jr., while working as a pharmacist at Eckerd Drugs, dispensed dangerous drugs to himself and members of his family, pursuant to unauthorized prescriptions and refills. Mr. Berce also engaged in fraud, deceit and misrepresentation in the practice of pharmacy, in that he made false or fraudulent claims to Eckerd Drugs' health insurance company for reimbursement for the prescriptions as if they had been authorized. The Board suspended Mr. Berce's license for three months, imposed a two-year probated suspension, assessed a probation fee of \$1,200; and required that Mr. Berce pass the Multistate Pharmacy Jurisprudence Examination.

In Ms. Benz's view, what distinguishes Mr. Berce's situation from Respondent's is that Mr. Berce was not convicted or placed on deferred adjudication.

D. ALJ's Analysis and Recommendation

As noted earlier, Respondent does not dispute that he is subject to discipline by the Board because of his 2008 deferred adjudication. His primary argument is that consideration of the Chapter 53 factors, as set forth in Board Rule 281.63(g) and (h), shows that the sanction

⁴¹ For this offense, the district court placed Mr. Stearns on seven years probation and ordered him to pay a fine of \$45,000.

specified in Rule 281.64, revocation, is inappropriate. Although the Board's expert witness, Ms. Benz, testified that application of Rule 281.64 is mandatory, Board Order No. E-08-006 entered on August 11, 2009, is inconsistent with that assertion. The order reflects that the Board does, in fact, consider the Chapter 53 factors in cases in which Rule 281.64 might otherwise be applied. The Board characterized Rule 281.64 as "a guideline" that may be deviated from "if, after evaluating and balancing the evidence, the mitigating factors outweigh the seriousness of the offense and the aggravating factors."

Respondent was a licensed pharmacist at the time he committed his offense, and his offense involved pharmaceuticals. No evidence was presented, however, that indicates Respondent used his pharmacist license in committing the offense. The evidence in the record suggests that Respondent's drive to establish the clinic was so intense that he might well have committed the same offense had he been a tree trimmer or a history professor. Because Respondent was a licensed pharmacist, however, he should have known better. Respondent, his wife, and Mr. Orji all acknowledged that Respondent exercised poor judgment, but they all asserted that he has learned his lesson and will not make the same mistake again.

Ms. Benz's testimony that pharmacists are responsible for ensuring that the drugs they dispense come from a safe source, are dispensed pursuant to a valid prescription, and that appropriate steps are taken to prevent harmful drug interactions, was credible and persuasive. The ALJ is troubled by Respondent's explanation of how he obtained the drugs, *i.e.*, from a stranger named John Bosco. She has difficulty understanding how a licensed pharmacist could have accepted drugs from someone he did not know, without obtaining information about the source of the drugs and contact information for Mr. Bosco. Dr. Goen testified that during the time he was a medical missionary in Nigeria, he sometimes accepted drug donations from churches and humanitarian groups if they were in sealed containers and had not reached their expiration dates. Respondent, in contrast, accepted drugs from a stranger and performed only a cursory check of the expiration dates. He offered no evidence indicating that, in the three weeks between the time he accepted the drugs from Mr. Bosco and delivered them to Hunt Global for shipment, he checked for sealed containers or took any steps to assure that the drugs were

authentic and had not been contaminated.⁴² By accepting drugs from an unknown source and shipping them to the clinic, Respondent might inadvertently have put the people of Aronidzougu in danger. As someone who had made multiple trips to Nigeria to visit the clinic during its construction, Respondent must have known what every lay traveler knows, namely, that it is risky to accept items from an unknown person and transport them without inspection.

The ALJ does not, however, believe Staff is accurate in characterizing Respondent's offense as the equivalent of dispensing dangerous drugs without a prescription. The preponderant evidence indicates that a prescription for most, if not all, of the drugs would not have been required in Nigeria. Moreover, Respondent intended that the drugs would be dispensed by personnel at the clinic, which was, in March 2007, already providing medical services on a limited basis. These factors do not absolve Respondent of accountability for his actions; however, they do distinguish his acts from those of the licensed pharmacists who, the Agreed Board Orders reflect, received significantly lighter sanctions than revocation.⁴³

Respondent does not have either a prior criminal record or a prior disciplinary history with the Board. He has been licensed in Texas for approximately 17 years, apparently without complaint. When Respondent was charged with a criminal offense, he accepted responsibility for his actions by entering a plea and accepting the court's punishment. He has been punished by the authorities with jurisdiction over criminal matters. Those authorities chose to defer adjudication of the offense and place Respondent on three years' community supervision instead of seeking his incarceration in the state prison system. Apparently, Respondent was so

⁴² Nor did Respondent take any steps to comply with the requirements of TEX. HEALTH & SAFETY CODE ch. 431, subchapter M, which deals with drug donations.

