

*BOARD ORDER #L-10-017
SOAH DOCKET NO. 515-11-4234*

RE: IN THE MATTER OF
TIANA JEAN WITCHER
(PHARMACIST LICENSE #30135)

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 30135, issued to Tiana Jean Witcher.

After proper and timely notice was given, the matter was heard in public hearing on November 1, 2011, before Roy G. Scudday, 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. 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. 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 October 21, 1987, the (Board) issued pharmacist's license No. 30315 to Tiana Jean Witcher (Respondent).
2. On May 20, 1992, the North Carolina Board of Pharmacy (NCBP) issued pharmacist's license No. 11664 to Respondent.
3. On or about October 21, 2008, Respondent was admitted to the Wake Forest University Baptist Medical Center Emergency Department and was treated for alcohol intoxication.
4. On or about December 12, 2008, Petitioner was admitted to Pavillion International, a substance abuse treatment center, where she received treatment for alcohol dependence.

5. On or about January 2, 2009, Respondent voluntarily entered a substance abuse program administered by the North Carolina Pharmacist Recovery Network (NCPRN), entering into a contract governing the terms of her participation in the program.
6. Between March 2009 and November 2009, Respondent failed to comply with the terms of the contract with NCPRN by:
 - a. Failing to call in to determine if she should be drug tested on or about March 14, 2009, April 15, 2009, and April 17, 2009;
 - b. Submitting dilute urine samples on or about June 9, 2009, July 27, 2009, September 8, 2009, October 21, 2009, and November 24, 2009;
 - c. Violating the Contract's limitations on her employment, specifically by working the third shift at the North Carolina Baptist Hospital Pharmacy in or about April 2009, without approval from PRN and after PRN had denied her request for such approval; and
 - d. Failing to participate in the required sessions of continuing care in July 2009.
7. NCPRN terminated Respondent's contract on January 5, 2010, for her failure to comply with provisions of that contract on five separate occasions between June 2009 and January 2010.
8. On April 20, 2010, the NCBP issued an order suspending Respondent's license to practice pharmacy with the following provision:

Respondent may not petition for reinstatement, unless as a condition precedent to any such application, Respondent provides the NCBP with written notice from NCPRN that NCPRN will advocate the reinstatement of Respondent's license. Monitoring by a third-party recovery or monitoring entity other than NCPRN will not satisfy this condition precedent.
9. Respondent had been disciplined by a regulatory board of another state for conduct substantially equivalent to conduct for which the Board may discipline a licensee.
10. On March 30, 2011, Staff issued Respondent a complaint in which it requested suspension of Respondent's Texas pharmacist's license until such time as Respondent demonstrates reinstatement of her North Carolina pharmacist license.

11. On March 31, 2011, the Staff of Board issued Respondent a notice of hearing, to which it attached the complaint, informing her of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be held; the particular sections of the statutes and rules involved; and included a short, plain statement of the matter asserted.
12. All parties appeared and were represented at the hearing on sanctions on August 12, 2011, in Austin, Texas. Staff was represented by Julie C. Hildebrand, litigation attorney; Respondent was represented by Dan Lype, attorney.
13. The record of the contested case hearing closed September 23, 2011, upon receipt of the parties' written closing arguments.
14. In November 2007, Respondent's husband of two weeks died in a car accident. Her admittance to the emergency room at the North Carolina hospital for intoxication on October 21, 2008, was near the first anniversary of his death.
15. Respondent did not work on October 21, 2008, the date on which she was impaired due to alcohol.
16. When her North Carolina license was suspended, Respondent lost her job, had her home foreclosed upon, and was forced to relocate to Texas to live with her family. She does not pay rent to her father due to the substantial debt sustained from her North Carolina suspension.
17. Respondent does not have any remaining professional or social ties to North Carolina and her support network is in Texas.
18. Respondent voluntarily entered into a participation agreement with the Texas PRN (TxPRN) on or about November 2, 2010.
19. Respondent has complied with all terms and conditions of her participation agreement with TxPRN, including all drug and alcohol screening requirements such as not missing any of her daily call-ins to verify whether she has been selected to test on that day, not testing positive for drugs or alcohol, and not submitting dilute test samples.
20. The Board has not received any reports or other information from TxPRN regarding Respondent that might provide ground for disciplinary action.
21. In September 2011, Respondent was evaluated by a physician requested and approved by Staff who determined that she could safely practice pharmacy.

22. Respondent has been sober since October 22, 2008.
23. Respondent has been working at Texas Health Harris Methodist Hospital in Bedford, Texas, as a hospital pharmacist since October 2010, without incident. Her supervisor and director are aware of her history and present participation in TxPRN.
24. Respondent has never been impaired at her current place of work and her supervisor considers her to be a valuable asset and is willing to monitor Respondent as may be required by a Board order.
25. Respondent has established a support system in Texas consisting of her family, colleagues, treating psychologist, Alcoholics Anonymous (AA), and her TxPRN case worker to support her sobriety and prevent relapse.
26. The NCBP will not accept the participation of Respondent in the TxPRN program as a substitute for the requirement that she participate in the NCPRN program.
27. Due to her present residence in Texas and difficult financial situation, it is not feasible for Respondent to participate in the NCPRN program as a precondition to having the suspension of her North Carolina license lifted, and it is not financially viable for her to return to North Carolina.
28. Respondent is not seeking to evade compliance with the reinstatement provisions of the North Carolina order, but only to avoid the considerable financial hurdles she would face to achieve that compliance.
29. Respondent can safely practice pharmacy in Texas.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter, pursuant to TEX. OCC. CODE ANN. (Code) subtitle J (Texas Pharmacy Act), including the authority to sanction violations of the Act and of the Board's administrative rules.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Based on her having been disciplined by the NCBP for conduct substantially equivalent to conduct for which she could be disciplined in Texas, Respondent is subject to disciplinary action by the Board pursuant to Code § 565.001(a)(16).
5. The Board does not have a written policy or rule requiring that a pharmacist be prevented from practicing in Texas until the pharmacist resolves restrictions on her license in another state.
6. Respondent established that the mitigating factors in regard to her fitness to practice pharmacy outweigh the aggravating factors, as set forth in 22 TEX. ADMIN. CODE (TAC) § 281.62.
7. In several disciplinary cases, the Board has sanctioned pharmacists who suffered from an alcohol or drug dependency but who were found to be able to practice safely with a 5-year probated suspension during which they would participate in the Texas PRN program, undergo random drug & alcohol screening, attend AA meetings, and work under the supervision of another pharmacist.

ADMINISTRATIVE LAW JUDGE'S RECOMMENDATION

The Administrative Law Judge (ALJ) recommends that, based on the above Findings of Fact and Conclusions of Law, the Board should suspend Respondent's pharmacist license for a period of five (5) years, but that the suspension should be fully probated subject to such conditions as the Board deems appropriate.

The Board disagrees with the ALJ's recommended sanction because the ALJ did not properly apply Sections 551.002, 554.001, 554.002, 565.001, and 565.051 of the Texas Pharmacy Act and Sections 281.60 and 281.62 of the Texas Pharmacy Board Rules, which charges the Board with the responsibility to assess sanctions against licensees who are found to have violated the Act. The Board is changing the ALJ's recommended sanction because, based upon the above Findings of Fact and Conclusions of Law, the appropriate sanction is a suspension of Respondent's pharmacist license to run concurrently with the North Carolina Board of Pharmacy Order. This sanction best reflects the Board's determination of the seriousness of the violation and is the best sanction to deter future violations.

A concurrent suspension is the appropriate disciplinary sanction because the Board can not allow pharmacists to work in Texas who have had their practice ability taken away in another state. The integrity of all states' licensing systems is compromised if pharmacists are allowed to jump from state to state in order to avoid disciplinary action. The Board has a duty to respect the public acts of another state board. This promotes uniformity and consistency in regulation among the states.

Although the ALJ's recommendation may satisfy concerns the Board would have regarding Respondent's impairment, it would not address the fact that Respondent is barred from practicing pharmacy by a regulatory board of another state for conduct substantially equivalent to conduct described under the Texas Pharmacy Act. The ALJ did not believe that this was a valid concern that should be reflected in the Board's sanction. However, the Board disagrees and believes that a concurrent suspension is the most appropriate sanction to address Respondent's violation of the Texas Pharmacy Act.

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 effective upon the entry of this Order, pharmacist license number 30135 issued to Tiana Jean Witcher (hereinafter referred to as "Respondent") shall be, and such pharmacist license is hereby suspended until such time as Respondent:

- (1) provides the BOARD with documentation from the North Carolina Board of Pharmacy that the suspension imposed on North Carolina pharmacist license number 11664, as set forth in the North Carolina Board of Pharmacy Final Order, entered April 20, 2010, has been lifted, and the North Carolina pharmacist license number 11664, held by Respondent, is reinstated; and
- (2) requests in writing to have the suspension stayed or lifted, and personally appears before the BOARD or a panel of the BOARD and provides sufficient evidence and information which in the discretion of the BOARD adequately indicates that Respondent is physically, mentally, and otherwise competent to practice pharmacy with reasonable skill, competence and safety to the public. Such evidence and information shall include at a minimum, but shall not be limited to:
 - (a) written documentation provided by a BOARD-approved mental health professional (hereinafter referred to as "MHP") which states that Respondent is

not physiologically or psychologically alcohol or drug dependent, does not have an incapacity of a nature that would prevent her from engaging in the practice of pharmacy with reasonable skill, competence and safety to the public, and is able to return to the practice of pharmacy without posing a threat to herself or the public;

- (b) documentation of compliance with the requirements listed below in paragraphs (3) through (23).

It is further ORDERED that upon an adequate showing before the BOARD that Respondent is able to practice pharmacy, the BOARD in its discretion shall determine necessary disciplinary action in regard to Respondent's pharmacist license to adequately protect the public.

It is further ORDERED that during the period of suspension, Respondent shall:

- (3) surrender pharmacist license number 30135 and any renewal certificate and personal identification card pertaining to pharmacist license number 30135;
- (4) not practice pharmacy in any manner or be employed in any manner that would allow access to controlled substances;
- (5) participate in the Professional Recovery Network of the Texas Pharmacy Association (hereinafter referred to as "PRN PROGRAM") for evaluation and chemical dependence treatment and monitoring. Participation in the PRN PROGRAM shall include entering into a contract with the PRN PROGRAM and abiding by all terms of the PRN PROGRAM contract. Failure to comply with all provisions and recommendations of the PRN PROGRAM shall constitute a violation of this Order;
- (6) authorize a BOARD-approved MHP to furnish and ensure that the MHP furnishes an initial written report, and any subsequent reports requested by the BOARD, to the BOARD and the PRN PROGRAM. The initial written report shall include an evaluation of the current status of Respondent, her capacity to engage in the practice of pharmacy, and a suggested schedule of future treatment and/or after-care if necessary;
- (7) continue under the care of a MHP if the MHP determines further treatment and/or after-care is needed and authorize the MHP and/or representative of the after-care program to furnish written quarterly reports to the BOARD and the PRN PROGRAM concerning the conduct and status of Respondent. Failure to comply with all recommendations of the MHP shall constitute a violation of this Order;

- (8) authorize the persons listed below to discuss and/or disclose the terms of this Order, the nature of the complaint(s) resulting in the entry of the Order, the status and conduct of Respondent, and any other relevant matter, with each other:
 - ◆ staff of the BOARD;
 - ◆ intervenors and staff of the PRN PROGRAM;
 - ◆ MHP and/or any physician (or other health-care practitioner with prescriptive authority) who is evaluating or treating (or who has evaluated or treated) Respondent; and
 - ◆ representative(s) of any after-care program evaluating or treating (or that has evaluated or treated) Respondent;
- (9) inform any and all physicians (or other health-care practitioners with prescriptive authority) who treat Respondent for any reason or condition that Respondent has a history of substance-abuse, and that Respondent is the subject of this Order. Unless a medical emergency exists, Respondent shall also provide a copy of this Order to any treating physician for review prior to the physician's authorization of prescription medication for Respondent;
- (10) cause any treating physician (or other health-care practitioner with prescriptive authority) to provide BOARD staff, upon request, with information and patient records, including information about any and all prescriptions authorized for Respondent. By her signature on this Order, Respondent does hereby authorize any and all physicians (or other health-care practitioners with prescriptive authority) treating Respondent for any reason or condition to provide BOARD staff with information, including patient records, regarding prescriptions authorized for Respondent;
- (11) authorize the staff of the BOARD to discuss and/or disclose the terms of this Order, the nature of the complaint(s) resulting in the entry of the Order, the status and conduct of Respondent, and any other relevant matter with any person who Respondent, by oral or written notification to the BOARD, has authorized to receive this information;
- (12) submit personal quarterly reports to the BOARD containing information as specified by BOARD staff regarding employment status and rehabilitation activities; and provide written information to the BOARD with the name and telephone number of an individual or individuals to contact in case of a medical emergency; and authorize the staff of the BOARD to disclose to such individual any relevant information regarding this Order or the medical emergency;

- (13) abstain from the consumption of alcohol, any products containing alcohol (including over-the-counter products and prescription drugs), dangerous drugs, and/or controlled substances in any form unless prescribed, within one (1) year if a dangerous drug, or within six (6) months if a controlled substance, by a practitioner with prescriptive authority for a legitimate and documented therapeutic purpose and unless ingested for the same therapeutic purpose as originally prescribed;
- (14) submit, within twenty-four (24) hours, to the performance of unscheduled urinalysis or other types of drug or alcohol analysis as specified by BOARD staff or others authorized by BOARD staff, such as a mental health professional, PRN PROGRAM representative, or supervising pharmacist;
- (15) provide copies of chain-of-custody document(s) from the collection site for any urinalysis or other type of drug or alcohol analysis, as required by Paragraph (14), for which Respondent has submitted a sample. Such document(s) shall be provided within three (3) days of the submission to the analysis;
- (16) provide copies of any and all current prescriptions taken by or in possession of Respondent to BOARD staff. Within ten (10) days of any and all new prescriptions prescribed by a treating physician (or other health-care practitioner with prescriptive authority) who has reviewed this Order, Respondent shall provide copies of any and all new prescriptions to BOARD staff;
- (17) provide a written statement from a treating physician (or other health-care practitioner with prescriptive authority), who has reviewed this Order, for all current sample medication taken by or in possession of Respondent to BOARD staff. The statement shall include the patient's name, drug name, quantity provided, date provided, directions for use, and physician's name. Within ten (10) days of any and all new sample medication provided by a treating physician (or other health-care practitioner with prescriptive authority), who has reviewed this Order, Respondent shall provide copies of such a statement to BOARD staff;
- (18) be in violation of this Order in the event that:
 - (a) the results of any alcohol or drug analysis indicate the presence of alcohol or drugs (unless the dangerous drug was prescribed within one (1) year or the controlled substance was prescribed within six (6) months from the date of the analysis for a legitimate and documented therapeutic purpose by a practitioner who reviewed the terms of this Order before authorizing the prescription; and/or
 - (b) any health-care practitioner submits written documentation that Respondent has developed an incapacity of a nature that may prevent her from engaging in the practice of pharmacy with reasonable skill, competence and safety to the public;

- (19) authorize and request the PRN PROGRAM to furnish quarterly reports to the BOARD concerning the status and conduct of Respondent;
- (20) not hold any of the individuals providing reports to the BOARD or PRN PROGRAM liable in any manner for the contents of such reports;
- (21) not be convicted of or receive deferred adjudication for an alcohol-related or drug-related offense;
- (22) participate in the activities and programs of Alcoholics Anonymous, or any other substantially similar program that has been approved in writing by BOARD staff, on a regular basis as directed by BOARD staff. Respondent shall maintain documentation as to the number and location of meetings attended and make such documentation available to BOARD staff upon request; and
- (23) abide by and not violate Federal laws and laws of the State of Texas or any other state with respect to pharmacy, controlled substances, dangerous drugs and rules and regulations promulgated pursuant to the above-mentioned statutes.

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 further ORDERED that Respondent shall be responsible for any costs associated with compliance of the terms 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 #L-10-017
Tiana Jean Witcher
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Passed and approved at the regular meeting of the Texas State Board of Pharmacy
on the 1st day of November, 2011.

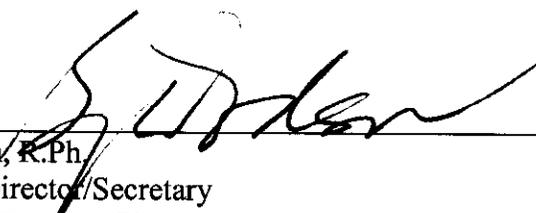
THIS ORDER IS A PUBLIC RECORD.

SIGNED AND ENTERED ON THIS 1st day of November, 2011.



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. 515-11-4234

TEXAS STATE BOARD OF PHARMACY, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
TIANA J. WITCHER, LICENSE NO. 30135, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas State Board of Pharmacy (Staff/Board) brought action against Tiana J. Witcher (Respondent) for allegedly violating TEX. OCC. CODE ANN. (Code) § 565.001(a)(16). Staff sought to suspend Respondent's license. The Administrative Law Judge (ALJ) recommends that Respondent's license be suspended for a period of five years, but that the suspension should be fully probated subject to such conditions as the Board deems appropriate.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing convened August 12, 2011, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Julie C. Hildebrand, Litigation Counsel. Respondent was represented by attorney Dan Lype. The record closed on September 23, 2011, upon receipt of the parties' written closing arguments.

Matters concerning notice and jurisdiction were undisputed. Those matters are set out in the Findings of Fact and Conclusions of Law.

On March 30, 2011, Petitioner filed a Motion for Summary Disposition. On April 26, 2011, the ALJ issued an Order Granting Partial Summary Disposition and Continuance of Hearing on the issue of sanctions.

II. REASONS FOR DECISION

A. Facts Found in Order Granting Partial Summary Disposition

1. Tiana J. Witcher (Respondent) holds pharmacist license No. 30135 issued by the Texas State Board of Pharmacy (Board) on October 21, 1987.
2. On or about April 20, 2010, the North Carolina Board of Pharmacy (NCBP) entered a Final Order against the North Carolina pharmacist license No. 11664 held by Respondent. That Order made the following Findings of Fact:
 - a. On or about January 29, 2009, Respondent voluntarily entered a substance abuse program administered by North Carolina Pharmacist Recovery Network (NCPRN). At that time Respondent entered into a contract governing the terms of her participation in the program (Contract).
 - b. Between approximately March 2009 and November 2009, Respondent violated the terms of the Contract in various ways, including but not limited to:
 - i. By failing to call in to determine if she should be drug tested on or about March 14, 2009, April 15, 2009, and April 17, 2009;
 - ii. By submitting dilute urine samples on or about June 9, 2009, July 27, 2009, September 8, 2009, October 21, 2009, and November 24, 2009;
 - iii. By violating the Contract's limitations on her employment, specifically by working the third shift at the North Carolina Baptist Hospital Pharmacy in or about April 2009, without approval from NCPRN, and after NCPRN had denied her request for such approval; and
 - iv. By failing to participate in the required sessions of continuing care in July 2009.
3. The April 20, 2010 Order placed Respondent's license on an indefinite suspension with the requirement that she may not petition for reinstatement unless she provides the NCBP with written notice from NCPRN that NCPRN will advocate for Respondent's reinstatement.
4. Respondent had been disciplined by a regulatory board of another state for conduct substantially equivalent to conduct for which the Board may discipline a licensee.
5. Respondent is subject to disciplinary action by the Board pursuant to Code § 565.001(a)(16).

B. Evidence**1. Carol Fisher's Testimony**

Ms. Fisher is the Director of Enforcement for Petitioner. She testified that the Board's unpublished policy is to defer to other states regarding disciplining of pharmacists licensed in those states, which in this case would mean suspension of Respondent's license until she has resolved her problems in North Carolina. She pointed out that the Board rule at 22 TEX. ADMIN. CODE (TAC) § 281.62 lists the aggravating and mitigating factors to be considered in determining the proper sanction. She stated that the following aggravating factors were particularly considered in regard to Respondent:

- increased potential for harm to the public based on the determination of the NCBP;
- disciplinary actions taken by the NCBP;¹
- failure to implement remedial measures required by NCBP; and
- relevant circumstances increasing the seriousness of the conduct which serves as a basis for disciplinary action under the Act, specifically not complying with the requirements for drug screens resulting in suspension of license by NCBP.

Ms. Fisher cited Board Order #N-03-005, which contains the following:

In previous cases with similar facts, the Board has typically imposed disciplinary action mirroring the action by another state board of pharmacy. The policy the Board considers in taking such action is to prevent licensees from escaping disciplinary action in one state by coming to Texas. If another state board of pharmacy has prohibited a pharmacist from practicing, so long as there is no evidence that a pharmacist has not been afforded due process in the other state, the Board believes it is sound policy for that pharmacist to be prevented from practicing in Texas until the pharmacist resolves the restrictions on his license in the other state. Otherwise a pharmacist would suffer no negative consequences from violations of the law in another state. Other pharmacists with licenses in Texas and in another state might assume that similar violations would not merit serious considerations by the Board.²

¹ No violation of the Order has been shown, only non-compliance with the conditions for reinstatement.

² It should be noted that this cannot be considered to be a written statement of policy applicable to all licensees because it is not contained within a Board rule, but is merely applicable to this particular order.

2. Respondent's Testimony

Respondent testified that she has been licensed as a pharmacist in Texas since 1987. In 1992 she moved to North Carolina and received a license to practice pharmacy in that state. In November 2007, after only two weeks of marriage, her husband was killed in a car crash. Near the first anniversary of his death, while off duty from the hospital pharmacy where she worked, Respondent consumed copious amounts of alcohol and was taken to the emergency room of the hospital where she worked. After informing her employer of the incident, Respondent voluntarily enrolled in the NCPRN. Although she has remained sober since the emergency room incident, Respondent missed test call-ins, worked a third shift at the pharmacy, and submitted diluted samples due to her use of the prescription drug Detrol to treat an overactive bladder condition, all of which were violations of her contract with NCPRN. As a result, her contract was terminated.

Respondent testified that, as a part of her program, she traveled 100 miles one-way to see a therapist to help maintain her sobriety, for which she spent over \$40,000 that was not covered by insurance. She stated that she reached the maximum limits on her credit cards and that her home was foreclosed upon. The NCBP suspended her license in April 2010, and she returned to Texas to live with her family.

Respondent testified that she has obtained a therapist in Texas to deal with her coping problems. In September 2010, pursuant to a request from Staff, she submitted to an examination by a physician to determine whether she possessed an incapacity of a nature that would prevent her from engaging in the practice of pharmacy with reasonable skill, competence, and safety to the public, which examination she passed. In November 2010, she entered into an agreement with Texas PRN and has complied with all the drug and alcohol screening requirements of that agreement.

Respondent testified that she has no ties to North Carolina. Her family and support system are in Texas. Although she has requested that North Carolina accept her participation in the Texas PRN program to meet the requirements to lift her suspension, the NCBP has refused, insisting that she participate in the NCPRN program, including attending meetings and

conferences in North Carolina. Respondent stated that she is not financially able to participate in the NCPRN program, pointing out that she cannot even afford to pay rent to her father.

3. Michelle Henke's Testimony

Ms. Henke is a clinical specialist at Texas Health Harris Methodist Hospital in Bedford, Texas. She testified that she had hired Respondent as a Staff Pharmacist for the hospital. She stated that Respondent is an asset to the hospital team, is responsible and efficient, has a high level of clinical competency, has never been impaired at work, and was extremely capable. She further testified that if Respondent were required to be supervised to retain her license, she would be willing to provide that supervision.

4. Constance Byers' Testimony

Ms. Byers is a licensed psychologist who has served as Respondent's professional counselor since January 2011. She testified that Respondent does not have a problem with alcohol abuse except in times of stress and that she has developed other methods for coping with stress. She states that Respondent is committed to her weekly therapy sessions, attends Alcoholics Anonymous (AA) meetings regularly, and, in her opinion, is completely safe to practice pharmacy.

C. Analysis and Recommendation

Staff argues that a suspension of Respondent's Texas license concurrent with the suspension of her North Carolina license is the appropriate disciplinary action because the Board cannot allow pharmacists to work in Texas who have had their practice ability taken away in another state. Staff asserts that to do otherwise would compromise the integrity of all states' licensing systems if pharmacists were allowed to jump from state to state in order to avoid disciplinary action. Staff cites to the aggravating factors in this case as pointed out by Ms. Fisher and argues that these factors outweigh any mitigating factors.

Respondent argues that the mitigating factors support the treatment of Respondent in the same way as the Board has treated other pharmacists who suffered from an alcohol or drug dependency but who were found to be able to practice safely: a 5-year probated suspension during which Respondent would participate in the Texas PRN program, undergo random drug and alcohol screening, attend AA meetings, and work under the supervision of another pharmacist.³ Respondent cites to the mitigating factors set forth in the Board rule at 22 TAC § 281.62(2), including absence of potential harm to the public, implementation of remedial measures to correct or mitigate harm from her conduct, rehabilitative potential, prior community service and present value to the community, and monitoring of an impairment.

After reviewing the evidence and arguments of the parties, the ALJ is of the opinion that Respondent's license should be suspended for a period of five years, but that the suspension should be fully probated. It appears certain that by participating in the Texas PRN program, Respondent will secure the same results that she would if she were required by the Board to participate in the North Carolina PRN program in order to retain her Texas license. Any benefit to Texas by having consistency with the North Carolina order is outweighed by the fact that Respondent is not seeking to evade compliance with the reinstatement provisions of the North Carolina order, but only to avoid the considerable financial hurdles she would face to achieve that compliance, particularly when the same end result could be achieved by her continued participation in the Texas PRN program.

III. FINDINGS OF FACT

1. On October 21, 1987, the Texas State Board of Pharmacy (Board) issued pharmacist's license No. 30315 to Tiana Jean Witcher (Respondent).
2. On May 20, 1992, the North Carolina Board of Pharmacy (NCBP) issued pharmacist's license No. 11664 to Respondent.
3. On or about October 21, 2008, Respondent was admitted to the Wake Forest University Baptist Medical Center Emergency Department and was treated for alcohol intoxication.
4. On or about December 12, 2008, Petitioner was admitted to Pavillion International, a substance abuse treatment center, where she received treatment for alcohol dependence.

³ Agreed Board Orders #G-09-025, #G-10-020, #B-08-038-A.

5. On or about January 2, 2009, Respondent voluntarily entered a substance abuse program administered by the North Carolina Pharmacist Recovery Network (NCPRN), entering into a contract governing the terms of her participation in the program.
6. Between March 2009 and November 2009, Respondent failed to comply with the terms of the contract with NCPRN by:
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11. On March 31, 2011, the Staff of Board issued Respondent a notice of hearing, to which it attached the complaint, informing her of the date, time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing would be held; the particular sections of the statutes and rules involved; and included a short, plain statement of the matter asserted.

12. All parties appeared and were represented at the hearing on sanctions on August 12, 2011, in Austin, Texas. Staff was represented by Julie C. Hildebrand, litigation attorney; Respondent was represented by Dan Lye, attorney.
13. The record of the contested case hearing closed September 23, 2011, upon receipt of the parties' written closing arguments.
14. In November 2007, Respondent's husband of two weeks died in a car accident. Her admittance to the emergency room at the North Carolina hospital for intoxication on October 21, 2008, was near the first anniversary of his death.
15. Respondent did not work on October 21, 2008, the date on which she was impaired due to alcohol.
16. When her North Carolina license was suspended, Respondent lost her job, had her home foreclosed upon, and was forced to relocate to Texas to live with her family. She does not pay rent to her father due to the substantial debt sustained from her North Carolina suspension.
17. Respondent does not have any remaining professional or social ties to North Carolina and her support network is in Texas.
18. Respondent voluntarily entered into a participation agreement with the Texas PRN (TxPRN) on or about November 2, 2010.
19. Respondent has complied with all terms and conditions of her participation agreement with TxPRN, including all drug and alcohol screening requirements such as not missing any of her daily call-ins to verify whether she has been selected to test on that day, not testing positive for drugs or alcohol, and not submitting dilute test samples.
20. The Board has not received any reports or other information from TxPRN regarding Respondent that might provide ground for disciplinary action.
21. In September 2011, Respondent was evaluated by a physician requested and approved by Staff who determined that she could safely practice pharmacy.
22. Respondent has been sober since October 22, 2008.
23. Respondent has been working at Texas Health Harris Methodist Hospital in Bedford, Texas, as a hospital pharmacist since October 2010, without incident. Her supervisor and director are aware of her history and present participation in TxPRN.
24. Respondent has never been impaired at her current place of work and her supervisor considers her to be a valuable asset and is willing to monitor Respondent as may be required by a Board order.

25. Respondent has established a support system in Texas consisting of her family, colleagues, treating psychologist, Alcoholics Anonymous (AA), and her TxPRN case worker to support her sobriety and prevent relapse.
26. The NCBP will not accept the participation of Respondent in the TxPRN program as a substitute for the requirement that she participate in the NCPRN program.
27. Due to her present residence in Texas and difficult financial situation, it is not feasible for Respondent to participate in the NCPRN program as a precondition to having the suspension of her North Carolina license lifted, and it is not financially viable for her to return to North Carolina.
28. Respondent is not seeking to evade compliance with the reinstatement provisions of the North Carolina order, but only to avoid the considerable financial hurdles she would face to achieve that compliance.
29. Respondent can safely practice pharmacy in Texas.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter, pursuant to TEX. OCC. CODE ANN. (Code) subtitle J (Texas Pharmacy Act), including the authority to sanction violations of the Act and of the Board's administrative rules.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on her having been disciplined by the NCBP for conduct substantially equivalent to conduct for which she could be disciplined in Texas, Respondent is subject to disciplinary action by the Board pursuant to Code § 565.001(a)(16).
5. The Board does not have a written policy or rule requiring that a pharmacist be prevented from practicing in Texas until the pharmacist resolves restrictions on her license in another state.
6. Respondent established that the mitigating factors in regard to her fitness to practice pharmacy outweigh the aggravating factors, as set forth in 22 TEX. ADMIN. CODE (TAC) § 281.62.
7. In several disciplinary cases, the Board has sanctioned pharmacists who suffered from an alcohol or drug dependency but who were found to be able to practice safely with a 5-year probated suspension during which they would participate in the Texas PRN

program, undergo random drug & alcohol screening, attend AA meetings, and work under the supervision of another pharmacist.

V. RECOMMENDATION

The ALJ recommends that, based on the above Findings of Fact and Conclusions of Law, the Board should suspend Respondent's pharmacist license for a period of five years, but that the suspension should be fully probated subject to such conditions as the Board deems appropriate.

SIGNED October 5, 2011.



ROY G. SCUDBAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

447 S.W.3d 520
Court of Appeals of Texas,
Austin.

The Texas State Board of Pharmacy,
and in their official capacities only, Gay
Dodson, Executive Director; and Jeanne D.
Waggener, President of [the Board](#), Appellants

v.

Tiana Jean Witcher, Appellee

NO. 03-12-00560-CV

|
Filed: October 31, 2014

Synopsis

Background: Pharmacist filed suit for judicial review of Board of Pharmacy's order indefinitely suspending her pharmacist license. The District Court, Travis County, 345th Judicial District, [Tim Sulak](#), P.J., reversed and remanded. Board appealed.

Holdings: The Court of Appeals, [J. Woodfin Jones](#), C.J., held that:

[1] reciprocal-sanctions policy was a “rule” within meaning of Administrative Procedure Act (APA), and

[2] issue was not novel or one with which Board was unfamiliar, making imposed adjudicative reciprocal sanctions policy invalid.

Affirmed; motion for rehearing overruled.

[Melissa Goodwin](#), J., dissented and filed opinion.

West Headnotes (13)

[1] **Health**

🔑 [Order, Judgment, or Remedy](#)

Board of Pharmacy applied reciprocal-sanctions policy to pharmacist, enforcing suspension of her state license concurrent with suspension of her out-of-state license, without regard to

her individual circumstances and in attempt to promote consistent sanctions generally applicable to all pharmacists licensed in other states, and therefore policy was “rule” within meaning of Administrative Procedure Act (APA), rather than statement regarding only internal management or organization of Board, not affecting private rights or procedures; sanctions were imposed on pharmacist despite Board's adoption of ALJ's findings that mitigating factors outweighed aggravating factors considered in assessing appropriate disciplinary penalty, and sanctions were, according to testimony from Board member, “Board's policy” and “standard sanction” in such circumstances. [Tex. Gov't Code Ann. § 2001.003\(6\)\(c\)](#); [22 Tex. Admin. Code §§ 281.60\(c\), 281.62](#).

[1 Cases that cite this headnote](#)

[2] **Administrative Law and Procedure**

🔑 [Validity](#)

Rule that is not properly promulgated under mandatory Administrative Procedure Act (APA) procedures is invalid. [Tex. Gov't Code Ann. § 2001.174\(2\)](#).

[1 Cases that cite this headnote](#)

[3] **Administrative Law and Procedure**

🔑 [Reversal](#)

Agency decision based on invalid rule must be reversed and remanded to agency if substantial rights of appellant have been prejudiced thereby. [Tex. Gov't Code Ann. § 2001.174\(2\)](#).

[Cases that cite this headnote](#)

[4] **Administrative Law and Procedure**

🔑 [Discretion of Administrative Agency](#)

Administrative Law and Procedure

🔑 [Arbitrary, unreasonable or capricious action; illegality](#)

An agency's decision is arbitrary or results from an abuse of discretion if the agency weighs only relevant factors that the legislature directs

it to consider but still reaches a completely unreasonable result.

[Cases that cite this headnote](#)

[5] **Administrative Law and Procedure**

🔑 [Stare decisis; estoppel to change decision](#)

Although agency is not bound to follow its decisions in contested cases in same way that court is bound by precedent, agency is required by courts to explain its reasoning when it appears to reviewing court that agency has departed from its earlier administrative policy or there exists apparent inconsistency in agency determinations.

[Cases that cite this headnote](#)

[6] **Health**

🔑 [Order, Judgment, or Remedy](#)

Case wherein Board of Pharmacy imposed adjudicative reciprocal-sanctions policy to suspend pharmacist's license whose out-of-state license had been suspended was not novel issue with which Board was unfamiliar, and thus it did not qualify as circumstance wherein adjudicative rulemaking was appropriate, making Board's reciprocal-sanctions policy invalid; Board adjudicated policy in prior case wherein it referenced existence of other cases involving reciprocal sanctions, and Board member testified that imposing reciprocal sanctions was "Board's policy" and their "standard sanction" under such circumstances. [Tex. Gov't Code Ann. § 2001.035\(a\)](#).

[1 Cases that cite this headnote](#)

[7] **Administrative Law and Procedure**

🔑 [Notice and comment, necessity](#)

Ad hoc rulemaking is a narrow exception to the Administrative Procedure Act's (APA) mandate that agency rules be adopted through notice-and-comment rulemaking procedures. [Tex. Gov't Code Ann. § 2001.174\(2\)](#).

[2 Cases that cite this headnote](#)

[8] **Administrative Law and Procedure**

🔑 [Duty to make](#)

Unless mandated by statute, the choice by an agency to proceed by general rule or by ad hoc adjudication is one that lies primarily in the informed discretion of the agency.

[Cases that cite this headnote](#)

[9] **Administrative Law and Procedure**

🔑 [Duty to make](#)

Administrative Law and Procedure

🔑 [Notice and comment, necessity](#)

When an agency seeks to adopt rules of general applicability, there is a presumption favoring the fairness and public participation that accompany formal rulemaking under the Administrative Procedure Act (APA) because allowing an agency to amend its rules through administrative adjudication undercuts the APA. [Tex. Gov't Code Ann. § 2001.174\(2\)](#).

[2 Cases that cite this headnote](#)

[10] **Administrative Law and Procedure**

🔑 [Duty to make](#)

In exceptional cases, an agency may choose to formulate and enforce a general requirement through a decision in a particular case, but that may be done only when using the rulemaking procedure would frustrate the effective accomplishment of the agency's functions. [Tex. Gov't Code Ann. § 2001.174\(2\)](#).

[Cases that cite this headnote](#)

[11] **Health**

🔑 [Review](#)

Board of Pharmacy waived appellate review of any error in trial court's order concerning the scope of remand following invalidation of Board's reciprocal-discipline policy as an invalid rule not promulgated in accordance with Administrative Procedure Act (APA), where Board did not challenge the trial court's order with respect to the scope of remand. [Tex. Gov't Code Ann. § 2001.174\(2\)](#).

[Cases that cite this headnote](#)

[12] **States**

🔑 [What are suits against state or state officers](#)

Subject to the limited “ultra vires” exception, sovereign immunity protects state officers sued in their official capacities to the same extent that it protects their employers.

[Cases that cite this headnote](#)

[13] **Health**

🔑 [Pharmacists](#)

Members of Board of Pharmacy who were sued in their official capacity did not have sovereign immunity from pharmacist's action challenging Board's reciprocal-sanctions policy as an invalid rule not adopted in accordance with Administrative Procedure Act (APA), since APA waived Board's immunity from suit. [Tex. Gov't Code Ann. §§ 2001.171, 2001.174\(2\)](#).

[Cases that cite this headnote](#)

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL *522 DISTRICT, NO. D-1-GN-12-00026, HONORABLE TIM SULAK, JUDGE PRESIDING

Attorneys and Law Firms

[Dan Lype](#), [Andre D'Souza](#), [Louis Leichter](#), for Tiana Jean Witcher.

[Kristofer S. Monson](#), for The Texas State Board of Pharmacy, [Gay Dodson](#) and [Jeanne D. Waggener](#).

Before Chief Justice [Jones](#), Justices [Goodwin](#) and [Field](#)

ON MOTION FOR REHEARING

OPINION

[J. Woodfin Jones](#), Chief Justice

We withdraw our opinion and judgment dated May 3, 2013, and substitute the following in its place. The appellants' motion for rehearing is overruled.

After a contested-case hearing, the Texas State Board of Pharmacy (“the Board”) indefinitely suspended Tiana Jean Witcher's pharmacist license. Witcher filed a suit for judicial review of the Board's order. *See* [Tex. Gov't Code § 2001.176](#). The trial court reversed the Board's order and remanded the cause to the Board, concluding that the indefinite suspension of Witcher's license was arbitrary and capricious and also was based on an invalid rule. *See id.* § 2001.174(2). We will affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are largely undisputed. Witcher received her Texas pharmacist license in 1987 and her North Carolina pharmacist license in 1992 via reciprocity. In November 2007, her husband died in a car accident two weeks after they were married. In October 2008, near the anniversary of his death, Witcher became so intoxicated during her personal time that she had to be treated for [alcohol poisoning](#). On the advice of a colleague, Witcher self-referred to the North Carolina Pharmacist Recovery Network (NCPRN), a program that aids impaired pharmacists, to address alcohol-abuse issues in her personal life. She voluntarily entered into a monitoring contract with NCPRN in January 2009.

Witcher subsequently came under scrutiny by the North Carolina licensing authority when she failed to comply with some of the terms of her voluntary monitoring agreement with the NCPRN. Due to the compliance issues, the North Carolina licensing authority suspended Witcher's pharmacist license in April 2010 based on concerns that she was unfit to practice pharmacy. In suspending Witcher's license, the North Carolina licensing authority found that she had “[i]ndulged in the use of drugs to an extent that renders the pharmacist unfit to practice pharmacy” and “[d]eveloped a physical or [mental disability](#) that render[ed her] unfit to practice pharmacy with reasonable skill, competence and safety to the public.” *See* [N.C. Gen.Stat. Ann. § 90-85.38\(a\)\(3\), \(5\)](#). Under the North Carolina suspension order, Witcher is ineligible to petition for reinstatement of her license until the NCPRN advocates for its reinstatement, a condition presumably directed to ensuring her fitness to practice pharmacy.¹ The North Carolina order further specifies that only the NCPRN may monitor Witcher's recovery.

***523** After Witcher's North Carolina license was suspended, she returned to Texas to live with her father because she lacked means to earn a living in North Carolina, had lost her house in foreclosure, and had no family or support system in North Carolina. Upon returning to Texas, she voluntarily enrolled in the Texas Pharmacist Recovery Network (TxPRN), became successfully employed as a pharmacist, and participated in therapy. Witcher averred that she did not abuse alcohol after her October 2008 hospitalization, did not abuse alcohol on the job, and sought assistance from NCPRN and TxPRN on her own initiative. While in Texas, Witcher has exhibited no signs of alcohol impairment in the workplace or elsewhere.

Based on the active suspension of Witcher's license in North Carolina, however, the Board instituted disciplinary proceedings to suspend Witcher's Texas license until the suspension of her North Carolina license has been lifted. *See* [Tex. Occ.Code § 565.001\(a\)\(16\)](#) (authorizing disciplinary action against licensed pharmacist disciplined by another state). Along with the disciplinary complaint, the Board's staff filed a motion for summary disposition, asserting that, as a matter of law, (1) Witcher was subject to discipline under section 565.001(a)(16) of the Texas Pharmacy Act (TPA), which authorizes the Board to discipline a license holder who has "been disciplined by the regulatory board of another state for conduct substantially equivalent to conduct described under this subsection"; (2) the violations found by the North Carolina licensing authority were, as a matter of law, substantially equivalent to conduct prohibited in TPA [sections 565.001\(a\)\(4\)](#) and [\(a\)\(7\)](#); and (3) the appropriate disciplinary sanction was "a period of suspension in Texas to run concurrently with the North Carolina suspension." *See id.* [§§ 565.001\(a\)\(4\)](#) (pharmacist may be disciplined upon "developing an incapacity that prevents the applicant or license holder from practicing pharmacy with reasonable skill, competence, and safety to the public"), [\(a\)\(7\)](#) (pharmacist may be disciplined for "us[ing] drugs in an intemperate manner that, in the board's opinion, could endanger a patient's life"), [\(a\)\(16\)](#) (pharmacist may be disciplined based on disciplinary action in another state for conduct that would violate the TPA); [565.051](#) (discipline for violation of TPA includes revocation, suspension, probated suspension, and licensing restrictions).

Witcher admitted that she was subject to being disciplined by the Board based on the North Carolina disciplinary action. However, because she had not abused alcohol since

October 2008 and it was undisputed that she was presently fit to practice pharmacy, she advocated for a five-year probated suspension in keeping with Board precedent in disciplinary proceedings involving impaired pharmacists who had engaged in significantly more egregious conduct but who had demonstrated current fitness to practice to the Board's satisfaction.

The administrative law judge (ALJ) who presided over the disciplinary proceedings granted partial summary disposition as to Witcher's violation of the TPA but denied summary disposition regarding the appropriate sanction to be imposed.² *See* ***524** [1 Tex. Admin. Code § 155.505 \(2014\)](#) (State Office of Admin. Hearings, Summary Disposition) (authorizing ALJ to issue decision without evidentiary hearing if no genuine issue of material fact and party is entitled to decision as matter of law). After an evidentiary hearing directed solely to the appropriate sanction, the ALJ recommended a five-year probated suspension, finding among other things that (1) Witcher voluntarily entered into a participation agreement with TxPRN, (2) she had complied with all terms and conditions of her TxPRN participation agreement, (3) she had been sober since October 22, 2008, which was prior to her self-referral to NCPRN, and was not working when she was impaired due to alcohol use, (4) she "can safely practice pharmacy in Texas," (5) the mitigating factors in her case outweighed the aggravating factors, (6) it was "not feasible for [Witcher] to participate in the NCPRN program as a precondition to having the suspension of her North Carolina license lifted, and it is not financially viable for her to return to North Carolina," and (7) the North Carolina licensing authority would not accept Witcher's participation in the TxPRN program as a substitute for the requirement that she participate in the NCPRN program. The ALJ further found that, in relocating to Texas, Witcher was "not seeking to evade compliance with the reinstatement provisions of the North Carolina order, but only to avoid the considerable financial hurdles she would face to achieve that compliance."

The Board adopted all of the ALJ's recommended findings of fact and conclusions of law without modification. However, in keeping with the Board's unwritten policy that a pharmacist with an active suspension in another state cannot practice pharmacy in Texas, the Board rejected the ALJ's recommended sanction and instead suspended Witcher's Texas license until her North Carolina license has been reinstated. The Board also required Witcher to submit to simultaneous monitoring by the TxPRN, even though the

terms of both the NCPRN and TxPRN agreements require Witcher to be physically present to participate in or complete several of the *525 tasks, including meeting attendance and drug and alcohol screenings.

After exhausting her administrative remedies, Witcher filed a suit for judicial review in the district court of Travis County. *See Gov't Code § 2001.176*. Witcher alleged, and the district court ultimately found, that (1) an enforced suspension of Witcher's license is arbitrary and capricious in light of the facts found by the Board and its conclusions of law, (2) the Board used an unwritten policy (“reciprocal-sanctions policy”) to impose an enforced suspension on Witcher's license, and (3) the use of the reciprocal-sanctions policy was arbitrary and capricious, resulted from improper ad hoc rulemaking, and violated the formal rulemaking requirements in the Administrative Procedure Act (APA) and the TPA. *See id.* § 2001.174(2) (specifying when trial court must reverse and remand in suit for judicial review); *see also id.* §§ 2001.021–.041 (governing agency rulemaking); *Tex. Occ.Code §§ 554.051–.057* (prescribing Board's rulemaking authority). The trial court did not disturb any of the Board's findings of fact and conclusions of law (which were unchallenged), but the court reversed the portion of the final order imposing an indefinite enforced suspension of Witcher's license. The court ordered the cause remanded to the Board to determine an appropriate sanction consistent with the court's findings but limited the proceedings on remand to the established record and the Board's affirmed fact findings and conclusions of law. *See Gov't Code § 2001.174(2)* (governing judicial review of agency decisions).

On appeal, the Board contends that the reciprocal sanction imposed in Witcher's case was not arbitrary and capricious because the Board has the exclusive authority to impose penalties and the sanction imposed was (1) within the range of sanctions authorized in the TPA, (2) consistent with statutory provisions that automatically deny licensing to new applicants who are subject to an active suspension in another state, and (3) consistent with the Board's policy, practice, and precedent of imposing reciprocal sanctions on Texas licensees who have been disciplined by other states.

DISCUSSION

In addition to having the authority to discipline a pharmacist for acts violating Texas laws and federal law applicable in Texas, the Board may also discipline pharmacists who have

been disciplined by pharmacy regulatory boards in other states if the pharmacist was disciplined for conduct that would violate the TPA. *See Occ.Code § 565.001(a)(16)*. If a pharmacist is found to have committed violations in another state that are substantially equivalent to Texas violations, the Board has available to it the same disciplinary options in regard to limiting a pharmacist's practice as it would have for a violation committed in Texas. *See id.* § 565.051. Those options include revocation, enforced suspension, probated suspension, and license restrictions. *See id.* Although the Board may consider an ALJ's recommendation regarding the sanction to be imposed, the Board retains discretion to determine the appropriate sanction. *22 Tex. Admin. Code § 281.60(b) (2014)* (Tex. State Bd. of Pharmacy, General Guidance); *cf. Sears v. Texas State Bd. of Dental Exam'rs, 759 S.W.2d 748, 751 (Tex.App.—Austin 1988, no writ)* (“The agency is charged by law with discretion to fix the penalty when it determines that the statute has been violated.”).

In selecting the appropriate sanction, the Board has formally promulgated rules setting forth guidelines to be considered in assessing sanctions for violations of the TPA. Those guidelines specify that “[t]he *526 ultimate purpose of disciplinary sanctions is to protect and inform the public, deter future violations, offer opportunities for rehabilitation, if appropriate, punish violators, and deter others from violations.” *22 Tex. Admin. Code § 281.60(c)*. The guidelines are further “intended to promote consistent sanctions for similar violations.” *Id.* Included in the analytical framework guiding disciplinary matters is section 281.62, a rule that prescribes several aggravating and mitigating factors that the Board may consider in assessing the appropriate disciplinary penalty.³ Although *527 the Board adopted the ALJ's finding that the mitigating factors in Witcher's case outweighed the aggravating factors, it nonetheless imposed an indefinite enforced suspension of Witcher's license coterminous with the suspension of her North Carolina license.

[1] [2] [3] It is undisputed that, under the TPA, the Board had the authority to discipline Witcher and to impose an enforced suspension of her license. The overarching issue in this appeal, however, is whether the particular sanction imposed—enforced suspension of Witcher's license concurrently with the suspension of her North Carolina license—resulted from the improper application of a “rule” as that term is defined in the APA. *See Tex. Gov't Code § 2001.003(6)* (defining “rule” for purposes of APA). A rule that is not properly promulgated under mandatory APA

procedures is invalid, *see El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n*, 247 S.W.3d 709, 714 (Tex.2008), and an agency decision based on an invalid rule must be reversed and remanded to the agency if substantial rights of the appellant have been prejudiced thereby, *see Gov't Code § 2001.174(2)* (specifying when trial court must reverse and remand agency decision). Because the Board's action in this case undeniably affected Witcher's substantial rights, we focus our analysis on whether the Board applied an improperly promulgated “rule” within the meaning of the APA.

The Board does not dispute that, in the present case, it employed what it characterized as a “non-binding” policy, practice, or precedent of imposing reciprocal sanctions on Texas licensees who have been disciplined by licensing authorities of other states if the conduct would have been sanctionable if committed in Texas. It is further undisputed that the Board did not adopt this policy, practice, or precedent in accordance with the APA's formal rulemaking procedures. The Board contends, however, that no matter how the reciprocal-sanctions policy is characterized, it was not required to comply with the APA's rulemaking procedures because the policy is not a “rule” within the meaning of the APA but rather is a “statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.” *See Gov't Code § 2001.003(6)(c)* (excluding such statement from APA's definition of “rule”). The Board asserts that it has the authority to develop internal practices intended to promote consistency in the assessment of administrative penalties and that the reciprocal-sanctions policy furthers that goal. Alternatively, the Board asserts that it was entitled to adopt the policy as an ad hoc rule because the Board did not have sufficient experience with the issue of suspended pharmacists to develop a “hard and fast rule.” *See City of El Paso v. Public Util. Comm'n of Tex.*, 883 S.W.2d 179, 188–89 (Tex.1994) (observing that agency rule may be adopted outside formal rulemaking procedures in limited circumstances including novel situations in which agency is inexperienced).

Witcher contends, however, that the policy falls squarely within the APA's definition of a rule, was not properly promulgated under the APA, and does not qualify for any recognized exception to the requirement of formal rulemaking. *See, e.g., id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947), as recognizing that agency has discretion to proceed on ad hoc or “case-by- case” basis when issue is novel to

agency or so specialized and varying as to be impossible of capture within any general rule); *see also Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 745 S.W.2d 918, 926 (Tex.App.–Austin 1988, writ denied) (recognizing ad hoc rulemaking can be appropriate to flesh out new statute or rule). Witcher also asserts that, absent the application of a rule, the Board's chosen sanction is arbitrary and capricious because, among other things, there is no rational relationship between the facts found by the Board and the sanction imposed. *See City of El Paso*, 883 S.W.2d at 184 (agency decision is arbitrary if agency fails to consider statutorily required factor, considers irrelevant factor, or weighs only relevant factors but reaches unreasonable result). Stated another way, Witcher contends that absent the application of a valid rule mandating a reciprocal sanction, such a sanction is unreasonable considering both her individual circumstances and prior Board precedent involving pharmacists who engaged in significantly more egregious substance-abuse conduct but who received probated five-year sentences upon establishing fitness to practice, as she has in this case. *See* Agreed Board Order # G–09–025 (May 5, 2010) (pharmacist who stole drugs from pharmacy, abused legal and illegal drugs, and violated terms of monitoring agreement with TxPRN given one-year active suspension followed by five-year probated suspension if fitness to practice established by end of active suspension); Agreed Board Order # G–10–020 (June 7, 2011) (involving similar facts and sanctions); Agreed Board Order # B–08–038–A (Aug. 11, 2010) (pharmacist who stole controlled substances given limited active suspension followed by five-year probated suspension if fitness to practice established by end of active suspension).

The APA defines a “rule” as follows:

“Rule”:

- (A) means a state agency statement of general applicability that:
 - i. implements, interprets, or prescribes law or policy; or
 - ii. describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

Gov't Code § 2001.003(6). This Court has held that, to constitute a “rule” under this definition, “an agency statement interpreting law must bind the agency *or otherwise represent its authoritative position in matters that impact personal rights.*” *Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 703 (Tex.App.–Austin 2011, no pet.) (emphasis added); see *Texas Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 905 (Tex.App.–Austin 2009, no pet.) (“Agency statements that ‘have no effect on private persons’ are not considered rules.”) (quoting *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764, 770 (Tex.App.–Austin 1999, no pet.)); *Combs v. Entertainment Publ'ns Inc.*, 292 S.W.3d 712, 722 (Tex.App.–Austin 2009, no pet.) (emphasizing that legal interpretation in Comptroller's letters would bind agency employees and “unambiguously express[ed] an intent to apply this interpretation ... in all future cases” involving private parties in similar circumstances); *Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators of Tex. Inc.*, 997 S.W.2d 651, 658 (Tex.App.–Austin 1999, pet. dism'd w.o.j.) (agency memoranda to its law-enforcement agents held to constitute “rules” on that record where there was evidence that agents “*not only intend to enforce, but *529 have enforced administrative sanctions*” in accordance with memoranda (emphasis added)); see also *Brinkley*, 986 S.W.2d at 770 (observing that agency advisory opinion regarding applicable law would have no legal effect “absent a statute that so provides *or some attempt by the agency to enforce its statement against a private person*” (emphasis added)). “Although the distinction between a ‘rule’ and an agency statement that concerns only ‘internal management or organization ... and not affecting private rights’ may sometimes be elusive, the core concept is that the agency statement must in itself have a binding effect on private parties.” *Slay v. Texas Comm'n on Env'tl. Quality*, 351 S.W.3d 532, 546 (Tex.App.–Austin 2011, pet. denied). In that regard, a distinction exists between nonbinding evaluative guidelines that take into consideration case-specific circumstances—which have been held not to be a rule—and policies that dictate specified results without regard to individual circumstances, which have been held to be a rule. *Compare id.* at 538–39, 548 (agency's guidelines used to evaluate environmental violations for purposes of recommending penalty based on individual circumstances was not “rule” under APA), with *El Paso Hosp. Dist.*, 247 S.W.3d at 714 (by establishing cut-off date for accepting data to determine hospitals' Medicaid reimbursement rate, agency established “rule” within meaning of APA) and *Entertainment Publ'ns*, 292 S.W.3d at 721 (“[T]he Comptroller's statements in the

March and April 2008 letters that the Comptroller will uniformly regard brochure-fundraising firms as the sellers and nonprofit entities as the sellers' agents, without regard to the individual factors considered under the Comptroller's previous guidelines, are ‘generally applicable’ statements for purposes of the APA.”).

The Board's disciplinary order in this case, including the findings of fact and conclusions of law, leave little doubt that the Board's reciprocal-sanctions policy is a statement implementing, interpreting, or prescribing the agency's policy that affects private rights and has implications beyond the parties to the underlying proceeding. It is, therefore, a rule within the meaning of the APA. See *El Paso Hosp. Dist.*, 247 S.W.3d at 714 (stating that “general applicability” under APA references agency statements that affect interests of public at large such that they cannot be given effect of law without public input); see also *CenterPoint Energy Entex v. Railroad Comm'n of Tex.*, 213 S.W.3d 364, 369 (Tex.App.–Austin 2006, no pet.) (“Ad hoc rulemaking occurs when the agency makes a determination that has implications beyond the instant parties....”).

In the final agency order in Witcher's disciplinary proceeding, the Board explained its reciprocal-sanctions policy in the following terms of general applicability:

A concurrent suspension is the appropriate disciplinary sanction because the Board can not [sic] allow pharmacists to work in Texas who have had their practice ability taken away in another state. The integrity of all states' licensing systems is compromised if pharmacists are allowed to jump from state to state in order to avoid disciplinary action. The Board has a duty to respect the public acts of another state board. This promotes uniformity and consistency in regulation among the states.

As articulated, the Board's reciprocal-sanctions policy applies not just to Witcher but to all pharmacists licensed in more than one state. The order essentially states that the Board is *duty-bound* to impose reciprocal disciplinary action without regard to any other factor that might be ***530** considered in individual circumstances.⁴

[4] The general applicability of the Board's policy is underscored by the passage that followed its articulation, which further demonstrates that the reciprocal-sanctions policy was applied without regard to the specific circumstances in Witcher's case:

Although the ALJ's recommendation [of a five-year probated sentence with monitoring] may satisfy concerns the Board would have regarding [Witcher's] impairment, it would not address the fact that [Witcher] is barred from practicing pharmacy by a regulatory board of another state for conduct substantially equivalent to conduct described under the Texas Pharmacy Act.

Moreover, contrary to the stated rationale for the reciprocal-sanctions policy, the Board adopted the ALJ's finding that Witcher was “not seeking to evade compliance with the reinstatement provisions of the North Carolina order, but only to avoid the considerable financial hurdles she would face to achieve that compliance.” Significantly, although the Board found that requiring Witcher to participate in the NCPRN program as a precondition to having the suspension of her North Carolina license lifted is not reasonably possible given her current circumstances, it nonetheless ordered her to do just that.⁵ These findings and conclusions support the construction of the Board's policy as a rule that applies irrespective of the circumstances in an individual case.

The general applicability of the reciprocal-sanctions policy and its impact on the interests of the public at large is further evident from the evidence and testimony admitted at the hearing before the ALJ. At the evidentiary hearing, Carol Fisher, the Board's Director of Enforcement, testified that reciprocal discipline is the “Board's policy” and the “standard sanction.” As the source of the policy, Fisher cited the case of *In re Nealy*, in which the Board had previously articulated its reciprocal-sanctions policy in the same terms of general applicability in a particularly egregious case in which a pharmacist who received his Texas license via reciprocity with Louisiana had a long history of violating the pharmacy laws of both states. See *531 Texas State Bd. of Pharmacy v. Nealy, Board Order # N-03-005, SOAH Docket No. 515-04-6488 (2005). After nearly 15 years of suspensions, revocations, reinstatements, and continuing violations, the Board suspended Nealy's license concurrently with an active suspension of his Louisiana license, and stated:

In previous cases with similar facts, the Board has typically imposed disciplinary action mirroring the action by another state board of pharmacy. The policy the Board considers in taking such action is to prevent licensees from escaping disciplinary action in one state by coming to Texas. If another state board of pharmacy has prohibited a pharmacist from practicing, so long as there is no evidence that a pharmacist has not been afforded due process in the other state, *the Board believes it is sound policy for the pharmacist to be prevented from practicing in Texas until the pharmacist resolves the restrictions on his license in the other state.* Otherwise a pharmacist would suffer no negative consequences from violations of the law in another state. Other pharmacists with licenses in Texas and in another state might assume that similar violations would not merit serious consideration by the Board.

Id. (emphasis added). Although the factual circumstances and extensive disciplinary history in *Nealy* would have justified the imposition of a reciprocal sanction without regard to the enunciated policy, the Board made a point of articulating the policy itself as the basis for imposing a reciprocal sanction. As the Board's staff noted in its written closing argument in Witcher's case: “It is clear from the order [in *Nealy*] that [the Board] based the selection of the sanction on the licensee's disciplinary status in the other state and not upon his prior disciplinary history with [the Board].”

Despite the stark disparity in individual circumstances between Witcher's case and the facts in *Nealy*, Fisher testified that she did not expect that the Board would do anything differently from what it had done in *Nealy* because the fact of an active suspension of Witcher's North Carolina license was dispositive of the appropriate sanction. Fisher repeatedly testified to the effect that individual circumstances do not matter. In this regard, the reciprocal-sanctions policy is analogous to agency policies that this Court in *Combs v. Entertainment Publications, Inc.*, 292 S.W.3d 712 (Tex.App.—Austin 2009, no pet.), and the supreme court in

El Paso Hospital District v. Texas Health & Human Services Commission, 247 S.W.3d 709 (Tex.2008), found to be rules under the APA.

In *Entertainment Publications*, a brochure-fundraising firm that contracted with tax-exempt schools to sell merchandise and food products to raise money for student groups challenged an agency policy that would require it to collect and remit tax on its sale of those goods to the schools. *Entertainment Publ'ns*, 292 S.W.3d at 715. Historically, the brochure-fundraising firm had structured its transactions with its customers to take advantage of the exemption to avoid collecting sales taxes on its initial sale of goods to those customers. *Id.* at 716. The tax-exempt customers, in turn, could use a different provision of the tax code to avoid collecting sales tax on the items when sold to the ultimate consumer, but only if the tax-exempt customer was considered to be the “seller” of the merchandise. *Id.* To determine who was the seller in such transactions, the Comptroller had historically applied several criteria to analyze the actual substance of the relevant transaction. That policy had been reflected in an earlier letter ruling, which a representative of the Comptroller's office testified accurately stated the Comptroller's policy *532 as to brochure fundraising at the time it was issued. However, the Comptroller subsequently issued two letters in which the policy was changed from the factor-based approach to a bright-line rule that the fundraising firm would always be considered the “seller.”

Like the Board in the present case, the Comptroller in *Entertainment Publications* argued that the letters were merely advisory opinions, not binding instructions, concerning her future enforcement of the sales tax. This Court disagreed, holding:

There is no question in this case that the [Comptroller's] March and April 2008 letters are statements implementing, interpreting, or prescribing law or policy. As the Comptroller's witness testified, these letters communicated the Comptroller's intention to apply section 151.024 in all cases involving brochure fundraising firms, thereby interpreting the tax code to mean that such firms are, for purposes of collecting and remitting sales tax,

always the “sellers” of the taxable items.

Id. at 721. The Court further concluded that the policy was “generally applicable” within the meaning of the APA because

the Comptroller's statements in the March and April 2008 letters that the Comptroller will uniformly regard brochure-fundraising firms as the sellers and nonprofit entities as the sellers' agents, without regard to the individual factors considered under the Comptroller's previous guidelines, are “generally applicable” statements for purposes of the APA. These interpretations apply not only to [the appellee] and the tax-exempt groups with which it conducts business, but to all brochure-fundraising firms engaging in business across the state.

Id. at 721–22.

As in *Entertainment Publications*, the present case involves a policy that establishes a bright-line rule that is applicable without regard to individual circumstances that could be considered under section 281.62 of the Board's rules. In addition, both the terms of the final order and the testimony by the Board's Enforcement Director during the disciplinary proceeding reveal the Board's intent to apply the policy not just to Witcher but also prescriptively to others.

