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**RIGHT TO FINAL AGENCY ACTION AND JUDICIAL  
REVIEW OF TEMPORARY SUSPENSION ORDERS  
POST-*WISEMAN* AND REVISED APA**

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# RIGHT TO FINAL AGENCY ACTION AND JUDICIAL REVIEW OF TEMPORARY SUSPENSION ORDERS POST-WISEMAN AND REVISED APA

## I. INTRODUCTION

The purpose of this paper is to provide a brief outline and analysis of the exhaustion of administrative remedies doctrine as applied to temporary agency actions such as temporary suspensions of licenses pending proceedings for revocation or other action. Specifically, this paper will provide an overview of agency authority exemplified in a comparison of the Texas Medical Board's ("TMB's") temporary suspension process with other selected agencies' processes, including the potential time frame of a licensee's inability to practice depending on the agencies' statutory and rule authorities. This paper will also discuss *Tex. Med. Bd. v. Wiseman*, No. 03-13-00210-CV, 2015 WL 410330, 2015 Tex. App. LEXIS 902 (Tex. App.—Austin Jan. 30, 2015, pet. filed) as an example of the application of the Administrative Procedure Act ("APA"), the Medical Practice Act ("MPA"), and the TMB's board rules to the important question of what constitutes final agency action. Finally, this paper will address revisions to the APA as they directly apply to temporary suspensions and contemplate whether changes in the exemplified TMB's process, if any, will ensue as a result of amended provisions in the APA.

## II. OVERVIEW OF EXHAUSTION OF REMEDIES DOCTRINE AS APPLIED TO TEMPORARY SUSPENSIONS

Generally speaking, the purpose behind requiring the exhaustion of remedies is "to control the timing of judicial relief from adjudicative action of an agency."<sup>1</sup> Texas courts have repeatedly interpreted the right to judicial review of an administrative order, absent some sort of constitutional deprivation, as "not a natural or inherent one but is one that may be granted or withheld at the discretion of the Legislature."<sup>2</sup> Thus, Texas courts' rulings have consistently deferred to an agency's statutory authority in affirming an agency's exclusive jurisdiction over a dispute.<sup>3</sup> As a vehicle to have the agency resolve disputed issues of fact and

policy, the exhaustion of remedies "ensures that the administrative agency has the opportunity to resolve disputed fact issues within its exclusive jurisdiction before a court must address those issues."<sup>4</sup>

The Texas Supreme Court opined in *Bennet* that when an agency has exclusive jurisdiction, the court may review the agency's administrative action "only at the time and in the manner designated by statute."<sup>5</sup> As applied to a temporary emergency suspension as was the case in *Wiseman*, the Third District Court of Appeals (Third Court") used the same analysis to grant an agency's plea to the jurisdiction and dismiss a Respondent's suit for judicial review prior to a final action by the agency.<sup>6</sup> Consequently, an agency's enabling statute and rules for temporary actions, such as emergency suspensions, become the primary focus for whether a licensee in the midst of a temporary suspension or restriction upon her license has any remedy outside the administrative adjudicatory process absent some sort of constitutional deprivation.

## III. STATUTORY AND RULE INTERPRETATION OF TEMPORARY SUSPENSIONS IN RECENT CASE LAW – WISEMAN

In the *Wiseman* case, the Third Court found that the Texas Legislature gave the TMB exclusive jurisdiction over disputes involving medical licenses; that the court may only review an agency's action when allowed by the statute; and there has been an exhaustion of remedies.<sup>7</sup> In its ruling, the court identified that under the APA, the TMB may issue a temporary suspension without notice or a hearing. and a doctor cannot appeal until the Board's decision is "final."<sup>8</sup> Thus, the court ruled a temporary suspension action was not appealable under the MPA or relevant provisions of the APA.

Dr. Wiseman's counsel argued that the TMB applied an improper standard in deciding whether to suspend Dr. Wiseman's license; that the suspension order was not supported by substantial evidence; that his due process rights had been violated by the Board's procedures; and that the suspension was arbitrary and capricious. In their decision, the Third Court focused on the language of the MPA and agency rules to decide a temporary suspension or restriction proceeding was ancillary to a disciplinary proceeding concerning the

<sup>1</sup> *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000).

<sup>2</sup> *Burkhalter v. Texas State Bd. of Med. Exam'rs*, 918 S.W.2d 1, 3 (Tex. App.-Austin 1996, no writ).

<sup>3</sup> *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013).

<sup>4</sup> *Holmes v. Zurich Am. Ins. Co.*, 421 S.W.3d 766, 771-72 (Tex. App.-Dallas 2014, pet. denied).

<sup>5</sup> *Bennett*, 35 S.W.3d at 15.