⁴³ The Agreed Board Orders, by definition, were all the compromise product of negotiations between Board Staff and individual licensees. Because the ALJ does not know what factors the parties considered in their negotiations (for example, how each party weighed the risks of litigation), the ALJ attached only limited weight to the agreed orders. She recognizes, too, that the vast majority of the underlying "bad acts" described in the Agreed Board Orders appear to have occurred before September 3, 2006, the effective date of the rules Staff seeks to apply in this case (whereas Respondent committed his criminal act in March 2007 and was placed on deferred adjudication in July 2008). She notes, however, that many of the Agreed Board Orders involved pharmacists who engaged in self-dealing, whereas, here, Respondent committed his offense in a misguided effort to help people less fortunate than he.

compliant with the terms and conditions of his probation that the court, on the recommendation of his probation officer, terminated his community supervision after only eight and one-half months. One can reasonably infer that neither Respondent's probation officer nor the court considered Respondent to pose an ongoing threat to society or believed there was any need to continue monitoring him. Yet, under Staff's analysis, Respondent should be barred from practicing pharmacy until at least 20 years have passed since the court's disposition.

Staff has not presented compelling evidence that Respondent should be treated so much more harshly by the Board than by the criminal justice system. Following the District's termination of his employment, Respondent obtained employment as a contractor with a pharmacy staffing company, a position he still holds. No evidence was presented that called into question Respondent's ability to properly perform his duties as a pharmacist or that the public would be at risk if Respondent continued in his career as a pharmacist. The preponderant evidence indicates that Respondent has learned from his mistake and will not repeat it. Moreover, Respondent's wife testified that he is a responsible father and a generous member of the community. Mr. Orji confirmed Respondent's commitment to helping others.

The ALJ is not convinced that the public will be better served by the Board's revoking Respondent's license. Rather, the ALJ finds that the evidence presented supports Respondent's request that he be penalized but permitted to keep his license. The ALJ's finding does not diminish the seriousness of the crime Respondent committed. Rather, the finding results from balancing the Board's interests in protecting the public health and safety against Respondent's interests in continuing to work as a pharmacist, and through that employment, supporting not only his family and himself, but also others less fortunate.

For the reasons set forth above, the ALJ does not agree with Staff's recommendation that Respondent's license be revoked. She does, however, believe Respondent's license should be suspended for a significant length of time, in light of the dubious circumstances surrounding his acquisition of the drugs he attempted to ship to the clinic. The ALJ recommends that

Respondent's license be suspended for three years,⁴⁴ with the suspension probated for two years and six months, and that he be assessed an administrative penalty of \$5,000.

IV. FINDINGS OF FACT

1. Emmanuel Kanu (Respondent) holds Pharmacist License No. 34077 issued by the Texas State Board of Pharmacy (Board) on July 29, 1993.
2. On January 22, 2010, Board Staff (Staff) mailed its complaint and notice of hearing to Respondent's counsel by United States Postal Service certified mail, return receipt requested.
3. The notice of hearing and complaint contained a statement of the time, place, and nature of the hearing; a statement of the legal authority under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. All parties appeared and participated in the hearing held on April 13, 2010. The record closed on May 6, 2010.
5. On July 7, 2008, in Cause No. 1120937, in the 228th District Court, Harris County, Texas, following a plea of guilty by Respondent, the district court deferred adjudication of guilt and placed Respondent on community supervision for three years for the felony offense of Delivery or Offer to Deliver a Dangerous Drug, Cephalexin.
6. Cephalexin is an antibiotic that is commonly used to treat ear infections and respiratory infections.
7. Respondent complied with all of the terms of his community supervision and, on March 24, 2009, was granted early release from community supervision on the recommendation of his probation officer.
8. Since 2005, Respondent has been the national president of a humanitarian organization called the Arondizougu Patriotic Union of North America (APUNCNA), whose mission is to assist people living in Arondizougu, an impoverished collection of villages in southeastern Nigeria.
9. There is a high prevalence of diabetes and malaria in Arondizougu, and medical care is virtually non-existent for poor people, except as provided by medical missionaries.

⁴⁴ The term of the recommended suspension corresponds to the term of community supervision on which the court placed Respondent in July 2008.

