

## RULE ANALYSIS

**Introduction:** THE AMENDMENTS ARE SUBMITTED TO THE BOARD FOR CONSIDERATION AS PROPOSED RULES

**Short Title:** Informal Disposition of a Contested Case

**Rule Numbers:** §281.22

**Statutory Authority:** Texas Pharmacy Act, Chapter 551-566 and 568-569, Occupations Code:

- (1) Chapter 55 gives the Board the authority to allow for alternative procedures for licensing and registration of military service members, veterans, and spouses;
- (2) Section 551.002 specifies that the purpose of the Act is to protect the public through the effective control and regulation of the practice of pharmacy; and

**Purpose:** The amendments, if adopted, implement S.B. 404 as passed by the 83<sup>rd</sup> Texas Legislature.

1 TITLE 22 EXAMINING BOARDS  
2 PART 15 TEXAS STATE BOARD OF PHARMACY  
3 CHAPTER 281 ADMINISTRATIVE PRACTICE AND PROCEDURES  
4 SUBCHAPTER B GENERAL PROCEDURES IN A CONTESTED CASE

5  
6 **§281.22 Informal Disposition of a Contested Case**  
7

8  
9 (a) (No change.)

10  
11 (b) Prior to the imposition of disciplinary sanction(s) against a **respondent** [~~licensee or~~  
12 ~~registration~~], the board shall provide the **respondent** [~~licensee or registrant~~] with written notice  
13 of the matters asserted, including:

14  
15 (1) a statement of the legal authority, jurisdiction, and alleged conduct under which the  
16 enforcement action is based, with a reference to the particular section(s) of the statutes and  
17 rules involved;

18  
19 **(2) information the board staff intends to use at an informal conference;**

20  
21 **(3) [(2)]** an offer for the **respondent** [~~licensee or registrant~~] to attend an informal conference at  
22 a specified time and place and show compliance with all requirements of law, in accordance  
23 with §2001.054(c) of the Administrative Procedure Act;

24  
25 **(4) [(3)]** a statement that the **respondent** [~~licensee or registrant~~] has an opportunity for a  
26 hearing before the State Office of Administrative Hearings on the allegations; and

27  
28 **(5) [(4)]** the following statement in capital letters in 12 point boldface type: FAILURE TO  
29 RESPOND TO THE ALLEGATIONS, BY EITHER PERSONAL APPEARANCE AT THE  
30 INFORMAL CONFERENCE OR IN WRITING, WILL RESULT IN THE ALLEGATIONS BEING  
31 ADMITTED AS TRUE AND THE RECOMMENDED SANCTION MADE AT THE INFORMAL  
32 CONFERENCE BEING GRANTED BY DEFAULT. The notice shall be served by delivering a  
33 copy to the **respondent** [~~licensee or registrant~~] in person, by courier receipted delivery, by first  
34 class mail, or by certified or registered mail, return receipt requested to the **respondent's**  
35 [~~licensee's or registrant's~~] last known address of record as shown by agency records.

36  
37 **(c) The respondent will be provided the opportunity to appear at an informal conference**  
38 **prior to a hearing at the State Office of Administrative Hearings. The notice of the time**  
39 **and place of the informal conference, along with the written notice required in subsection**  
40 **(b) of this section, will be given to the respondent at least 45 days before the date of the**  
41 **informal conference. If such notice is not timely provided, the respondent may**  
42 **reschedule the informal conference.**

43  
44 **(d) [(c)]** The **respondent** [~~licensee or registrant~~] shall respond by either personal appearance at  
45 the informal conference, **or shall provide a rebuttal** [~~or~~] in writing no later than **15 days before**  
46 the date of the informal conference. **The rebuttal may be presented by the respondent at**  
47 **the informal conference or be submitted in lieu of appearing at the informal conference.**  
48 If the **respondent** [~~licensee or registrant~~] chooses to respond in writing, the response shall  
49 admit or deny each of the allegations. If the **respondent** [~~licensee or registrant~~] intends to deny  
50 only a part of an allegation, the **respondent** [~~licensee or registrant~~] shall specify so much of it is  
51 true and shall deny only the remainder. The response shall also include any other matter,

52 whether of law or fact, upon which the **respondent** [~~licensee or registrant~~] intends to rely **upon**  
53 **as a** [~~for his or her~~] defense. If the **respondent** [~~licensee or registrant~~] fails to respond to the  
54 notice specified in subsection (b) of this section, the matter will be considered as a default case  
55 and the **respondent** [~~licensee or registrant~~] will be deemed to have:

- 56  
57 (1) admitted all the factual allegations in the notice specified in subsection (b) of this section;  
58  
59 (2) waived the opportunity to show compliance with the law;  
60  
61 (3) waived notice of a hearing;  
62  
63 (4) waived the opportunity for a hearing on the allegations; and  
64  
65 (5) waived objection to the recommended sanctions made at the informal conference.  
66

67 **(e)** [~~(d)~~] Default orders.  
68

69 (1) The informal conference panel may recommend that the board enter a default order, based  
70 upon the allegations set out in the notice specified in subsection (b) of this section, adopting the  
71 recommended sanctions made at the informal conference. Upon consideration of the case, the  
72 board may enter a default order under §2001.056 of the Administrative Procedure Act or direct  
73 that the case be set for a hearing at the State Office of Administrative Hearings.  
74

75 (2) For a contested case before the State Office of Administrative Hearings, the judge may  
76 announce a default upon receiving the required showing of proof to support a default, and then  
77 recess the hearing, issue an order dismissing the case from the docket of the State Office of  
78 Administrative Hearings, and return the file to the board for informal disposition on a default  
79 basis in accordance with §2001.056 of the Administrative Procedure Act. The board may then  
80 enter a default order or direct the case back to the State Office of Administrative Hearings.  
81

82 **(f)** [~~(e)~~] Any default judgment granted under this section will be entered on the basis of the  
83 factual allegations in the notice specified in subsection (b) of this section, and upon proof of  
84 proper notice to the **respondent's** [~~licensee's or registrant's~~] address of record. For purposes of  
85 this section, proper notice means notice sufficient to meet the provisions of §2001.054 of the  
86 Administrative Procedure Act and §281.30 of this title (relating to Pleadings and Notice in a  
87 Contested Case).  
88

89 **(g)** [~~(f)~~] A motion for rehearing which requests that the board vacate its default order under this  
90 section shall be granted if the motion presents convincing evidence that the failure to respond to  
91 the notice specified in subsection (b) of this section was not intentional or the result of conscious  
92 indifference, but due to accident or mistake, provided that the **respondent** [~~licensee or~~  
93 ~~registrant~~] has a meritorious defense to the factual allegations contained in the notice specified  
94 in subsection (b) of this section and the granting thereof will not result in delay or injury to the  
95 public or the board.  
96

97 **(h)** [~~(g)~~] Informal conferences shall be attended by the executive director/secretary or  
98 designated representative, legal counsel of the agency or an attorney employed by the office of  
99 the attorney general, and other representative(s) of the agency as the executive  
100 director/secretary and legal counsel may deem necessary for proper conduct of the conference.  
101 The **respondent** [~~licensee or registrant~~] and/or the **respondent's** [~~licensee's or registrant's~~]  
102 authorized representative(s) may attend the informal conference and shall be provided an

103 opportunity to be heard. All communications from the **respondent** [~~licensee or registrant~~] shall  
104 be directed to the legal counsel of the agency.

105  
106 **(i) [(h)]** In any case where charges are based upon information provided by a person  
107 (complainant) who filed a complaint with the board, the complainant may attend the informal  
108 conference, unless the proceedings are confidential under §564.002 and §564.003 of the Texas  
109 Pharmacy Act or other applicable law. A complainant who chooses to attend an informal  
110 conference shall be provided an opportunity to be heard with regard to charges based upon the  
111 information provided by the complainant. Nothing herein requires a complainant to attend an  
112 informal conference.

113  
114 **(j) [(i)]** Informal conferences shall not be deemed meetings of the board, and no formal record of  
115 the proceedings at such conferences shall be made or maintained **unless the respondent**  
116 **requests such a recording in writing at least 15 days before the informal conference.**  
117 **Board staff will arrange for the presence of a court reporter to make the recording. The**  
118 **respondent shall be responsible for the cost of the recording. The recording will be part**  
119 **of the board's investigative file and will not be released to a third party unless authorized**  
120 **under §565.055 of the Act. The board will provide a copy of the recording to the**  
121 **respondent upon request.**

122  
123 **(k) [(j)]** Any proposed consent order shall be presented to the board in open meeting for its  
124 review. At the conclusion of its review, the board shall approve or disapprove the proposed  
125 consent order. Should the board approve the proposed consent order, the appropriate notation  
126 shall be made in minutes of the board and the proposed consent order shall be entered as an  
127 official action of the board. Should the board disapprove the proposed consent order, the matter  
128 shall be scheduled for public hearing.

AN ACT

relating to complaints filed with the Texas State Board of Pharmacy; authorizing fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 555.005, Occupations Code, is amended to read as follows:

Sec. 555.005. RECORDS OF COMPLAINTS. For each complaint received by the board, the board shall maintain information about parties to the complaint, including the complainant's identity, the subject matter of the complaint, a summary of the results of the review or investigation of the complaint, and the [~~its~~] disposition of the complaint.

SECTION 2. Section 555.007, Occupations Code, is amended by adding Subsection (d) to read as follows:

(d) The board may not consider or act on a complaint involving a violation alleged to have occurred more than seven years before the date the complaint is received by the board.

SECTION 3. Section 565.056, Occupations Code, is amended by amending Subsection (b) and adding Subsections (d) and (e) to read as follows:

(b) A rule adopted under this section must:

(1) provide the complainant, if applicable and permitted by law, and the license holder an opportunity to be heard; ~~and~~

(2) require the presence of an attorney to advise the board or a board employee; and

(3) if an informal meeting will be held, require notice of the time and place of the informal meeting to be given to the license holder not later than the 45th day before the date the informal meeting is held.

(d) The notice required by Subsection (b)(3) must be accompanied by a written statement of the nature of the allegations against the license holder and the information the board intends to use at the informal meeting. If the board does not provide the statement or information when the notice is provided, the license holder may use that failure as grounds for rescheduling the informal meeting. The license holder must provide to the board the license holder's rebuttal not later than the 15th day before the date of the meeting in order for that information to be considered at the meeting.

(e) On request by a license holder under review, the board shall make a recording of the informal meeting. The recording is a part of the investigative file and may not be released to a third party unless authorized under this subtitle. The board may charge the license holder a fee to cover the cost of recording the meeting. The board shall provide a copy of the recording to the

license holder on the license holder's request.

SECTION 4. Subchapter B, Chapter 565, Occupations Code, is amended by adding Section 565.060 to read as follows:

Sec. 565.060. REMEDIAL PLAN. (a) The board may issue and establish the terms of a remedial plan to resolve the investigation of a complaint relating to this subtitle.

(b) A remedial plan may not be imposed to resolve a complaint:

(1) concerning:

(A) a death;

(B) a hospitalization;

(C) the commission of a felony; or

(D) any other matter designated by board rule; or

(2) in which the appropriate resolution may involve a restriction on the manner in which a license holder practices pharmacy.

(c) The board may not issue a remedial plan to resolve a complaint against a license holder if the license holder has entered into a remedial plan with the board in the preceding 24 months for the resolution of a different complaint relating to this subtitle.

(d) If a license holder complies with and successfully completes the terms of a remedial plan, the board shall remove all records of the remedial plan from the board's records on the fifth

anniversary of the date the board issued the terms of the remedial plan.

(e) The board may assess a fee against a license holder participating in a remedial plan in an amount necessary to recover the costs of administering the plan.

(f) The board shall adopt rules necessary to implement this section.

SECTION 5. (a) Sections 555.005 and 565.056, Occupations Code, as amended by this Act, and Subsection (d), Section 555.007, Occupations Code, as added by this Act, apply only to the investigation of a complaint filed on or after the effective date of this Act. The investigation of a complaint filed before that date is governed by the law in effect on the date the complaint was filed, and that law is continued in effect for that purpose.

(b) The Texas State Board of Pharmacy shall adopt rules under Section 565.060, Occupations Code, as added by this Act, not later than January 1, 2014.

(c) Section 565.060, Occupations Code, as added by this Act, applies only to a complaint under Subtitle J, Title 3, Occupations Code, filed on or after the effective date of this Act. A complaint under Subtitle J, Title 3, Occupations Code, filed before that date is governed by the law in effect on the date the complaint was filed, and that law is continued in effect for that purpose.

SECTION 6. This Act takes effect September 1, 2013.

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Speaker of the House

I hereby certify that S.B. No. 404 passed the Senate on March 21, 2013, by the following vote: Yeas 31, Nays 0.

\_\_\_\_\_  
Secretary of the Senate

I hereby certify that S.B. No. 404 passed the House on May 22, 2013, by the following vote: Yeas 141, Nays 7, two present not voting.

\_\_\_\_\_  
Chief Clerk of the House

Approved:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor

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