<sup>6</sup> *Wiseman v. Tex. Med. Bd.*, 03-13-00291-CV, 2015 WL 410330 (Tex. App.—Austin Jan. 30, 2015, pet. denied.).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

alleged violations under agency rule § 187.61.<sup>9</sup> In explaining away that Dr. Wiseman’s medical license was not a constitutionally protected property right based on its statutory creation, the Third Court concluded in a one sentence statement stating “the framework of the Act and the Board’s rules make it plain that a temporary suspension proceeding is not a contested case subject to the APA.”<sup>10</sup>

#### **IV. STATUTORY COMPARATIVE ANALYSIS OF TEMPORARY SUSPENSION PROCESSES IN SELECTED AGENCIES**

##### **A. Texas Board of Nursing**

In accordance with the Nursing Practice Act (“NPA”), the Texas Board of Nursing (“BON”) shall temporarily suspend or restrict the license of a nurse on a determination by a majority of the Board or a three-member committee of board members that, from the evidence or information presented, the continued practice of the nurse would constitute a continuing and imminent threat to the public welfare.<sup>11</sup> Per the statute, the license may be temporarily suspended without notice or hearing on the complaint if (1) institution of proceedings for a hearing before the State Office of Administrative Hearings (“SOAH”) is initiated simultaneously with the temporary suspension or determination to restrict; and (2) a hearing is held as soon as possible under the APA.<sup>12</sup>

The statute further stipulates jurisdiction and a timeframe when a preliminary hearing must be initiated. Specifically, SOAH shall hold a preliminary de novo hearing not later than the 17th day after the date of the temporary suspension or restriction becomes effective.<sup>13</sup> Subsequently, a final hearing on the matter shall be held not later than the 61st day after the date of the temporary suspension or restriction.<sup>14</sup>

The practical effect of the stipulated timeframe allows for a defined period for both the adjudicative process for determining probable cause for the temporary action and a final hearing on the merits to determine a final agency action. The BON’s process expedites a final agency action and presumably an exhaustion of administrative remedies.

##### **B. Texas State Board of Dental Examiners**

Like the BON, the Texas State Board of Dental Examiners (“SBDE”) shall temporarily suspend the license if it determines that the continued practice by a licensee would constitute a clear, imminent, or continuing threat to a person’s physical health or well-

being.<sup>15</sup> As in the NPA, the Dental Practice Act (“DPA”) stipulates the agency may not temporarily suspend a license or permit without notice or hearing unless at the time of the temporary suspension the board or the executive committee requests SOAH to set a date for a hearing on the temporary suspension.

The DPA sets out a timeframe requiring SOAH hold a show cause hearing not later than the 30th day after the date the license or permit is suspended unless the license or permit holder requests a continuance and a second hearing on the merits not later than the 60th day after (1) the date the license or permit is temporarily suspended; or (2) the date specified in the continuance requested by the license or permit holder.<sup>16</sup> The DPA takes a step further in ensuring the expediency of the process by stipulating that the time limit set on these deadlines must be met or the suspended license or permit is automatically reinstated.<sup>17</sup>

##### **C. Texas State Board of Pharmacy**

The Texas State Board of Pharmacy’s (“TSBP’s”) temporary suspension process provides for a license holder’s notice and opportunity for a hearing before the board’s disciplinary panel to determine whether the suspension or restriction imposed should be continued. The hearing must be conducted by the panel after the 10th day after the date notice of the hearing is provided to the license holder; or if imposed without notice or hearing if, at the time the suspension or restriction is ordered, a hearing before the panel is scheduled to be held not later than the 14th day after the date of the temporary suspension is effective.<sup>18</sup>

The Pharmacy Act places the show-cause hearing under the Board’s jurisdiction with a final hearing on the merits to be conducted by SOAH. While a deadline for initiating the disciplinary action proceeding is not specified, the statute does place a deadline for holding the hearing at SOAH not later than the 90th day after the date of the temporary suspension or restriction.<sup>19</sup> Again, expediency is ensured by the Act’s requirement to automatically reinstate the suspended license if SOAH does not hold the hearing within the time required.<sup>20</sup>

##### **D. Texas Board of Chiropractic Examiners**

Under the Chiropractic Board’s statutory authority, the board’s enforcement committee may temporarily suspend the license of a chiropractor on an emergency basis if it determines the chiropractor presents a

<sup>9</sup> 22 TEX. ADMIN. CODE § 187.61(a).

<sup>10</sup> *Wiseman*, 2015 WL 410330, at \*1.

<sup>11</sup> TEX. OCC. CODE § 301.455(a).

<sup>12</sup> TEX. OCC. CODE § 301.455(b).

<sup>13</sup> TEX. OCC. CODE § 301.455(c).

<sup>14</sup> TEX. OCC. CODE § 301.455(d).

<sup>15</sup> TEX. OCC. CODE § 263.004(a)-(b).

<sup>16</sup> TEX. OCC. CODE § 263.004(c).

<sup>17</sup> TEX. OCC. CODE § 263.004(d).

<sup>18</sup> TEX. OCC. CODE § 565.059(b).

<sup>19</sup> TEX. OCC. CODE § 565.059(d).

<sup>20</sup> *Id.*

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