10. Under Respondent's leadership, APUNCNA has been committed to establishing a clinic in Arondizougu (the clinic) to provide basic medical services, such as immunizations, prenatal care, diabetes treatment, and treatment for trauma.
11. Construction of the clinic began in 2005 or 2006.
12. The criminal offense described in Finding of Fact No. 5 arose from Respondent's attempt to ship 537 containers of drugs: the antibiotic Cephalexin, insulin, glyburide metformin, and Celebrex (collectively, the drugs), from Houston, Texas, to his brother-in-law in Lagos, Nigeria, for subsequent delivery to the clinic.
13. The drugs listed in Finding of Fact No. 12 are typically used for treating infections, diabetes, and high blood pressure.
14. When Respondent attempted to ship the drugs to the clinic in March 2007, the clinic was already providing medical services on a limited basis.
15. A person in Nigeria could obtain most, if not all, of the drugs listed in Finding of Fact No. 12 without a prescription.
16. In February 2007, Respondent obtained the drugs as a donation from an individual named John Bosco, whom he had never met before and from whom he did not obtain any contact information or information about the source of the drugs.
17. Respondent performed a cursory check of the drugs to confirm that they had not reached their expiration dates.
18. Respondent did not use his pharmacist license in committing the offense described in Finding of Fact No. 5.
19. As a licensed pharmacist, Respondent should have been familiar with the law governing the proper delivery of drugs for charitable purposes, and he should have known not to accept drugs from an unknown source for shipment to the clinic.
20. At the time Respondent committed his offense, his desire to help his Nigerian countrymen overrode his good judgment.
21. Respondent committed a serious offense that is directly related to the licensed occupation.
22. Respondent does not have a prior criminal record.
23. Respondent does not have a prior disciplinary history with the Board.
24. Until fall 2007, Respondent had been employed for approximately 15 years as a pharmacist with the Harris County Hospital District (the District) in Houston, Texas.

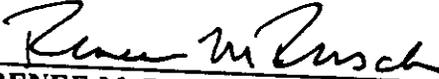
25. The District terminated Respondent's employment in fall 2007 during the course of the criminal investigation of Respondent; however, neither the District nor anyone else ever established that Respondent obtained any of the drugs from District inventory.
26. Respondent has never been terminated from any other job.
27. Shortly after the District terminated his employment, Respondent obtained employment with a pharmacy staffing company called Pharmistat, L.L.C. As a contractor for Pharmistat, Respondent travels throughout Texas to work at pharmacies to which Pharmistat assigns him.
28. At the time of the hearing, Respondent was still working as a contractor for Pharmistat.
29. Respondent has taken the necessary training to become certified as a hospital-based inpatient pharmacist.
30. Respondent is a responsible person who supports himself, his family, and three students who are pursuing higher education in Nigeria.
31. Respondent is a respected leader in the Nigerian immigrant community in the United States.
32. Respondent has shown remorse for his criminal offense and is determined not to make the same mistake again.
33. The public's health and safety will not be at risk if Respondent is allowed to continue working as a pharmacist.

V. CONCLUSIONS OF LAW

1. The Texas State Board of Pharmacy (Board) has jurisdiction over this matter pursuant to the Texas Pharmacy Act, TEX. OCC. CODE ANN. ch. 565.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, under TEX. GOV'T CODE ANN. ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by TEX. GOV'T CODE ANN. ch. 2001.
4. Staff had the burden of proof by a preponderance of the evidence.

5. Respondent's criminal offense constituted a violation of TEX. HEALTH & SAFETY CODE § 483.042.
6. The Board may discipline a licensee who has been placed on deferred adjudication community supervision for a felony. TEX. OCC. CODE ANN. § 565.001(a)(6)(B).
7. The Board may discipline a license holder who has violated a provision of TEX. HEALTH & SAFETY CODE ch. 483. TEX. OCC. CODE ANN. § 565.001(a)(9)(A).
8. Authorized discipline includes license revocation and suspension, probated suspension, restrictions, reprimand, and imposition of an administrative penalty. TEX. OCC. CODE ANN. § 565.051.
9. The crime committed by Respondent is directly related to the duties and responsibilities of a pharmacist, pursuant to 22 TEX. ADMIN. CODE § 281.63(i)(6).
10. The Board has adopted Rule 281.64, entitled Sanctions for Criminal Offenses, which constitutes a guideline concerning sanctions for certain enumerated convictions and deferred adjudication community supervisions. 22 TEX. ADMIN. CODE § 281.64.
11. Based on the foregoing Findings of Fact, mitigating factors outweigh the seriousness of Respondent's crime to such an extent that the guideline contained in Board Rule 281.64 should not be followed. Board Order No. E-08-006, entered August 11, 2009.
12. In reaching a decision on the imposition of a disciplinary sanction, the Board shall determine the person's fitness to perform the duties and discharge the responsibilities of the licensed occupation, pursuant to TEX. OCC. CODE ANN. § 53.022 and 53.023 and 22 TEX. ADMIN. CODE § 281.63(g) and (h).
13. Based on the foregoing Findings of Fact and Conclusions of Law, revocation of Respondent's license is not justified.
14. Based on the foregoing Findings of Fact and Conclusions of Law, the Board should suspend Pharmacist License No. 34077 held by Respondent for three years, with the suspension probated for two years and six months, and he should be assessed an administrative penalty of \$5,000.

SIGNED June 18, 2010.


RENEE M. RUSCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS