

**SOAH DOCKET NO. 515-10-0369**

TEXAS STATE BOARD OF	§	BEFORE THE STATE OFFICE
PHARMACY,	§	
Petitioner	§	
	§	
V.	§	
	§	
ANTONIO MARTINEZ,	§	OF
LICENSE NUMBER 38929	§	
AND	§	
A.M. PHARMACY	§	
LICENSE NUMBER 22603	§	
Respondents	§	ADMINISTRATIVE HEARINGS

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*BOARD ORDER #N-08-020*  
*SOAH DOCKET NO. 515-10-0369*

RE: IN THE MATTER OF  
ANTONIO MARTINEZ  
(PHARMACIST LICENSE #38929)

BEFORE THE TEXAS STATE  
BOARD OF PHARMACY

On this day came on to be considered by the Texas State Board of Pharmacy the matter of pharmacist license number 38929, issued to Antonio Martinez.

After proper and timely notice was given, the matter was heard in public hearing on January 11, 2010, before Penny A. Wilkov, 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; however, no exceptions were filed. The Texas State Board of Pharmacy, 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. 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. On November 24, 1999, the Texas Board of Pharmacy (Board) issued Texas pharmacist license number 38929 to Antonio Martinez.
2. On March 19, 2003, the Board issued Texas pharmacy license number 22603 to A.M. Pharmacy (Pharmacy), owned by Mr. Martinez.
3. The licenses of Mr. Martinez and the Pharmacy (Respondents) were the subject of a contested case hearing held at the State Office of Administrative Hearings (SOAH) by an Administrative Law Judge (ALJ).
4. After the contested hearing, the SOAH ALJ issued a Proposal for Decision (PFD) on January 28, 2008, which recommended no sanctions against Respondents.

5. The Board did not adopt all Conclusions of Law found in the PFD, and instead, issued Board Order #G-06-022-A (Board Order), placing Respondents on a probated suspension for five years; requiring Mr. Martinez to participate in a drug and alcohol analysis program and to submit personal quarterly reports; and ordering Respondents to each pay a \$1,200 probation fee.
6. On May 20, 2008, the Board notified Respondents of the Board Order. On June 11, 2008, Respondents filed a Motion for Rehearing, which was overruled on June 13, 2008, making the Board Order final.
7. On July 2, 2008, Respondents filed "Plaintiff's Original Petition" for judicial review (Appeal) in the 200<sup>th</sup> Judicial District Court, Travis County, Texas. The case is still pending. No temporary or permanent injunction was entered as part of the Appeal, and the Board Order remains in effect.
8. On September 18, 2009, Board Staff issued a Complaint and Notice of Hearing to Respondent in which it sought an indefinite suspension against Respondents until Respondents have complied with Board Orders, and an additional \$45,000 administrative penalty (\$5,000 payable by the Pharmacy and \$40,000 by Mr. Martinez) based on the failure to comply with the Board Order.
9. The Complaint and the Notice of Hearing informed Respondent of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be held; the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
10. The hearing convened on January 11, 2010, in the hearing facilities at the William P. Clements Building, 4<sup>th</sup> floor, 300 W. 15<sup>th</sup> Street, Austin, Texas, with ALJ Penny A. Wilkov presiding. Staff was represented by litigation counsel Julie C. Hildebrand. Respondent appeared and was represented by attorney Daniel Robledo. The record remained open until February 12, 2010, to allow the submission of written closing arguments.
11. The Appeal did not stay enforcement of the Board Order because Respondents did not pay the District Court the amount of the penalty in an escrow account, post a supersedeas bond, or file an affidavit of inability to pay.

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

1. The Texas State Board of Pharmacy has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. § 551.001 *et seq.* (Texas Pharmacy Act).

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, pursuant to 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 (the APA).
4. A final decision of the Board is subject to judicial review under the APA. TEX. OCC. CODE ANN. § 565.061(b).
5. The scope of judicial review of a state agency decision in a contested case hearing is as provided for by the law under which the review is sought. TEX. GOV'T CODE ANN. § 2001.172.
6. The Texas Pharmacy Act does not specify the judicial scope of review in a contested case hearing. TEX. OCC. CODE ANN. § 565.061.
7. TEX. GOV'T CODE ANN. § 2001.174 requires a court reviewing a proceeding governed by the APA to use the substantial evidence rule if the law authorizing the proceeding, the Texas Pharmacy Act, does not state a standard of review.
8. TEX. GOV. CODE ANN. § 2001.176(b)(3) provides that unless otherwise provided by statute, the filing of the petition vacates a state agency decision for which trial de novo is the manner of review authorized by law but does not affect the enforcement of an agency decision for which another manner of review is authorized.
9. The Board Order was not vacated by the filing of the Appeal. TEX. GOV. CODE ANN. § 2001.176.
10. TEX. OCC. CODE ANN. § 566.004, entitled "Options Following Decision: Pay or Appeal, provides three options available to a respondent following a Board Order to stay the enforcement of the Board Order: (1) pay the administrative penalty; (2) pay the penalty and file a petition for review contesting the violation, amount of penalty, or both; or (3) refuse to pay the penalty and file a petition for judicial review contesting the violation, amount of penalty or both.
11. The filing of the Appeal without payment or proof of financial inability to pay did not stay enforcement of the Board Order. TEX. OCC. CODE ANN. § 566.004.
12. Mr. Martinez has violated the Board Order by failing to comply with the Board Order that required him to participate in a drug and alcohol screening program, to submit

- quarterly reports, and to pay the probation fee. TEX. OCC. CODE ANN. § 565.001(a)(17).
13. The Pharmacy has violated the Board Order by failing to pay the probation fee. TEX. OCC. CODE ANN. § 565.002(a)(11).
  14. The suspension of Respondents' licenses is warranted until Respondents have complied with the Board Order. TEX. OCC. CODE ANN. § 565.001 and 22 TEX. ADMIN. CODE § 281.62.
  15. Aggravating and mitigating factors were not shown to warrant a \$45,000 administrative penalty. 22 TEX. ADMIN. CODE § 281.62.

### **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 does hereby ORDER that effective upon the entry of this Order, pharmacist license number 38929 held by Antonio Martinez (hereinafter referred to as "Respondent") shall be, and such license is hereby suspended until such time as Respondent demonstrates full compliance with all terms and conditions of Board Order #G-06-022-A, which was entered May 6, 2008.

It is further ORDERED that Respondent:

- (1) shall not practice pharmacy in this state or have access to prescription drugs during the period pharmacist license number 38929 is suspended; and
- (2) shall upon the entry of this Order, surrender to the Texas State Board of Pharmacy, pharmacist license number 38929 and any renewal certificate and personal identification card pertaining to pharmacist license number 38929.

*Board Order #N-08-020*  
*Antonio Martinez*  
*Page 5*

It is finally ORDERED that Board Order #N-08-020 shall not supersede Board Order #G-06-022-A, which was entered on or about May 6, 2008, and that Board Order #G-06-022-A remain in full force and effect.

*Board Order #N-08-020*  
*Antonio Martinez*  
*Page 6*

Passed and approved at the regular meeting of the Texas State Board of Pharmacy on the \_\_\_\_\_ day of *May 2010*.

THIS ORDER IS A PUBLIC RECORD.

SIGNED AND ENTERED ON THIS \_\_\_\_\_ day of *May 2010*.

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MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

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

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Kerstin E. Arnold  
General Counsel  
Texas State Board of Pharmacy

*BOARD ORDER #N-08-020*  
*SOAH DOCKET NO. 515-10-0369*

RE: IN THE MATTER OF  
ANTONIO MARTINEZ  
(PHARMACIST LICENSE #38929)

BEFORE THE TEXAS STATE  
BOARD OF PHARMACY

On this day came on to be considered by the Texas State Board of Pharmacy the matter of pharmacist license number 38929, issued to Antonio Martinez.

After proper and timely notice was given, the matter was heard in public hearing on January 11, 2010, before Penny A. Wilkov, 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; however, no exceptions were filed. The Texas State Board of Pharmacy, 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. 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. On November 24, 1999, the Texas Board of Pharmacy (Board) issued Texas pharmacist license number 38929 to Antonio Martinez.
2. On March 19, 2003, the Board issued Texas pharmacy license number 22603 to A.M. Pharmacy (Pharmacy), owned by Mr. Martinez.
3. The licenses of Mr. Martinez and the Pharmacy (Respondents) were the subject of a contested case hearing held at the State Office of Administrative Hearings (SOAH) by an Administrative Law Judge (ALJ).
4. After the contested hearing, the SOAH ALJ issued a Proposal for Decision (PFD) on January 28, 2008, which recommended no sanctions against Respondents.

5. The Board did not adopt all Conclusions of Law found in the PFD, and instead, issued Board Order #G-06-022-A (Board Order), placing Respondents on a probated suspension for five years; requiring Mr. Martinez to participate in a drug and alcohol analysis program and to submit personal quarterly reports; and ordering Respondents to each pay a \$1,200 probation fee.
6. On May 20, 2008, the Board notified Respondents of the Board Order. On June 11, 2008, Respondents filed a Motion for Rehearing, which was overruled on June 13, 2008, making the Board Order final.
7. On July 2, 2008, Respondents filed “Plaintiff’s Original Petition” for judicial review (Appeal) in the 200<sup>th</sup> Judicial District Court, Travis County, Texas. The case is still pending. No temporary or permanent injunction was entered as part of the Appeal, and the Board Order remains in effect.
8. On September 18, 2009, Board Staff issued a Complaint and Notice of Hearing to Respondent in which it sought an indefinite suspension against Respondents until Respondents have complied with Board Orders, and an additional \$45,000 administrative penalty (\$5,000 payable by the Pharmacy and \$40,000 by Mr. Martinez) based on the failure to comply with the Board Order.
9. The Complaint and the Notice of Hearing informed Respondent of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be held; the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
10. The hearing convened on January 11, 2010, in the hearing facilities at the William P. Clements Building, 4<sup>th</sup> floor, 300 W. 15<sup>th</sup> Street, Austin, Texas, with ALJ Penny A. Wilkov presiding. Staff was represented by litigation counsel Julie C. Hildebrand. Respondent appeared and was represented by attorney Daniel Robledo. The record remained open until February 12, 2010, to allow the submission of written closing arguments.
11. The Appeal did not stay enforcement of the Board Order because Respondents did not pay the District Court the amount of the penalty in an escrow account, post a supersedeas bond, or file an affidavit of inability to pay.

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

1. The Texas State Board of Pharmacy has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. § 551.001 *et seq.* (Texas Pharmacy Act).

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, pursuant to 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 (the APA).
4. A final decision of the Board is subject to judicial review under the APA. TEX. OCC. CODE ANN. § 565.061(b).
5. The scope of judicial review of a state agency decision in a contested case hearing is as provided for by the law under which the review is sought. TEX. GOV'T CODE ANN. § 2001.172.
6. The Texas Pharmacy Act does not specify the judicial scope of review in a contested case hearing. TEX. OCC. CODE ANN. § 565.061.
7. TEX. GOV'T CODE ANN. § 2001.174 requires a court reviewing a proceeding governed by the APA to use the substantial evidence rule if the law authorizing the proceeding, the Texas Pharmacy Act, does not state a standard of review.
8. TEX. GOV. CODE ANN. § 2001.176(b)(3) provides that unless otherwise provided by statute, the filing of the petition vacates a state agency decision for which trial de novo is the manner of review authorized by law but does not affect the enforcement of an agency decision for which another manner of review is authorized.
9. The Board Order was not vacated by the filing of the Appeal. TEX. GOV. CODE ANN. § 2001.176.
10. TEX. OCC. CODE ANN. § 566.004, entitled "Options Following Decision: Pay or Appeal, provides three options available to a respondent following a Board Order to stay the enforcement of the Board Order: (1) pay the administrative penalty; (2) pay the penalty and file a petition for review contesting the violation, amount of penalty, or both; or (3) refuse to pay the penalty and file a petition for judicial review contesting the violation, amount of penalty or both.
11. The filing of the Appeal without payment or proof of financial inability to pay did not stay enforcement of the Board Order. TEX. OCC. CODE ANN. § 566.004.
12. Mr. Martinez has violated the Board Order by failing to comply with the Board Order that required him to participate in a drug and alcohol screening program, to submit

- quarterly reports, and to pay the probation fee. TEX. OCC. CODE ANN. § 565.001(a)(17).
13. The Pharmacy has violated the Board Order by failing to pay the probation fee. TEX. OCC. CODE ANN. § 565.002(a)(11).
  14. The suspension of Respondents' licenses is warranted until Respondents have complied with the Board Order. TEX. OCC. CODE ANN. § 565.001 and 22 TEX. ADMIN. CODE § 281.62.
  15. Aggravating and mitigating factors were not shown to warrant a \$45,000 administrative penalty. 22 TEX. ADMIN. CODE § 281.62.

### **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 does hereby ORDER that effective upon the entry of this Order, pharmacist license number 38929 held by Antonio Martinez (hereinafter referred to as "Respondent") shall be, and such license is hereby suspended until such time as Respondent demonstrates full compliance with all terms and conditions of Board Order #G-06-022-A, which was entered May 6, 2008.

It is further ORDERED that Respondent:

- (1) shall not practice pharmacy in this state or have access to prescription drugs during the period pharmacist license number 38929 is suspended; and
- (2) shall upon the entry of this Order, surrender to the Texas State Board of Pharmacy, pharmacist license number 38929 and any renewal certificate and personal identification card pertaining to pharmacist license number 38929.

*Board Order #N-08-020*  
*Antonio Martinez*  
*Page 5*

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 finally ORDERED that Board Order #N-08-020 shall not supersede Board Order #G-06-022-A, which was entered on or about May 6, 2008, and that Board Order #G-06-022-A remain in full force and effect.

*Board Order #N-08-020*  
*Antonio Martinez*  
*Page 6*

Passed and approved at the regular meeting of the Texas State Board of Pharmacy on the \_\_\_\_\_ day of *May 2010*.

THIS ORDER IS A PUBLIC RECORD.

SIGNED AND ENTERED ON THIS \_\_\_\_\_ day of *May 2010*.

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MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

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

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Kerstin E. Arnold  
General Counsel  
Texas State Board of Pharmacy

**EXHIBIT "A"**

**SOAH DOCKET NO. 515-10-0369**

**TEXAS STATE BOARD OF  
PHARMACY,  
Petitioner**

**V.**

**ANTONIO MARTINEZ, LICENSE  
NUMBER 38929, AND A.M.  
PHARMACY, LICENSE NO. 22603,  
Respondents**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff (Staff) of the Texas State Board of Pharmacy (Board) brought this case seeking disciplinary action against both A.M. Pharmacy (Pharmacy) and Antonio Martinez (Respondents) for violating the Texas Pharmacy Act (Act), TEX. OCC. CODE ANN. § 551.001 *et seq*, by failing to comply with Board Order #G-06-022-A (Board Order) that required Mr. Martinez to participate in a drug and alcohol analysis program and to submit personal quarterly reports, and ordered Respondents to each pay a \$1,200 probation fee. Staff sought an indefinite suspension against Respondents until they have complied with the Board Order and an additional \$45,000 administrative penalty, \$5,000 payable by the Pharmacy and \$40,000 by Mr. Martinez, based on the failure to comply with the Board Order.

Respondents dispute the enforceability of the Board Order that it is charged with violating for two reasons: (1) the Board, which placed Respondents on probation for five years with certain conditions, failed to adopt a Proposal for Decision (PFD) by a State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) recommending that no disciplinary action be taken against Respondents; and (2) Respondents filed a petition for judicial review in the Travis County District Court in May 2008, challenging the Board's failure to adopt the ALJ's PFD. That case is still pending.

Based on the preponderance of credible evidence in this case, the ALJ recommends that the Board suspend Respondents' licenses until Respondents have complied with the original orders, including Mr. Martinez's participation in a drug and alcohol analysis program and submission of personal quarterly reports and Respondents' payment of the \$1,200 probation fee each. No further penalty is recommended.

## I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of jurisdiction in this proceeding, and that matter will be addressed in the findings of fact and conclusions of law.

The hearing convened on January 11, 2010, in the hearing facilities at the William P. Clements Building, 4<sup>th</sup> floor, 300 W. 15<sup>th</sup> Street, Austin, Texas, with ALJ Penny A. Wilkov presiding. Staff was represented by litigation counsel Julie C. Hildebrand. Respondent appeared and was represented by attorney Daniel Robledo. The record remained open until February 12, 2010, to allow the submission of written closing arguments.

## II. DISCUSSION

### A. Background

Antonio Martinez is a pharmacist holding current Texas pharmacy license number 38929 issued on November 24, 1999. The Pharmacy holds current Texas pharmacy license number 22603 issued on March 19, 2003. Mr. Martinez owns the Pharmacy.

After a contested hearing, SOAH ALJ Ami Larson issued a PFD on January 28, 2008, concerning the pharmacy licenses of Mr. Martinez and the Pharmacy.<sup>1</sup> The PFD made the following relevant Findings of Fact and Conclusions of Law:

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<sup>1</sup> Staff's Exhibit 3.

- Mr. Martinez, the pharmacist in charge of A.M Pharmacy, had two DWI convictions: a DWI misdemeanor on June 5, 2002, and a State Jail felony DWI with a child passenger on October 12, 2005;
- The two DWI incidents did not occur while Mr. Martinez was on duty as a pharmacist; he was evaluated to have a low probability of having a substance dependence disorder; and he posed little danger to the community as a pharmacist; and
- No sanctions against Mr. Martinez or the Pharmacy were warranted.

The Board did not adopt all Conclusions of Law found in the 2008 PFD. Specifically, the Board rejected the ALJ's interpretation of Section 565.001(a)(7) of the Act "... because the ALJ did not find the alcohol infractions to be endangering to patients' lives."<sup>2</sup> Instead, the Board found that Section 565.001(a)(7) "... authorizes the Board to opine based on specific facts what conduct constitutes intemperate use of alcohol that could endanger a patient's life."<sup>3</sup> The Board concluded that two alcohol-related offenses within a ten-year period established intemperate use which could endanger a patient's life.<sup>4</sup> The Board Order, issued on May 6, 2008, placed Respondents on probated suspension for five years and required Mr. Martinez to participate in a drug and alcohol analysis program with quarterly reports.<sup>5</sup> The Board Order also required each Respondent to pay a \$1,200 probation fee 90 days after the entry of the Order on August 4, 2008.<sup>6</sup> On May 20, 2008, the Board notified Respondents of the Board Order.<sup>7</sup> On June 11, 2008, Respondents filed a Motion for Rehearing.<sup>8</sup> On June 13, 2008, the Board overruled the motion and the Board Order became final.<sup>9</sup>

On July 2, 2008, Respondents filed "Plaintiff's Original Petition" for judicial review (Appeal) in the 200<sup>th</sup> Judicial District Court, Travis County, Texas.<sup>10</sup> No temporary or permanent

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<sup>2</sup> *Id.* at 44.

<sup>3</sup> *Id.* at 45.

<sup>4</sup> *Id.* at 44.

<sup>5</sup> Staff's Exhibit 4 and 5.

<sup>6</sup> *Id.*

<sup>7</sup> Staff's Exhibit 6.

<sup>8</sup> Staff's Exhibit 7.

<sup>9</sup> Staff's Exhibit 8.

<sup>10</sup> Staff's Exhibit 9.

injunction was entered as part of the Appeal, and the Board Order remains in effect. The Appeal is still pending.

## **B. The Issue and Applicable Law**

The dispute in this case centers on the scope of review for the Appeal and whether the filing of the Appeal was sufficient to stay the disciplinary action imposed by the Board Order.

### **1. Scope of Review in District Court**

Section 565.061(b) of the Act states that “a final decision of the board under this chapter is subject to judicial review under Chapter 2001, Government Code” (APA).<sup>11</sup> The APA, however, provides that the scope of judicial review of a state agency decision in a contested case hearing is as provided for by the law under which the review is sought.<sup>12</sup> The Act does not supply a standard of review in a contested case hearing.<sup>13</sup> In such a circumstance, the APA provides that “a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but (1) may affirm the agency decision in whole or in part; and (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced . . .”<sup>14</sup> Statutory language of this nature requires a court reviewing a proceeding governed by the APA to use a substantial evidence review if the law authorizing the proceeding, in this case the Texas Pharmacy Act, does not state a standard of review.<sup>15</sup> Accordingly, the standard for review is the substantial evidence rule.

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<sup>11</sup> TEX. OCC. CODE ANN § 565.061(b) (2007).

<sup>12</sup> TEX. GOV. CODE ANN § 2001.172 (2009).

<sup>13</sup> TEX. OCC. CODE ANN § 565.061 (2007).

<sup>14</sup> TEX. GOV. CODE ANN § 2001.174 (2009).

<sup>15</sup> TEX. OCC. CODE ANN § 565.061 (2007).

## 2. Methods to Stay Disciplinary Action

There are two methods for Respondents to stay the Board Order. First, Section 566.009 of the Act states that the APA will apply to proceedings under this subchapter.<sup>16</sup> The APA specifically provides that “. . . unless otherwise provided by statute . . . the filing of the petition vacates a state agency decision for which trial de novo is the manner of review authorized by law but does not affect the enforcement of an agency decision for which another manner of review is authorized.”<sup>17</sup> As discussed above, however, the manner of review in the district court is under the substantial evidence rule and Respondents would not have this method to vacate the Board Order and prevent enforcement through the APA due to this provision.

Second, Section 566.004 of the Act, entitled “Options Following Decision: Pay or Appeal,” provides three options available to a respondent following a Board Order.<sup>18</sup> A respondent, no later than 30 days after the order becomes final, shall either: (1) pay the administrative penalty; (2) pay the penalty and file a petition for review contesting the violation, amount of penalty, or both; or (3) refuse to pay the penalty and file a petition for judicial review contesting the violation, amount of penalty or both.<sup>19</sup> If a respondent chooses the third option and refuses to pay, Section 566.004(b) states that:

- (b) Within the 30-day period, a person who acts under Subsection (a)(3) may:
  - (1) stay enforcement of the penalty by:
    - (A) paying the penalty to the court for placement in an escrow or account;
    - (B) giving to the court a supersedeas bond that is approved by the court and that:
      - (i) is for the amount of the penalty; and
      - (ii) is effective until judicial review of the board’s order is final; or
  - (2) requests the court to stay enforcement of the penalty by:
    - (A) filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the penalty and is financially unable to give the supersedeas bond; and

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<sup>16</sup> TEX. OCC. CODE ANN. § 566.004(b) (2007).

<sup>17</sup> TEX. GOV. CODE ANN. § 2001.176(b)(3) (2009).

<sup>18</sup> TEX. OCC. CODE ANN. § 566.004(a) (2007).

<sup>19</sup> *Id.*

(B) giving a copy of the affidavit to the executive director by certified mail.<sup>20</sup>

**C. ALJ's Analysis**

The Respondents have not properly stayed enforcement of the Board Order. Because the Act does not specify the judicial scope of review in a contested case, the APA imposes a substantial evidence review for the Appeal. Unlike the trial de novo provisions of the APA, the filing of the Appeal did not vacate the state agency decision in a substantial evidence review case. Thus, in the absence of any other action on the part of Respondents, the Board Order was not stayed or vacated.

Under the provisions of Section 566.004 of the Act, a respondent must either pay the court the amount of the penalty in an escrow account, post a supersedeas bond, or file an affidavit of inability to pay to stay enforcement of the Board Order. Respondents did not pay the penalty, nor did they file a sworn affidavit stating that they were financially unable to pay the penalty and bond.<sup>21</sup> Because the Respondents did not provide evidence or testimony that they completed any one of the three options to stay the enforcement of the penalty, the Appeal did not stay enforcement of the Board Order.