In *El Paso Hospital District*, the Texas Supreme Court considered whether the Health & Human Services Commission's (HHSC) data-collection method for calculating prospective Medicaid inpatient service rates was an agency rule as defined by the APA. 247 S.W.3d at 711. In determining the reimbursement rate, HHSC employed a policy of accepting data from claims paid only through a specified date in the year following the base year. *Id.* at 713. Claims for all patients admitted during the base year, but not paid by the cut-off date, were not included in determining the prospective reimbursement rates. *Id.* This policy resulted in the exclusion of data for services actually performed in the base year if the claims were not paid before the cut-off date. *Id.* The supreme court rejected HHSC's argument that the cut-off date was not a rule itself but rather an interpretation of its own base-year rule. *Id.* at 714. The court concluded that

the cut-off rule fell squarely within the APA's definition of a rule because (1) it implemented HHSC's policy and described its data-collection procedure and (2) it applied to all hospitals receiving reimbursement for inpatient Medicaid services. *Id.*

The court observed that HHSC's rules provided that it would use a base year, defined as “[a] 12–consecutive–month period of claims data,” to calculate the Hospitals' rates and that the effect of the cut-off *533 date was to modify the base-year rule by controlling the data HHSC would use from that base year. *Id.* at 714 (quoting 1 Tex. Admin. Code § 355.8063(b)(5)). The court also determined that the cut-off date did not concern the agency's internal management or organization but rather affected the Hospitals' private rights. *Id.* at 714–15. Consequently, the court said, the Hospitals were “entitled to have their prospective reimbursement rates determined according to the formula set out in HHSC's rules.” *Id.* Because the cut-off date was a rule that had not been properly promulgated, it was found to be invalid. *Id.*

In the present case, the reciprocal-sanctions policy the Board cited in its final order is analogous to the cut-off date in *El Paso Hospital District* in that it establishes one of the aggravating factors in section 281.62 of the Board's rules—specifically, subsection (1)(I) pertaining to disciplinary actions taken by any state—as an outcome-determinative factor. Although use of the factors in section 281.62 is discretionary, the elevation of one of those factors to case-dispositive status either constitutes a modification of that rule or the establishment of a new rule.

The Board argues that the reciprocal-sanctions policy is like the evaluative penalty guidelines this Court concluded did not constitute a rule in *Slay v. Texas Commission on Environmental Quality*, 351 S.W.3d 532, 548 (Tex.App.–Austin 2011, pet. denied). That case—unlike the present case, *Entertainment Publications*, and *El Paso Hospital District*—involved guidelines that required evaluation of case-specific factors in formulating a recommendation for an appropriate sanction. See *id.* at 537–42. Although the guidelines considered in *Slay* were intended to achieve a level of consistency when similar circumstances were present, they did not require a specific result in all cases. There was no per se penalty dictated by the guidelines; rather, the agency's staff was required to use a formalized analytical structure to evaluate the case, but the structure did not direct a particular outcome. *Id.* at 546–48. That is the opposite of the circumstances in the present case.

Considering the foregoing, we conclude that construing the Board's policy as a “rule” is consistent with the supreme court's instruction that we consider the intent of the agency, the prescriptive nature of the policy, and the context in which the agency statement was made. Cf. *Entertainment Publ'ns*, 292 S.W.3d at 722 (citing *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 443 (Tex.1994)). The Board has unambiguously expressed its intent to apply the reciprocal-sanctions policy to all Texas pharmacists licensed to practice in other states, regardless of whether the particular circumstances of each case might result in a different sanction if the aggravating and mitigating factors in agency rule 281.62 were considered. Cf. 22 Tex. Admin. Code § 281.62 (2014) (Tex. State Bd. of Pharmacy, Aggravating and Mitigating Factors) (listing factors that “may be considered in determining the disciplinary sanctions imposed by the board if the factors are applicable to the factual situation alleged”); cf. also *Entertainment Publ'ns*, 292 S.W.3d at 722 (construing Comptroller's letters that changed policy from “seller versus agent-for-seller” analysis to bright-line standard). Without doubt, the Board's policy “represent[s] its authoritative position in matters that impact personal rights.”⁶ See *Sunset Transp., Inc.*, 357 S.W.3d at 703.

[5] *534 Furthermore, having previously articulated the reciprocal-sanctions policy in *Nealy* and as it is rearticulated in *Witcher's* case, the Board is not entirely free to disregard it in future cases. Although an “ ‘agency is not bound to follow its decisions in contested cases in the same way that a court is bound by precedent.’ ... [,] an agency is required by courts to ‘explain its reasoning when it “appears to the reviewing court that an agency has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations.” ’ ” *Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425, 438 (Tex.App.–Austin 2006, pet. denied) (quoting *Flores v. Employees Retirement Sys. of Tex.*, 74 S.W.3d 532, 533–34 (Tex.App.–Austin 2002, pet. denied)).⁷

[6] The foregoing analysis leads us to conclude that the Board's informally announced reciprocal-sanctions policy constitutes an agency “rule” as that term is *535 defined in the APA. It is well established that a rule that is not adopted in accordance with the APA's rulemaking procedures is typically invalid. *El Paso Hosp. Dist.*, 247 S.W.3d at 715 (citing Gov't Code § 2001.035(a)). In exceptional cases, however, an agency may choose to formulate and enforce a general requirement through a decision in a particular case. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255

(Tex.1999). Adjudicative rulemaking has been recognized as appropriate in limited circumstances in which an agency is confronted with (1) an issue of first impression, (2) a new or amended statutory scheme or administrative rules, or (3) an issue that cannot be adequately captured within the bounds of a general rule because the problem is so specialized and varying in nature. None of those circumstances is present in this case.⁸ Accordingly, the rule embodied in the reciprocal-sanctions policy is invalid and should not have been applied in Witcher's case. The inclusion of general language in the final order that the sanction imposed “best reflects the Board's determination of the seriousness of the violation and is the best sanction to deter future violations” neither negates the rule's obvious application in Witcher's case nor suggests an alternative basis for the Board's decision. The trial court did not err in reversing the Board's order and remanding the cause to the Board for reconsideration of the appropriate sanction under properly promulgated rules.

ON MOTION FOR REHEARING

In its initial appellate briefing, the Board's principal arguments were that (1) the Board's order did not contain or adopt a “rule” at all, and (2) if it did, the rule fell within one of the narrow circumstances in which ad hoc rulemaking is permitted. The Board has now filed a motion for rehearing raising wholly new issues and arguments. Although we conclude that the motion for rehearing does not require that we alter the substance of our original opinion, we add this supplemental opinion to address some of the new arguments raised in the motion.

It is undisputed that, at all relevant times, there was no statute or regulation that mandated the imposition of an identical reciprocal sanction for a Texas licensee whose out-of-state pharmacist's license had been suspended or revoked by another state. Rather, the Board's formally adopted regulations provided a number of aggravating and mitigating factors to be considered in determining the appropriate disciplinary sanction in an individual disciplinary proceeding. See 22 Tex. Admin. Code § 281.62 (providing evaluative factors in cases involving non-criminal conduct). The disciplinary action taken by another jurisdiction was but one of those factors. *Id.* § 281.62(1)(I). The central issue in this case is whether the Board improperly engaged in ad hoc rulemaking (also referred to as adjudicative rulemaking) when it applied a general policy that requires, as a standard sanction, the imposition of a reciprocal sanction

without regard to any other factor identified in the applicable regulation and without regard to whether the rationale underlying the policy is actually implicated by the affected pharmacist's individual circumstances.

An ad hoc rule is a general statement of law or policy that is made in the context of a contested case and the impact of which *536 will extend to persons beyond those who are parties to the proceeding at hand.

[T]he Texas Supreme Court and the Austin Court of Appeals have both recognized that an agency may formulate a rule for the first time within a contested case proceeding. Such act of rulemaking has been labeled ad hoc adjudication or ad hoc rulemaking or case by case rulemaking.

... [A]n ad hoc “rule” is not a mere finding of fact or interpretation of a statutory term but it is an agency formulating policy subject to its delegated rule making power that sets forth a standard that is binding on the parties before the agency.

2 Ronald L. Beal, *Texas Administrative Practice and Procedure* § 10.1 at 10–2 to 10–3 (Supp. 6/2009) (footnotes omitted).

While ad hoc rulemaking is an exercise of legislative power, the rules are developed by the “common law” method [i.e., within a contested case] that then imposes the rules by stare decisis and precedent. While the particular contested case order which adopted an ad hoc rule is only directly applicable to those to whom it has been applied, the agency will be required to apply it to future parties with substantially similar conditions.

1 Beal, *supra* § 2.4 at 2–58 (Supp. 6/2010).

The present case presents a quintessential example of ad hoc rulemaking. Pursuant to the APA's notice-and-comment rulemaking procedures, the Board had formally adopted a rule setting forth 15 aggravating factors and 12 mitigating factors that could be considered in determining the appropriate sanction to be assessed against a pharmacist who had violated Board rules. See 22 Tex. Admin. Code § 281.62. Nonetheless, in this case the Board's contested-case order stated that, as a matter of policy, one of the aggravating factors listed in

Rule 281.62(1) would be dispositive in all cases in which that factor was present, regardless of the presence or absence of any of the other 26 enumerated factors. *Id.* at 281.62(1)(I). This statement was announced as a matter of general policy. This is the essence of an ad hoc rule. See 1 Beal, *supra* at § 2.4 (Supp. 6/2010); Ron Beal, *Ad Hoc Rulemaking in Texas: The Scope of Judicial Review*, 42 *Baylor L.Rev.* 459, 461–67 (1990); Ron Beal, *Ad Hoc Rulemaking: Texas Style*, 41 *Baylor L.Rev.* 101, 102–07 (1989); see also Ron Beal, *The APA and Rulemaking: Lack of Uniformity within a Uniform System*, 56 *Baylor L.Rev.* 1, 13–18 (2004).

The main thrust of the Board's motion for rehearing is that the Board (and, by extension, any administrative agency) has virtually unrestricted discretion to engage in ad hoc rulemaking. In advancing this position, which was not previously made to this Court, the Board relies largely on two arguments, which were likewise not previously made to this Court. First, the Board asserts that certain statements in *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248 (Tex.1999), in which the Texas Supreme Court recognized severe limitations on an agency's authority to engage in ad hoc rulemaking, are mere “dictum” that can safely be ignored. Second, the Board asserts that, in any event, the holding in *Rodriguez* was undercut if not overturned—sub silentio—by the supreme court's later opinion in *Railroad Commission of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69 (Tex.2003). We disagree on both counts.

Rodriguez v. Service Lloyds Ins. Co.

The supreme court in *Rodriguez* emphasized the importance of requiring agencies to adhere to the notice-and-comment rulemaking procedures mandated by the APA: *537 “A presumption favors adopting rules of general applicability through the formal [notice-and-comment] rulemaking procedures as opposed to administrative adjudication. Allowing an agency to create broad amendments to its rules through administrative adjudication rather than through its rulemaking authority undercuts the [Administrative Procedure Act \(APA\)](#).” 997 S.W.2d at 255. The court held that agencies could utilize ad hoc rulemaking *only in narrow circumstances*:

In exceptional cases, an agency may choose to formulate and enforce a general requirement through a decision in a particular case. An agency may do this when using the [notice-and-comment] rulemaking procedure would

frustrate the effective accomplishment of the agency's functions. Adjudicative rulemaking may be appropriate, for example, *when the agency is construing a new rule* or when a dispute deals with a problem that requires ad hoc resolution because *the issue cannot be captured within the bounds of a general rule*. The agency's discretionary choice to rely on adjudication is subject to judicial review and revision.

Id. (citations omitted) (emphases added). In recognizing stringent limitations on an agency's power to use ad hoc rulemaking, the *Rodriguez* court did not make new law and did not go out on a jurisprudential limb.⁹ Rather, the court upheld *the plain language of the APA* as prescribing the method and manner by which a state agency can adopt generally applicable statements of law, policy, procedure, or practice. See *Tex. Gov't Code* §§ 2001.0225–.034 (governing agency rulemaking); cf. *generally Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 173, 199 (Tex.2004) (holding that APA's plain language controls in absence of express conflict with agency's enabling statute or unless clear evidence exists of contrary legislative intent). An improperly adopted rule is voidable. *Tex. Gov't Code* § 2001.035(a).

In its motion for rehearing in the present case, the Board attempts to dismiss these holdings in *Rodriguez* as dictum. They are not. In *Rodriguez*, the Texas Workers' Compensation Commission had formally adopted a rule requiring that an initial impairment rating be disputed by the claimant within 90 days after the rating was assigned. 997 S.W.2d at 252. Over the years, however, the Commission had purported to create ad hoc exceptions to the 90-day deadline. *Id.* at 254–55. The claimant in *Rodriguez* sought to take advantage of those exceptions. The supreme *538 court rejected the agency's ad hoc exceptions as improper, holding that the formally adopted rule would control:

Here, we see no reason to overturn the presumption favoring the fairness and public participation that accompany formal rulemaking under the APA. The 90-day Rule certainly is not new. In addition, the Commission could have easily formulated exceptions in the language of a general rule. In fact, the Commission appeals panels formulated their exceptions in the language of a general rule....

Id. at 255 (citations omitted).

[7] Thus, the *Rodriguez* opinion not only *announced* the standard by which courts should determine the validity of ad hoc rules, it specifically *applied* that standard in evaluating—and rejecting—the Commission's ad hoc exceptions. Far from being peripheral to the court's holding, the *Rodriguez* opinion's references to the exceptional circumstances needed to make ad hoc rulemaking permissible (“construing a new rule” or addressing an “issue [that] cannot be captured within the bounds of a general rule”) were central to the court's decision. Accordingly, the relevant statements in *Rodriguez* were not dictum. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 274 (2nd ed.1995) (quoting Judge Posner's definition of “dictum” as “a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding” contained in *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir.1986)). We therefore continue to be bound by the holdings in *Rodriguez*, which can only be read as affirming that ad hoc rulemaking is a narrow exception to the APA's mandate that agency rules be adopted through notice-and-comment rulemaking procedures.

Railroad Commission of Texas v. WBD Oil & Gas Co.

The second major argument raised in the Board's motion for rehearing is that the supreme court's holding in *Rodriguez* described above was undercut by the court's later opinion in *Railroad Commission of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69 (Tex.2003). Even a casual reading of *WBD*, however, shows that it is inapplicable to the present case. The sole issue in *WBD* was whether field rules adopted by the Railroad Commission after a trial-type proceeding (which the supreme court held to be a contested case) could be challenged under section 2001.038 of the APA or instead had to be challenged through contested-case procedures. See *id.* at 74. Section 2001.038 provides that “[t]he validity or applicability of a rule ... may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.” *Tex. Gov't Code* § 2001.038(a). The court held that the field rules at issue could not be challenged under section 2001.038 but had to be challenged through the procedure for challenging a contested-case order:

Thus, as we read the APA, judicial review of orders adopting field rules should be the same as in other contested case decisions....

Accordingly, we conclude that Commission field rules adopted in a contested case like those involved here cannot be challenged in a declaratory judgment action under section 2001.038 of the APA.

WBD, 104 S.W.3d at 79. Nowhere in the supreme court's *WBD* opinion is ad hoc rulemaking mentioned. Nowhere in the opinion is *Rodriguez* cited, much less discussed *539 or overruled. In short, ad hoc rulemaking was never an issue in *WBD*.

The procedural posture of the present case, on the other hand, is radically different. Here, Witcher *did* use contested-case procedures to challenge the Board's ad hoc rule. She timely filed a motion for rehearing with the Board, complaining of the ad hoc reciprocal-sanction rule. When that was overruled, she timely filed a suit for judicial review, again complaining of the ad hoc rule. See *Tex. Gov't Code* §§ 2001.171, .174–76. The trial court agreed, ruling that “the Board's use of an unwritten policy to impose an enforced suspension of Ms. Witcher's license is 1) arbitrary and capricious, 2) improper ad-hoc rulemaking, and 3) a violation of the APA and Pharmacy Act's rulemaking requirements.” Thus, as stated above, the dispositive issues in this appeal are (1) whether the Board's contested-case order applied an ad hoc “rule,” and (2) if it did, whether the circumstances fall within one of the narrow exceptions in which ad hoc rulemaking is permitted. *WBD* does not control these questions.

Nonetheless, the Board appears to contend in its motion for rehearing that *WBD* stands for the proposition that (1) agencies generally have unqualified discretion to adopt rules either by notice-and-comment rulemaking or by ad hoc adjudication and (2) an agency statement that “implements, interprets, or prescribes law or policy” adopted ad hoc in an adjudicative proceeding can never be a statement of general applicability as required to meet the APA's definition of a “rule.” See *Tex. Gov't Code* § 2001.003(6) (defining “rule” for purposes of APA). Neither of these broad propositions is supported by the applicable statutory schemes or the relevant jurisprudential environment.

We will not revisit the second proposition because our original opinion adequately explains our conclusion that the reciprocal-sanctions policy meets the APA's definition

of a rule and we discern nothing in *WBD* that alters that conclusion.¹⁰ Our discussion of the first proposition *540 proceeds from our conclusion that the reciprocal-sanctions policy is a rule that was not promulgated under the APA's mandatory rulemaking procedures before being applied to dictate the sanction imposed in Witcher's case.

In a nutshell, (1) the APA contains a statutory mandate governing agency adoption of rules of general applicability; (2) the Board's enabling statute, the TPA, contains no language that limits the APA's reach or expands the Board's rulemaking authority; and (3) to the extent the Board arguably has discretion to use its limited statutory adjudicatory authority to adopt ad hoc rules of general applicability, the facts of this case do not support the exercise (through any recognized or proffered exception to APA rulemaking) of any such discretion in contravention of the APA's plain language and the presumption favoring APA rulemaking.

[8] As a general proposition, “[u]nless mandated by statute, the choice by an agency to proceed by general rule or by ad hoc adjudication is one that lies primarily in the informed discretion of the agency.” *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 799 (Tex.App.–Austin 1982, writ ref'd n.r.e.) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947)). The APA is a statute that mandates the procedures by which agencies are permitted to adopt rules, and in *Mega Child Care*, the Texas Supreme Court affirmed the unremarkable proposition that the APA must be applied according to its plain language absent an express conflict with an agency's enabling statute. 145 S.W.3d at 199 (“[I]n the absence of express statutory language [in the agency's enabling statute] prohibiting judicial review, a legislative intent to prohibit judicial review [otherwise afforded under the APA] must be established by specific legislative history or other reliable evidence of intent.”). There is nothing in the TPA that support's the conclusion that the TPA's general grant of rulemaking authority or limited grant of adjudicatory authority categorically trumps the APA's mandate that agencies are to adopt rules of general applicability via notice-and-comment rulemaking.

With regard to rulemaking, the TPA states:

- (a) The board shall adopt rules consistent with this subtitle for the administration and enforcement of this subtitle.
- (b) If the board determines it necessary to protect the health and welfare of the citizens of this state, the board may make a rule concerning the operation of a licensed pharmacy

located in this state applicable to a pharmacy licensed by the board that is located in another state.

- (c) The board shall adopt rules regarding records to be maintained by a pharmacist performing a specific act under a written protocol.
- (d) The board by rule shall specify minimum standards for professional responsibility in the conduct of a pharmacy.

Tex. Occ.Code § 554.051. Thus, the TPA authorizes the Board to adopt rules but is silent with regard to the method or methods by which the Board may do so. The APA, on the other hand, is not silent about how agencies are required to adopt rules. *See Tex. Gov't Code* §§ 2001.0225–.036. Nevertheless, relying on the presumption that agencies have some discretion to select the method for adopting rules in the absence of a statutory prohibition, the Board now argues that the absence of an *express prohibition against* adjudicative rulemaking is all that is required to supersede the APA's plain directive. Such a position, however, is contrary to bedrock principles of statutory construction, which eschew reliance on extrinsic construction *541 aids that alter a statute's plain meaning. *See Shook v. Walden*, 304 S.W.3d 910, 917 (Tex.App.–Austin 2010, no pet.) (courts may resort to rules of construction or extrinsic aids only when statutory text is ambiguous); *cf. generally Mega Child Care*, 145 S.W.3d at 173 (holding that plain language of APA provides independent right to judicial review when agency's enabling statute neither specifically authorizes nor specifically prohibits judicial review).

In the present case, the TPA does not contain any language that limits the APA's mandate that agencies use notice-and-comment procedures to adopt rules, including making them available for public inspection and comment. *See Tex. Gov't Code* §§ 2001.004–.005, .0225–.034. Nor is there any other evidence of clear legislative intent to override or limit the APA's scope or to expand the Board's rulemaking authority.¹¹ Applying the APA as written, that statute provides the procedures required for the Board to adopt rules or regulations of general applicability. Although narrow exceptions have been recognized where necessary to allow the agency to accomplish its functions, the Board has cited none that would apply under the facts of this case, as we previously discussed and further explain here.

[9] To the extent the Board has “discretion” to adopt, repeal, or modify rules in an adjudicative proceeding by virtue of its statutory authority to adjudicate disciplinary

actions, the case law cannot be read to support the unfettered discretion alluded to in the Board's motion for rehearing. *542 Rather, the principle of "informed discretion" has long been tempered by "[a] presumption [that] favors adopting rules of general applicability through the [APA's] formal rulemaking procedures as opposed to administrative adjudication." *Rodriguez*, 997 S.W.2d at 255; see *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 688–689 (Tex.1992); cf. *City of El Paso v. Public Util. Comm'n of Tex.*, 883 S.W.2d 179, 189 n. 21 (Tex.1994) (observing that agency "discretion to proceed on a 'case-by-case basis is not absolute" and that agency is "bound to follow the [APA's] formal rulemaking procedures" when circumstances supporting ad hoc adjudication are not present). Thus, when an agency seeks to adopt rules of general applicability, there is a "presumption favoring the fairness and public participation that accompany formal rulemaking under the APA" because "[a]llowing an agency to [amend] its rules through administrative adjudication ... undercuts the APA." ¹² *Rodriguez*, 997 S.W.2d at 255.

[10] In "exceptional cases," an agency "may choose to formulate and enforce a general requirement through a decision in a particular case," but that may be done only when "using the rulemaking procedure would frustrate the effective accomplishment of the agency's functions." *Id.* (citing *Lone Star Gas Co.*, 844 S.W.2d at 689, and *Amarillo Indep. Sch. Dist. v. Meno*, 854 S.W.2d 950, 958 (Tex.App.–Austin 1993, writ denied)). Courts have recognized that ad hoc rulemaking "may be" appropriate, for example, when the agency is presented with a novel issue; when a dispute deals with a problem that is too technical, complex, or varied to be captured within the bounds of a general rule; or to fill in the interstices of a new statute or rule. See, e.g., *Rodriguez*, 997 S.W.2d at 255; *City of El Paso*, 883 S.W.2d at 188–89 & n. 21 (citing *Chenery*, 332 U.S. at 202–03, 67 S.Ct. 1760, and *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 745 S.W.2d 918, 926–27 (Tex.App.–Austin 1988, writ denied)); see also Beal, *supra*, 56 Baylor L.Rev. at 16 ("[N]otice and comment rulemaking procedures must be utilized unless a bona fide exception exists."). As stated in our original opinion, none of these circumstances applies to the reciprocal-sanctions policy at issue here. Even on rehearing, the Board has offered no exceptional circumstances to support adopting the reciprocal-sanctions policy on an ad hoc basis.

The Board asserts that the reciprocal-sanctions policy was not newly adopted in Witcher's case, or even in *Nealy*, but instead was adopted in contested cases 30 years ago (or over

the course of the past 30 years) to address the issue at a time when it was "novel." That proposition, however, is not supported by the plethora of Board decisions submitted for the first time in its motion for rehearing, nor by the history of the statutes governing pharmacist licensing. Until *Nealy* and the order in the present case, there is no indication that the results were governed by a prospective policy of general applicability rather than the significantly more egregious and entirely distinguishable factual and procedural circumstances presented in those cases. Moreover, this is not an issue that was unfamiliar to the legislature or the Board when the TPA was enacted. Indeed, suspension, revocation, cancellation, or restriction of an out-of-state license *543 has been a basis for disciplining a Texas licensee since the TPA's inception. ¹³ The reciprocal-sanctions policy simply does not address any novelty in the regulation of pharmacists that had not already been contemplated by the legislature in enacting the TPA.

Even if the issue had been "novel" at an earlier time, there are several other reasons why the Board would have abused its discretion in continuing to apply an ad hoc rule, including that any novelty or exigencies that might have previously warranted a deviation from the APA's procedures or the need for continued reliance on an ad hoc rule should have been temporary and lasted only so long as reasonably necessary to allow the Board an opportunity to comply with the APA in adopting the rule. ¹⁴ See *City of El Paso*, 883 S.W.2d at 188–89 & n. 21; cf. *Tex. Gov't Code* § 2001.034 (agency may enact "emergency rule without prior notice or hearing" upon finding "imminent peril to public health, safety, or welfare" but such rule may be used *only temporarily* pending adoption following APA's notice-and-comment rulemaking procedures). The availability of the APA rulemaking process and the amenability of the subject matter to promulgation as a formal rule support the presumption favoring the fairness and public participation that accompany notice-and-comment rulemaking under the APA. ¹⁵

*544 In sum, the Board's motion for rehearing does not persuade us that *WBD* requires a different outcome in this case. Nor does it persuade us that the Board appropriately adopted the reciprocal-sanctions policy as a rule of general applicability without complying with the APA.

The Board's Other Arguments in its Motion for Rehearing

The Board also complains that we are required to uphold the Board's decision if there is a rational basis underlying the reciprocal-sanction policy and if there is some evidence that it is applicable under the facts of Witcher's case. However, an agency's legislative rule is binding on all concerned, including the judicial department, only if the rule is (1) reasonable, (2) within the power delegated to the agency, and (3) *the product of proper procedure*. *General Elec. Credit Corp. v. Smil*, 584 S.W.2d 690, 694 (Tex.1979) (citing and quoting K. Davis, Administrative Law Treatise § 5.03 (1958 ed. and Supps.)); *Sharp v. Cox Tex. Publ'ns, Inc.*, 943 S.W.2d 206, 209 (Tex.App.–Austin 1997, no writ). “When an agency promulgates a rule without complying with proper rule-making procedures, the rule is invalid.” *El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n*, 247 S.W.3d 709, 715 (Tex.2008). Having concluded that the rule here is not the product of proper procedure, it lacks the force of law without regard to its reasonableness *vel non*.

[11] The Board also complains that the trial court erred in limiting the scope of remand to a determination of an appropriate sanction based on the established record and the affirmed fact findings and conclusions of law, which were not challenged below or on appeal. The Board contends that the *only* remedy for applying an improperly promulgated rule is remand for entirely new proceedings affording Witcher notice of the rules of decision to be applied, including the reciprocal-sanctions policy. *Cf. Texas State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 814 (Tex.App.–Austin 1988, writ denied) (“Assum[ing], *without deciding*, that the Board [of Pharmacy] possessed authority to promulgate official policy as to what that norm or standard [of conduct] should be; that it promulgated a valid policy consistent with the statutory provisions committed to the Board's administration; and that it permissibly promulgated and applied that policy retroactively in the course *545 of adjudicating Seely's case, rather than formulating and promulgating that policy under the rulemaking provisions of [the predecessor to the APA] to be applied prospectively”—*all such assumptions being necessary to valid license-revocation order*—due process required, at minimum, that Board give pharmacist prior notice of legal criteria Board would apply to his conduct); *Madden v. Texas Bd. of Chiropractic Exam'rs*, 663 S.W.2d 622, 626–27 (Tex.App.–Austin 1983, writ ref'd n.r.e.) (chiropractic board “arguably” had discretion to announce and apply new definition in ad hoc adjudicative proceeding rather than by promulgation of general rule through exercise of its rulemaking power, but, at minimum, due process required prior notice of legal criteria and hearing relative to issues

that would actually control result). In the present appeal, the Board did not challenge the trial court's order with respect to the scope of remand. Accordingly, if there is any error in that regard, it has been waived. *See Secure Comm, Inc. v. Anderson*, 31 S.W.3d 428, 430–31 (Tex.App.–Austin 2000, no pet.) (holding that appellant waives right to complain of ruling to which no error was assigned).

[12] [13] Finally, the Board summarily asserts that sovereign immunity bars Witcher's claims against the individual appellants who were sued in their official capacity.¹⁶ Subject to the limited “*ultra vires*” exception, sovereign immunity protects state officers sued in their official capacities to the same extent that it protects their employers. *See, e.g., University of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 776 (Tex.App.–Houston [1st Dist.] 1999, pet. dism'd w.o.j.) (“[T]o the extent [the nurse] was acting in her official capacity, she enjoys the same governmental immunity as UTMB on [the plaintiff's] claims under the Nurse Reporting Act.”). The Texas Supreme Court has explained the derivative nature of a state official's immunity as follows:

When a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit *held by the government itself*. It is fundamental that a suit against a state official is merely “another way of pleading an action against the entity of which [the official] is an agent.” A suit against a state official in his official capacity “is not a suit against the official personally, for the real party in interest is the entity.” Such a suit actually seeks to impose liability against the governmental unit rather than on the individual specifically named and “is, in all respects other than name, ... a suit against the entity.”

Texas A & M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 844 (Tex.2007) (internal citations omitted) (emphasis added); *see also, e.g., De Mino v. Sheridan*, 176 S.W.3d 359, 365 (Tex.App.–Houston [1st Dist.] 2004, no pet.). (“It is a well-established and generally accepted principle of law that suit against a government employee in his official capacity is, in all respects, a suit against the governmental unit.”). It is undisputed in this case that the Board's immunity from suit is waived by section *546 2001.171 of the APA.¹⁷ Because the Board is not immune from suit, neither are the individual appellants who were sued in their official capacities.

We overrule the Board's motion for rehearing.

CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Dissenting Opinion by Justice [Goodwin](#)

DISSENTING OPINION

[Melissa Goodwin](#), Justice

I withdraw my dissenting opinion dated May 3, 2013, and substitute the following in its place.

The only issue in this appeal is the sanction imposed against appellee Tiana Jean Witcher by the Texas State Board of Pharmacy. The Board's sanction against Witcher—suspending her Texas pharmacy license—was within the statutory range of punishment and consistent with past precedent and expressed policy concerns. Nonetheless, the majority concludes that the Board imposed the sanction based upon an invalid rule—a binding “reciprocal-sanctions policy.” Because the record supports that the Board did not have a binding policy and that it properly considered the facts and circumstances of this case, I respectfully dissent.

[Section 2001.003\(6\) of the Government Code](#) defines a rule to mean a “state agency statement of general applicability.” [Tex. Gov't Code § 2001.003\(6\)](#). As the majority recognizes, for an agency statement to be a rule, it must “bind the agency or otherwise represent its authoritative position in matters that impact personal rights.” [Texas Dep't of Transp. v. Sunset Transp., Inc.](#), 357 S.W.3d 691, 703 (Tex.App.–Austin 2011, no pet.); see [Slay v. Texas Comm'n on Env'tl. Quality](#), 351 S.W.3d 532, 546 (Tex.App.–Austin 2011, pet. denied) (noting that “core concept [of rule] is that the agency statement must in itself have a binding effect on private parties”).

The majority concludes that the Board's “unwritten policy that a pharmacist with an active suspension in another state cannot practice pharmacy in Texas” was an invalid rule. The majority focuses on testimony by the Board's director of enforcement at the contested case hearing and the Board's statements in its order concerning policy reasons for imposing a reciprocal sanction against Witcher. At the hearing, the director relied upon a prior order in which the Board imposed a reciprocal sanction of suspension based upon the disciplinary action by

another state's board of pharmacy. See *In re Nealy*, Bd. Order # N–03–005, SOAH Docket No. 515–04–6488 (2005). In *Nealy*, the Board noted that, “[i]n previous cases with similar facts, the Board has typically imposed disciplinary action mirroring the action by another state board of pharmacy.” But the fact that the Board has “typically imposed” a mirror sanction when faced with disciplinary action by another state board does not foreclose the Board from imposing a different sanction within its discretion depending on the facts and circumstances of a particular case. See [Slay](#), 351 S.W.3d at 546.

In the context of an agency's written policy “setting forth an elaborate methodology for applying statutory criteria” to determine administrative penalties, this *547 Court has explained the difference between a non-binding guideline and a rule. *Id.* at 538. In that case, we concluded that the district court did not err in determining that the “Penalty Policy” at issue was not a rule. *Id.* at 548. We explained: “[W]hat ultimately matters is that the district court also had evidence to the effect that the [agency] commissioners were not bound to follow the Penalty Policy's methodology when exercising their legislatively conferred discretion to impose penalties.” *Id.* at 546 (emphasis in original); see also [Texas Educ. Agency v. Leeper](#), 893 S.W.2d 432, 443 (Tex.1994) (“Not every statement by an administrative agency is a rule.”); [Texas Mut. Ins. Co. v. Vista Cmty. Med. Ctr., LLP](#), 275 S.W.3d 538, 555 (Tex.App.–Austin 2008, pet. denied) (noting it is “well-established that not every administrative pronouncement is a rule”); [Brinkley v. Texas Lottery Comm'n](#), 986 S.W.2d 764, 769 (Tex.App.–Austin 1999, no pet.) (observing that agencies routinely issue documents such as guidelines “which might contain statements that intrinsically implement, interpret, or prescribe law, policy, or procedure or practice requirements” that are not rules).

Here, the district court had evidence that the Board was not bound to impose a sanction of suspension. The Board's own conduct demonstrated that it was not bound to apply a reciprocal sanction but that it did so within its discretion and consistent with prior decisions addressing similar facts. See [Tex. Occ.Code § 565.051\(1\)](#) (board “may” “suspend the person's license”); [22 Tex. Admin. Code § 281.60 \(2012\)](#) (Texas State Bd. of Pharmacy, General Guidance)¹; [Pierce v. Texas Racing Comm'n](#), 212 S.W.3d 745, 754, 757 (Tex.App.–Austin 2006, pet. denied) (noting that “[p]olicy considerations ... are the reason that the Commission is granted discretion over what penalties should be imposed for racing violations” and upholding penalty that “followed

its guidelines” and “decade of precedent”); *see also Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425, 438 (Tex.App.–Austin 2006, *pet. denied*) (noting that “a licensing authority acts arbitrarily and unlawfully if it treats similarly situated applicants differently without an articulated justification”). The sole purpose of the contested case hearing was to determine the appropriate sanction. It was undisputed that Witcher's license was suspended in North Carolina, and she did not challenge the process or procedure in North Carolina that resulted in the suspension. If the board was “*duty-bound*” to suspend Witcher's license because her North Carolina license was suspended, as the majority suggests, why have the hearing? Why admit evidence at the hearing concerning the facts and circumstances of Witcher's particular case?

The Board's conclusions of law recognized that it did not have a binding policy that dictated the sanction of suspension against Witcher. The Board concluded ***548** that it “[did] not have a written policy or rule requiring that a pharmacist be prevented from practicing in Texas until the pharmacist resolves restrictions on her license in another state.” Similarly, at the open meeting where the Administrative Law Judge's proposal for decision was considered, the Board's representative stated:

There is not a policy that requires you to suspend when somebody is suspended in another state. However, suspension is an option. And so what you have to do is look at the facts—the findings of fact in this case and decide based upon everything that the Judge found, based upon her impairment, based on her management of that impairment, based upon her status in North Carolina what of your disciplinary options do you think is the appropriate option. And I've given you the arguments why I believe that it should be suspension and why we should look at what the other state did. But, no, there's not a policy that requires you to suspend and that's not what I'm asserting; but there is no need to have a policy on the flip side. It's not required that you have a policy that says what you do in these situations.

In contrast to the majority's conclusion that the Board's “reciprocal-sanctions policy” was a “bright-line rule that is applicable without regard to individual circumstances,” the Board's representative made clear to the Board that the appropriate sanction for Witcher was within the Board's discretion—not a foregone conclusion—and then argued for suspension based upon policy reasons.² *See Fay-Ray Corp. v. Texas Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex.App.–Austin 1998, *no pet.*) (upholding revocation of permit and noting that “an agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight”); *Sears v. Texas State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex.App.–Austin 1988, *no writ*) (“[T]he choice of penalty is vested in the agency, not in the courts.”).

Further, unlike the agency statements that were found to be rules in the cases cited by the majority, the agency statements at issue here were made during contested case hearings in the context of determining the appropriate sanction against an individual. *Compare El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n*, 247 S.W.3d 709, 711–12 (Tex.2008) (concluding that agency's “data-collection method for calculating prospective Medicaid inpatient service rates” was rule in suit for declaratory relief); *Combs v. Entertainment Publ'ns, Inc.*, 292 S.W.3d 712, 715 (Tex.App.–Austin 2009, *no pet.*) (concluding legal interpretations in letters sent by Comptroller were rules in suit for declaratory and injunctive relief), *with Railroad Comm'n of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 70, 79 (Tex.2003) (concluding that “field rules” were not rules of “general applicability” and noting that APA definition of rule “does not reference statements made in determining individual rights”).

Because I would conclude that the Board did not act based upon an invalid rule and that it considered the facts and ***549** circumstances of Witcher's case and then acted well within its discretion to impose the sanction of license suspension, I would affirm the order of the Board and reverse the trial court's judgment.³

As to the majority's supplemental opinion, I would not address issues and arguments raised by the Board for the first time in its motion for rehearing, except as to the individual appellants' assertion of immunity from suit. *See Wells Fargo Bank, N.A. v. Leath*, 425 S.W.3d 525, 540 (Tex.App.–Dallas 2014, *pet. filed*) (supp. op. on reh'g) (concluding issue raised for first time on rehearing not before the court and declining

to address it); *AVCO Corp. v. Interstate Sw., Ltd.*, 251 S.W.3d 632, 676 (Tex.App.–Houston [14th Dist.] 2008, pet. denied) (supp. op. on reh'g) (same); see also *OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 747 (Tex.App.–Dallas 2007, pet. denied) (op. on reh'g) (“A motion for rehearing does not afford a party an opportunity to

raise new issues after the case has been briefed, argued, and decided on other grounds, unless the error is fundamental.”).

All Citations

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Footnotes

- 1 The North Carolina suspension order notes that becoming eligible to petition for reinstatement does not guarantee that such petition will be granted. Thus, even if Witcher satisfies the precondition to applying for reinstatement, her license would remain suspended indefinitely under the North Carolina suspension order.
- 2 In granting partial summary disposition, the ALJ concluded from the following undisputed facts that Witcher was subject to disciplinary action by the Board in accordance with section 565.001(a)(16) of the TPA:
 1. Tiana J. Witcher (Respondent) holds pharmacist license No. 30135 issued by the Texas State Board of Pharmacy (Board) on October 21, 1987.
 2. On or about April 20, 2010, the North Carolina Board of Pharmacy (NCBP) entered a Final Order against the North Carolina license No. 11664 held by [Witcher]. That order made the following Findings of Fact:
 - a) On or about January 29, 2009, [Witcher] voluntarily entered a substance abuse program administered by North Carolina Pharmacist Recovery Network (NCPRN). At that time Respondent entered into a contract governing the terms of her participation in the program (Contract).
 - b) Between approximately March 2009 and November 2009, Respondent violated the terms of the Contract in various ways, including but not limited to:
 - i. By failing to call in to determine if she should be drug tested on or about March 14, 2009, April 15, 2009, and April 17, 2009;
 - ii. By submitting dilute urine samples on or about June 9, 2009, July 27, 2009, September 8, 2009, October 21, 2009, and November 24, 2009;
 - iii. By violating the Contract's limitations on her employment, specifically by working the third shift at the North Carolina Baptist Hospital Pharmacy in or about April 2009, without approval from NCPRN, and after NCPRN had denied her request for such approval; and
 - iv. By failing to participate in the required sessions of continuing care in July 2009.
 3. The April 10, 2010, Order placed [Witcher's] license on an indefinite suspension with the requirement that she may not petition for reinstatement unless she provides the NCBP with written notice from NCPRN that NCPRN will advocate for [her] reinstatement.
 4. [Witcher] had been disciplined by a regulatory board of another state for conduct substantially equivalent for which the Board may discipline a licensee.
- 3 Rule 281.62 provides:

The following factors may be considered in determining the disciplinary sanctions imposed by the board if the factors are applicable to the factual situation alleged....

(1) Aggravation. The following may be considered as aggravating factors so as to merit more severe or more restrictive action by the board:

 - (A) patient harm and the severity of patient harm;
 - (B) economic harm to any individual, entity, or the environment, and the severity of such harm;
 - (C) increased potential for harm to the public;
 - (D) attempted concealment of the conduct which serves as a basis for disciplinary action under the Act;
 - (E) premeditated conduct which serves as a basis for disciplinary action under the Act;
 - (F) intentional conduct which serves as a basis for disciplinary action under the Act;
 - (G) motive for conduct which serves as a basis for disciplinary action under the Act;
 - (H) prior conduct of a similar or related nature;
 - (I) disciplinary actions taken by any regulatory agency of the federal government or any state;
 - (J) prior written warnings or written admonishments from any government agency or official regarding statutes or regulations pertaining to the conduct which serves as a basis for disciplinary action under the Act;

- (K) violation of a board order;
- (L) failure to implement remedial measures to correct or mitigate harm from the conduct which serves as a basis for disciplinary action under the Act;
- (M) lack of rehabilitative potential or likelihood for future conduct of a similar nature;
- (N) relevant circumstances increasing the seriousness of the conduct which serves as a basis for disciplinary action under the Act; and
- (O) circumstances indicating intoxication due to ingestion of alcohol and/or drugs.

(2) Extenuation and Mitigation. The following may be considered as extenuating and mitigating factors so as to merit less severe or less restrictive action by the board:

- (A) absence of potential harm to the public;
- (B) self-reported and voluntary admissions of the conduct which serves as a basis for disciplinary action under the Act;
- (C) absence of premeditation to commit the conduct which serves as a basis for disciplinary action under the Act;
- (D) absence of intent to commit the conduct which serves as a basis for disciplinary action under the Act;
- (E) absence of prior conduct of a similar or related nature;
- (F) absence of disciplinary actions taken by any regulatory agency of the federal government or any state;
- (G) implementation of remedial measures to correct or mitigate harm from the conduct which serves as a basis for disciplinary action under the Act;
- (H) rehabilitative potential;
- (I) prior community service and present value to the community;
- (J) relevant circumstances reducing the seriousness of the conduct which serves as a basis for disciplinary action under the Act;
- (K) relevant circumstances lessening responsibility for the conduct which serves as a basis for disciplinary action under the Act; and
- (L) treatment and/or monitoring of an impairment.

[22 Tex. Admin. Code § 281.62 \(2014\)](#) (Tex. State Bd. of Pharmacy, Aggravating and Mitigating Factors).

- 4 The dissent makes much of the fact that “the Board’s representative” (i.e., a staff member) argued to the Board that it was not *required* to suspend Witcher. But in an administrative hearing, the agency’s staff is simply like any other party in the proceeding, and statements by a staff member are not deemed to be statements of the agency board or commission. Here, as in every contested case, the Board spoke through its order.
- 5 The Board adopted the ALJ’s finding that it would not be “feasible” for Witcher to comply with the NCPRN precondition to reinstatement. “Feasible” is defined to mean “capable of being done ... possible of realization,” “capable of being managed, utilized or dealt with successfully,” and “reasonable, likely.” *Webster’s Third New Int’l Dictionary: Unabridged* 831 (2002). “An agency’s decision is arbitrary or results from an abuse of discretion if the agency ... weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result.” *City of El Paso v. Public Util. Comm’n of Tex.*, 883 S.W.2d 179, 184 (Tex.1994). Thus, even if we were to agree with the Board that its policy is not a rule under the APA, the imposition of a requirement that the Board itself found to be virtually impossible to satisfy would suggest that the Board’s decision is arbitrary and capricious. If the Board applied a properly promulgated rule dictating such a consequence, however, it would be more difficult to conclude that the sanction lacked a rational basis. *Cf. Pierce v. Texas Racing Comm’n*, 212 S.W.3d 745, 753–54 (Tex.App.–Austin 2006, *pet. denied*) (agency did not abuse its discretion in applying zero-tolerance policy when racehorse tested positive for banned substance and unchallenged “guidelines” mandated loss of purse for type of violation involved).
- 6 After issuing its final order in Witcher’s case, the Board, using notice-and-comment rulemaking procedures, formally promulgated a rule requiring the imposition of reciprocal sanctions when a Texas licensee has been disciplined by the regulatory board of another state:
 - § 281.67. Sanctions for Out-of-State Disciplinary Actions
 - (a) When determining the appropriate sanction for a disciplinary action taken by a regulatory board of another state under § 565.001(a)(16), § 565.002(a)(13), or § 568.003(a)(13), the board has determined that the following shall be applicable for all types of licensees and registrants for such licenses and registrations issued by the board.
 - (1) If the other state’s disciplinary action resulted in the license or registration being restricted, suspended, revoked, or surrendered, the appropriate sanction shall be the same as the sanction imposed by the other state, such that the licensee or registrant has the same restriction against practice in Texas.

(2) If the license or registration is subject to any other type of disciplinary sanctions, the appropriate sanction shall be equivalent to or less than that imposed by the other state unless contrary to board policy.

(b) The sanctions imposed by this section can be used in conjunction with other types of disciplinary actions, including administrative penalties, as outlined in this chapter.

(c) When a licensee or registrant has additional violations of the Texas Pharmacy Act, the board shall consider imposing additional more severe types of disciplinary sanctions, as deemed necessary.

[22 Tex. Admin. Code § 281.67 \(2014\)](#) (Texas State Bd. of Pharmacy, Sanctions for Out-of-State Disciplinary Actions). In adopting that rule, the Board stated that the addition of [section 281.67](#) “clarifies the sanctions for disciplinary actions taken by a regulatory board of another state.” 37 Tex. Reg. 4046 (June 1, 2012) (emphasis added) (adopting new [section 281.67](#) of Board's rules); 37 Tex. Reg. 2145 (Mar. 30, 2012) (emphasis added) (proposing new [section 281.67](#)). This statement of the formal rule as a “clarification” might be construed to further support the prescriptive nature and general applicability of the reciprocal-sanctions policy prior to its formal adoption as a rule. But even if it is not, it at least demonstrates that the policy was capable of being captured in a rule, thus rendering one of the recognized exceptions to the APA's formal rulemaking procedures inapplicable. See [City of El Paso, 883 S.W.2d at 188–89](#) (observing that agency rule may be adopted outside formal rulemaking procedures in limited circumstances including when issue is so specialized and varying as to be impossible of capture within general rule).

7 In light of the facts the Board adopted in Witcher's case and the Board's acknowledgment that the underlying rationale of the policy is not strictly applicable to Witcher's individual circumstances, it is difficult to conceive of a scenario in which the Board would not apply the policy. At oral argument, the only scenario the Board's counsel could hypothesize was one for which no discipline would be authorized under the TPA in the first instance—that is, counsel suggested that the Board would not impose reciprocal discipline if a pharmacist's license was suspended in another state for something absurd, like wearing a red t-shirt. However, such conduct would not be sanctionable under the TPA, and accordingly the reciprocal-sanctions policy would not be implicated. See [Tex. Occ.Code § 565.001](#) (providing grounds for disciplining Texas licensee).

8 We are not persuaded by the Board's assertion that Witcher's case presented a novel issue with which the Board was unfamiliar. The case of *In re Nealy*, which references the existence of other cases involving reciprocal sanctions, refutes such a claim, as does Fisher's testimony.

9 See, e.g., [SEC v. Chenery Corp., 332 U.S. 194, 202–03, 67 S.Ct. 1760, 91 L.Ed. 1995 \(1947\)](#) (observing that agencies are less justified in resorting to ad hoc procedures in lieu of promulgating general rules, but recognizing that, to avoid “stultify[ing] the administrative process,” ad hoc decision making would be warranted in appropriate circumstances including reasonably unforeseeable situations, inexperience with particular problems, or inability to capture problem within bounds of general rule); [Railroad Comm'n of Tex. v. Lone Star Gas Co., 844 S.W.2d 679, 689 \(Tex.1992\)](#) (noting that agency has “informed discretion” in making decision to proceed via rulemaking or ad hoc adjudication but stating that *rulemaking should be utilized* except “[when] there is a danger that its use would frustrate the effective accomplishment of the agency's function”); [Amarillo Indep. Sch. Dist. v. Meno, 854 S.W.2d 950, 958 \(Tex.App.—Austin 1993, writ denied\)](#) (“exceptional cases” may arise in which “agency may justifiably choose, in its discretion to formulate and enforce a general requirement [ad hoc]” rather than by formal rulemaking, including construing new rule or statute or matter incapable of articulation as general rule); 1 Frank E. Cooper, *State Administrative Law* 177–85 (1965) (observing that legislature delegates rulemaking power to agency in expectation that it will ordinarily employ that power to formulate and adopt requirements of general applicability).

10 We reiterate our initial observations that the Board's disciplinary order included affirmative statements of general applicability that were prospective in operation and based on general policy considerations rather than Witcher's individual circumstances. Cf. [Combs v. Entertainment Publ'ns Inc., 292 S.W.3d 712, 724 & n. 8 \(Tex.App.—Austin 2009, no pet.\)](#) (agency not precluded from making individual determination, on case-by-case basis, but pronouncement of policy applicable to all similarly situated businesses without regard to individual circumstances constituted “rule” under APA). The evidence established that the Board considers a reciprocal sanction to be the “standard sanction.” Moreover, and perhaps most importantly, the indefinite-suspension sanction the Board imposed against Witcher's Texas license is so at odds with the Board's fact findings as to be inexplicable without the application of an outcome-determinative factor not found in the enabling statute or governing regulations. Without resort to such a rule, the sanction imposed is not supported by basic underlying fact findings and the Board's own precedent. Further, in addition to espousing a general policy to justify the selection of a standard sanction in reciprocal disciplinary scenarios, the Board's decision only sets forth justifications or explanations that contradict its fact findings. The Board's motion for rehearing presents no reason for us to reconsider our prior holding that the reciprocal-sanctions policy meets the APA's definition of a “rule.”

We do not read *WBD* as holding that contested-case proceedings can never give rise to a statement that meets the APA's general applicability standard. In that case, the supreme court concluded that the field rules emanating from a contested-case proceeding were not statements of general applicability *because they affected only individual interests in a specific field and had no impact on other oil and gas fields in the state*. See *WBD*, 104 S.W.3d at 79. That is not the situation presented here; the policy the Board articulated and applied in this case has statewide ramifications that extend far beyond the specific party to the contested-case proceeding.

- 11 To the contrary, when the TPA was enacted in 1981, the statute expressly required the Board to adopt rules in accordance with the APA. See Act of May 28, 1981, 67th Leg., R.S., ch. 255, § 16(a), 1981 Tex. Gen. Laws 638, 645 (“The rules shall be adopted, amended, or repealed in accordance with the Administrative Procedure Act.”). During a nonsubstantive codification in 1999, the foregoing language referring to compliance with the APA was removed. See Act of May 28, 1999, 76th Leg., R.S., ch. 388, § 1, 1999 Tex. Gen. Laws 1431, 1949 (current version at [Tex. Occ.Code § 554.051](#)). But according to a “Revisor’s Note” to the revised statute, the sentence requiring adoption of rules under the APA was deleted as “unnecessary” because the APA, by its express terms, applies to all agencies: “The revised law omits as unnecessary the portion of [the prior statute] that requires rules to be adopted, amended, or repealed in accordance with the Administrative Procedure Act. Chapter 2001, Government Code, requires each agency to follow that law in adopting rules.” *Id.* (Revisor’s Note). Notwithstanding this explanation, the Board asserts that the deletion of the reference to the APA means that, under the TPA, the Board has complete discretion to adopt rules in individual adjudications without regard to the APA. We disagree.

Although a revisor’s note cannot vary the plain language of a statute, the ability to proceed via “adjudicative rulemaking” is not included anywhere in the TPA. Therefore, the discretion to forgo compliance with APA rulemaking procedures could exist only by resorting to an extra-textual presumption that would create a conflict with the APA’s plain language. Harmonizing the TPA and APA to avoid such a conflict—and consistent with the legislature’s intent in adopting both statutes—the APA must be construed to govern the Board’s rulemaking activities in the absence of an express provision in the TPA to the contrary or clear evidence of legislative intent to restrict the APA’s scope and applicability vis-à-vis the Board. *Cf. Texas Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 199 (Tex.2004) (“In the absence of express statutory language prohibiting judicial review, a legislative intent to prohibit judicial review [despite independent right provided by the APA] must be established by specific legislative history or other reliable evidence of intent.”); *cf. also Texas Indus. Energy Consumers v. CenterPoint Energy Hous. Elec. LLC*, 324 S.W.3d 95, 107 (Tex.2010) (resort to “specific-controls-over-general maxim” is unnecessary because maxim only applies if overlapping statutes cannot be reconciled and court was able to construe two provisions to harmonize rather than conflict).

- 12 Although the Board attempts to distinguish *Rodriguez* on the basis that its holding is limited to *amendments* of rules made on an ad hoc basis, it is axiomatic that amending a rule is substantively, legally, and effectively indistinguishable from adopting a new rule or repealing an old one.
- 13 See *generally* Acts 1973, 63d Leg., R.S., ch. 286, § 1, 1973 Tex. Gen. Laws 677, 678. (authorizing Board to issue Texas pharmacy license by reciprocity on applicant’s satisfaction of certain conditions) (repealed); Act of May 28, 1981, 67th Leg., R.S., ch. 255, §§ 22(a)(5), 26(a)(15), 1981 Tex. Gen. Laws 638, 652, 54 (current versions at [Tex. Occ.Code §§ 558.101, 565.001\(a\)\(16\), 565.051](#)) (prohibiting Board from issuing Texas pharmacy license by reciprocity if applicant had license granted by another state “suspended, revoked, canceled or otherwise restricted for any reason” and authorizing a range of disciplinary actions against Texas licensee or applicant whose “license to practice pharmacy issued by another state [was] canceled, revoked, or suspended for conduct substantially equivalent” to conduct that would subject pharmacist to discipline under TPA); Act of May 28, 1987, 70th Leg., R.S. ch. 262, §§ 3, 5, 1987 Tex. Gen. Laws 1584, 1585 (current versions at [Tex. Occ.Code § 558.051\(a\)\(F\), 559.005\(a\)](#)) (amending TPA to prohibit initial licensing by examination if pharmacist had license issued by another state “suspended, revoked, canceled, surrendered, or otherwise restricted for any reason” and prohibiting Texas licensee from obtaining new license upon same circumstances if Texas license lapsed without renewal for two or more years).
- 14 Over the years, the Board has promulgated rules governing disciplinary sanctions on several occasions but failed to formally adopt the reciprocal-sanctions rule until June 2012, *after* its decision in Witcher’s case. See [22 Tex. Admin. Code § 281.67](#) (Texas State Bd. of Pharmacy, Sanctions for Out-of-State Disciplinary Actions). The Board’s regulatory history reveals that, in March 2000, it promulgated a rule expressly setting forth aggravating and mitigating factors as guidelines for determining the appropriate sanction in disciplinary actions under section 565.001 of the TPA, but the Board apparently was not moved at that time to include its “long-standing” reciprocal-sanctions policy in the new rule. See 25 Tex. Reg. 2574 (Mar. 24, 2000) (former 22 Tex. Admin. Code § 281.57). Nor was it moved to do so when the rule was amended

in 2005 and later repealed and replaced in 2006, both of which occurred after the Board's decision in *In re Nealy*, Bd. Order # N-03-005 (May 10, 2005). See 30 Tex. Reg. 7874 (Nov. 25, 2005) (former 22 Tex. Admin. Code § 281.57); 22 Tex. Admin Code § 281.62 (current version). Instead, “disciplinary actions taken by any regulatory agency of the federal government or any state” was included in the sanctions guidelines as *one factor among many* that could be considered.

15 The inadvisability of allowing the Board to freely adopt, amend, or repeal its rules in disciplinary proceedings is further demonstrated by the TPA's confidentiality provisions, which preclude the Board from publicly disclosing the contents of an order disciplining an impaired pharmacist. See *Tex. Occ.Code §§ 564.002* (“All records and proceedings of the board, an authorized agent of the board, or a pharmaceutical organization committee relating to the administration of this chapter (governing Texas's program to aid impaired pharmacists and pharmacy students) are confidential and are not considered public information....”), .003 (“The board may disclose that the license of a pharmacist who is the subject of [a confidential] order ... is suspended, revoked, canceled, restricted, or retired ... [but] may not disclose the nature of the impairment or other information that resulted in the board's action.”). Because the Board's orders are not uniformly made available for public inspection, using the disciplinary adjudicative process to announce new, amended, or repealed rules of general applicability would hinder the goals of openness and public participation reflected in the APA's provisions. See, e.g., *Tex. Gov't Code § 2001.004* (requiring agencies to make available for public inspection “all rules and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions”); see also *Rodriguez v. Service Loyds Ins. Co.*, 997 S.W.2d 248, 255–56 (Tex.1999) (“[I]nformally amending this rule through a contested case hearing or an appeals panel decision results in the ‘issuance of private opinion that will never be known by anyone except those few persons who take the time to research the files of an agency.’” (quoting Ron Beal, *Ad Hoc Rulemaking: Texas Style*, 41 *Baylor L.Rev.* 101, 120 (1989))).

16 Although courts occasionally use the terms “sovereign immunity” and “governmental immunity” interchangeably, they are distinct concepts. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex.2003). The Board generally asserts that its board members and executive director enjoy “immunity” from suit in their official capacities. We construe this as a claim of “sovereign immunity,” which refers to the state's immunity from suit and liability and extends not only to the state but also to various divisions of state government, including agencies, boards, hospitals, and universities. *Id.*

17 See *Tex. Gov't Code § 2001.171* (authorizing an aggrieved person to file suit for judicial review of agency's final decision in contested case); *Mega Child Care*, 145 S.W.3d at 198 (recognizing APA's limited waiver of sovereign immunity for suits for judicial review).

1 Section 281.60 states in relevant part:

(a) This subchapter is promulgated to:

(1) promote *consistency* and guidance in the exercise of the sound discretion by the agency in licensure and disciplinary matters; ...

(b) Board's role. The board shall render the final decision in a contested case and has the responsibility to assess sanctions against licensees who are found to have violated the Act.... *Asanction should be consistent with sanctions imposed in other similar cases* and should reflect the board's determination of the seriousness of the violation and the sanction required to deter future violations. A determination of the appropriate sanction is reserved to the board....

22 Tex. Admin. Code § 281.60 (2012) (Texas State Bd. of Pharmacy, General Guidance) (emphasis added).

2 For example, had there been evidence that Witcher was not afforded due process in the North Carolina proceeding, the Board, considering the facts and circumstances of Witcher's case, might have imposed a different sanction within its discretion. See *In re Nealy*, Order # N-03-005, SOAH Docket No. 515-04-6488 (2005) (recognizing that evidence of “whether a pharmacist has not been afforded due process in the other state” relevant to policy determination in context of appropriate sanction based on sanction imposed by another state board of pharmacy).

3 I also disagree with the majority's suggestion that, even if the Board's decision was not based upon an invalid rule, that its decision would be arbitrary and capricious. According to her own testimony, Witcher had no plans to return to North Carolina to practice pharmacy in North Carolina, or otherwise clear the North Carolina suspension because of lack of financial resources. I question whether a licensing board would be acting arbitrarily or capriciously by refusing to excuse compliance with another state's unchallenged sanction based upon the licensee's lack of financial resources.

14-1022

TEXAS STATE BOARD OF PHARMACY, GAY DODSON, EXECUTIVE DIRECTOR,
AND JEANNE D. WAGGENER, PRESIDENT OF THE BOARD, IN THEIR OFFICIAL
CAPACITIES v. TIANA JEAN WITCHER; from Travis County; 3rd Court of Appeals
District (03-12-00560-CV, 447 SW3d 520, 10-31-14)

The Court withdraws its order of January 22, 2016, granting the petition for review, as the petition was improvidently granted. The petition for review is denied.

JUL 17 2012

At 11:07 A.M.
Amalia Rodriguez-Mendoza, Clerk

Cause No. D-1-GN-12-000026

Tiana Jean Witcher,
Plaintiff

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IN THE DISTRICT COURT

V.

OF TRAVIS COUNTY, TEXAS

Texas State Board of Pharmacy, and in their
official capacities only, Gay Dodson,
Executive Director, and Jeanne D.
Waggener,
President of the Board,
Defendants

345th JUDICIAL DISTRICT

FINAL JUDGMENT

This matter came before the Court for non-jury trial on Thursday, June 14, 2012. Plaintiff was present through her counsel of record, the Leichter Law Firm, Dan Lype and Louis Leichter. Defendants were present through their counsel of record, Office of the Attorney General, Assistant Attorney General Ted A. Ross.

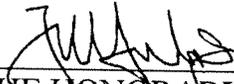
Having considered the administrative record, the parties' briefs and oral arguments, and applicable law, IT IS HEREBY ORDERED, ADJUGED, AND DECREED as follows:

1. The Court FINDS that that an enforced suspension of Ms. Witcher's license is arbitrary and capricious;
2. The Court FINDS that the Board's use of an unwritten policy to impose an enforced suspension of Ms. Witcher's license is 1) arbitrary and capricious, 2) improper ad-hoc rulemaking, and 3) a violation of the APA and Pharmacy Act's rulemaking requirements;
3. Findings of Fact 1-29 and Conclusions of Law 1-7 of Board Order #L-10-017,

dated November 1, 2011, in the Matter of Tiana J. Witcher pharmacist license #30135, are AFFIRMED;

4. The remainder of Board Order #L-10-017 of the Texas State Board of Pharmacy, dated November 1, 2011, in the Matter of Tiana J. Witcher pharmacist license #30135, is REVERSED;
5. This cause is REMANDED to the Texas State Board of Pharmacy to determine an appropriate sanction consistent with the Court's findings;
6. The remand proceedings are limited to the established administrative record, and to the twenty-nine (29) findings of fact and seven (7) conclusions of law already adopted by the Texas State Board of Pharmacy and affirmed by the Court.
7. All relief not granted herein is DENIED, and this judgment finally disposes of all parties and all claims in the entire suit and is appealable.

Dated: July 16, 2012



THE HONORABLE JUDGE TIM SULAK
JUDGE OF THE 353 DISTRICT COURT
OF TRAVIS COUNTY, TEXAS