**D. Consideration of Additional Disciplinary Action and Recommendation**

Staff sought an indefinite suspension against Respondents “. . . until [Respondents] have complied with the original orders,” and an additional \$45,000 administrative penalty, \$5,000 payable by the Pharmacy and \$40,000 by Mr. Martinez, based on the failure to comply with the Board Order.

Board Enforcement Division employee Jannell Mastri testified that she is responsible for oversight and monitoring of the Board Order. According to Ms. Mastri, Mr. Martinez failed to

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<sup>20</sup> TEX. OCC. CODE ANN. § 566.009(b) (2007).

<sup>21</sup> *Id.*

submit quarterly reports due on September 1, 2008, December 1, 2008, March 1, 2009, June 1, 2009, September 1, 2009, and December 1, 2009; failed to register for and comply with the drug screening program on June 20, 2008; and failed to submit the \$1,200 probation fee on August 4, 2008. Ms. Mastri also testified that the Pharmacy was required to pay a \$1,200 probation fee on August 4, 2008, which it failed to do.

In setting the amount of an administrative penalty, the Board must take into consideration such factors as the amount necessary to deter future violations, the seriousness of the violations, efforts to correct the violations, and the pharmacist's enforcement history, among other factors.<sup>22</sup> The amount of administrative penalty may not exceed \$5,000.00 for each violation, although each day a violation persists can be treated as a separate violation.<sup>23</sup>

Based on the evidence, testimony, and arguments of the parties, the ALJ concludes that as a matter of law, Respondents have violated the Board Order by failing to participate in a drug and alcohol screening program, to submit quarterly reports, and to pay the probation fee. The ALJ concludes that the evidence has established that suspension of Respondents' licenses is warranted until Respondents have complied with the original orders. However, the ALJ concludes that no evidence was presented to demonstrate that an additional \$45,000 in penalties was warranted after examination of such factors as the amount necessary to deter future violations, the seriousness of the violations, efforts to correct the violations, and the pharmacist's enforcement history, among other factors.<sup>24</sup> Therefore, the evidence presented fails to support that an additional \$45,000 in penalties is warranted and no additional penalty is recommended.

In sum, the ALJ recommends that the Board suspend Respondents' licenses until Respondents have complied with the original orders, that Mr. Martinez participate in a drug and alcohol analysis program and submit personal quarterly reports and that both Mr. Martinez and the

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<sup>22</sup> TEX. OCC. CODE ANN. § 566.002(c).

<sup>23</sup> TEX. OCC. CODE ANN. § 566.002(a) and (b).

<sup>24</sup> TEX. OCC. CODE ANN. § 566.002(c).

Pharmacy pay a \$1,200 probation fee within 90 days of entry of the order. No further penalty is recommended.

### III. FINDINGS OF FACT

1. On November 24, 1999, the Texas Board of Pharmacy (Board) issued Texas pharmacist license number 38929 to Antonio Martinez.
2. On March 19, 2003, the Board issued Texas pharmacy license number 22603 to A.M. Pharmacy (Pharmacy), owned by Mr. Martinez.
3. The licenses of Mr. Martinez and the Pharmacy (Respondents) were the subject of a contested case hearing held at the State Office of Administrative Hearings (SOAH) by an Administrative Law Judge (ALJ).
4. After the contested hearing, the SOAH ALJ issued a Proposal for Decision (PFD) on January 28, 2008, which recommended no sanctions against Respondents.
5. The Board did not adopt all Conclusions of Law found in the PFD, and instead, issued Board Order #G-06-022-A (Board Order), placing Respondents on a probated suspension for five years; requiring Mr. Martinez to participate in a drug and alcohol analysis program and to submit personal quarterly reports; and ordering Respondents to each pay a \$1,200 probation fee.
6. On May 20, 2008, the Board notified Respondents of the Board Order. On June 11, 2008, Respondents filed a Motion for Rehearing, which was overruled on June 13, 2008, making the Board Order final.
7. On July 2, 2008, Respondents filed "Plaintiff's Original Petition" for judicial review (Appeal) in the 200<sup>th</sup> Judicial District Court, Travis County, Texas. The case is still pending. No temporary or permanent injunction was entered as part of the Appeal, and the Board Order remains in effect.
8. On September 18, 2009, Board Staff issued a Complaint and Notice of Hearing to Respondent in which it sought an indefinite suspension against Respondents until Respondents have complied with Board Orders, and an additional \$45,000 administrative penalty (\$5,000 payable by the Pharmacy and \$40,000 by Mr. Martinez) based on the failure to comply with the Board Order.
9. The Complaint and the Notice of Hearing informed Respondent of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be

held; the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.

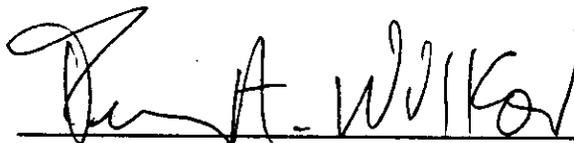
10. The hearing convened on January 11, 2010, in the hearing facilities at the William P. Clements Building, 4<sup>th</sup> floor, 300 W. 15<sup>th</sup> Street, Austin, Texas, with ALJ Penny A. Wilkov presiding. Staff was represented by litigation counsel Julie C. Hildebrand. Respondent appeared and was represented by attorney Daniel Robledo. The record remained open until February 12, 2010, to allow the submission of written closing arguments.
11. The Appeal did not stay enforcement of the Board Order because Respondents did not pay the District Court the amount of the penalty in an escrow account, post a supersedeas bond, or file an affidavit of inability to pay.

#### IV. CONCLUSIONS OF LAW

1. The Texas State Board of Pharmacy has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. § 551.001 *et seq.* (Texas Pharmacy Act).
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, pursuant to 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 (the APA).
4. A final decision of the Board is subject to judicial review under the APA. TEX. OCC. CODE ANN. § 565.061(b).
5. The scope of judicial review of a state agency decision in a contested case hearing is as provided for by the law under which the review is sought. TEX. GOV'T CODE ANN. § 2001.172.
6. The Texas Pharmacy Act does not specify the judicial scope of review in a contested case hearing. TEX. OCC. CODE ANN. § 565.061.
7. TEX. GOV'T CODE ANN. § 2001.174 requires a court reviewing a proceeding governed by the APA to use the substantial evidence rule if the law authorizing the proceeding, the Texas Pharmacy Act, does not state a standard of review.
8. TEX. GOV. CODE ANN. § 2001.176(b)(3) provides that unless otherwise provided by statute, the filing of the petition vacates a state agency decision for which trial de novo is the manner

- of review authorized by law but does not affect the enforcement of an agency decision for which another manner of review is authorized.
9. The Board Order was not vacated by the filing of the Appeal. TEX. GOV. CODE ANN. § 2001.176.
  10. TEX. OCC. CODE ANN. § 566.004, entitled "Options Following Decision: Pay or Appeal, provides three options available to a respondent following a Board Order to stay the enforcement of the Board Order: (1) pay the administrative penalty; (2) pay the penalty and file a petition for review contesting the violation, amount of penalty, or both; or (3) refuse to pay the penalty and file a petition for judicial review contesting the violation, amount of penalty or both.
  11. The filing of the Appeal without payment or proof of financial inability to pay did not stay enforcement of the Board Order. TEX. OCC. CODE ANN. § 566.004.
  12. Mr. Martinez has violated the Board Order by failing to comply with the Board Order that required him to participate in a drug and alcohol screening program, to submit quarterly reports, and to pay the probation fee. TEX. OCC. CODE ANN. § 565.001(a)(17).
  13. The Pharmacy has violated the Board Order by failing to pay the probation fee. TEX. OCC. CODE ANN. § 565.002(a)(11).
  14. The suspension of Respondents' licenses is warranted until Respondents have complied with the Board Order. TEX. OCC. CODE ANN. § 565.001 and 22 TEX. ADMIN. CODE § 281.62.
  15. Aggravating and mitigating factors were not shown to warrant a \$45,000 administrative penalty. 22 TEX. ADMIN. CODE § 281.62.

SIGNED April 6, 2010.



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PENNY A. WILKOV  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS