# SUPREME COURT OF TEXAS UPDATE

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**Special thanks to all the Staff Attorneys and Law Clerks at the Supreme Court of Texas for their substantial contributions.**

## February 1, 2019 – January 31, 2020

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## I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from February 1, 2019 through January 31, 2020. Petitions granted but not yet decided are also included.

## II. ADMINISTRATIVE LAW

### A. Disciplinary Action

1. Aleman v. Tex. Med. Bd., 573 S.W.3d 796 (Tex. May 24, 2019) [17-0385].

At issue in this case was whether the Texas Medical Board properly sanctioned Ruben Aleman, M.D., under the Medical Practice Act for his failure to electronically certify a death certificate. The Health and Safety Code requires a person who completes the medical certification for a death certificate to submit the information and attest to its validity electronically using the state-approved system. A patient of Aleman's died in July 2011, but Aleman was not registered to use the system at that time; accordingly, the patient's death certificate was "dropped to paper" by the funeral director who prepared it before it was sent to Aleman for certification. Aleman certified the paper certificate manually rather than submitting the information electronically. The Board filed a complaint with the State Office of Administrative Hearings (SOAH) seeking disciplinary action against Aleman for his failure to submit the information electronically. The administrative law judge concluded that Aleman violated the Medical Practice Act by committing "unprofessional or dishonorable conduct that is likely to deceive or defraud the public," which statutorily includes "an act that violates any state or federal law if the act is connected with the physician's practice of medicine." TEX. OCC. CODE §§ 164.052(a)(5), .053(a)(1). The Board sanctioned Aleman based on these findings.

Aleman petitioned for judicial review of the Board's order, which the trial court affirmed. The court of appeals affirmed the trial court's judgment.

The Supreme Court reversed in part, holding that the Board's complaint complied with the Act's statutory requirements but that the Act did not authorize disciplinary action against Aleman for the conduct at issue. Interpreting the provisions of the Act as a whole and in context, the Court held that an act that violates state or federal law is subject to disciplinary action only if the act is connected with the practice of medicine in a manner that makes it likely to deceive or defraud the public. The Court explained that, by classifying the prohibited conduct as "unprofessional or dishonorable conduct likely to deceive or defraud the public," the Legislature unambiguously expressed its intent to authorize sanctions only for conduct that falls within that overarching classification. Construing the phrase "connected with the practice of medicine" more broadly than that, as the Board would do, renders the Legislature's categorization of the conduct a nullity and improperly favors microscopic examination of isolated words over consideration of the statute as a contextual whole.

In light of the Court's holding that disciplinary action was not authorized, the Court did not reach the issues involving Aleman's impossibility defense or the severity of his sanction. Finally, the Court agreed with the Board that Aleman was not entitled to recover attorney's fees. Accordingly, the Court affirmed in part, reversed in part, and rendered judgment vacating the sanctions imposed against Aleman.

Justice Blacklock, joined by Justice Brown, concurred. In the view of the concurrence, section 164.053(a)(1) is not triggered any time a physician violates any state or federal law. It is only triggered when a physician "commits an act that violates any state or federal law." The Legislature's invocation of an act-omission distinction is quite sensible. Section

164.053(a)(1) does not encompass the Board's allegations against Dr. Aleman, which stem from his unlawful failures to act, not from unlawful actions.

**B. Exhaustion of Administrative Remedies**

1. E.A. v. Tex. Dep't of Family & Protective Servs., 587 S.W.3d 408 (Tex. Oct. 25, 2019) [17-0521].

This case presented issues identical to those the Supreme Court decided in *Mosley v. Texas Health & Human Services Commission*, ___ S.W.3d ___, 62 Tex. Sup. Ct. J. 894 (Tex. May 3, 2019) [17-0345]. In *Mosley*, the Court held that a party seeking judicial review of an administrative order must first move for rehearing before the administrative law judge, but that an agency's affirmative misrepresentation of the proper procedure for judicial review may violate a party's right to due process. E.A. did not seek rehearing before the administrative law judge of an order she challenged. But because, as in *Mosley*, the agency misrepresented the proper procedure for judicial review in a letter to E.A., the Court held that E.A. was denied due process. For the reasons expressed in *Mosley*, the Court reversed in part in a per curiam opinion, holding the government violated E.A.'s due-course-of-law rights under the Texas Constitution. The Court directed the Department of Family and Protective Services to reinstate E.A.'s administrative case and afford her an opportunity to seek rehearing before the administrative law judge of the order she challenged.

2. Horton v. Tex. Dep't of Family & Protective Servs., 587 S.W.3d 12 (Tex. Oct. 25, 2019) [17-0514].

This case presented issues identical to those the Supreme Court decided in *Mosley v. Texas Health & Human Services Commission*, 593 S.W.3d 250 (Tex. May 3, 2019) [17-0345]. In *Mosley*, the Court held that a party seeking judicial review of an administrative order must first move for rehearing before the administrative law judge, but that an agency's affirmative misrepresentation of the proper procedure for judicial review may violate a party's right to due process. Roderic Horton did not seek rehearing before the administrative law judge of an order he challenged. But because, as in *Mosley*, the agency misrepresented the proper procedure for judicial review in a letter to Horton, the Court held that Horton was denied due process. For the reasons expressed in *Mosley*, the Court reversed in part in a per curiam opinion, holding the government violated Horton's due-course-of-law rights under the Texas Constitution. The Court directed the Department of Family and Protective Services to reinstate Horton's administrative case and afford him an opportunity to seek rehearing before the administrative law judge of the order he challenged.

3. Mosley v. Tex. Health & Human Servs. Comm'n, 593 S.W.3d 250 (Tex. May 3, 2019) [17-0345].

In this case the Supreme Court addressed whether under the Administrative Procedure Act (APA), an appellant seeking judicial review of an administrative order must first file a motion for rehearing with the administrative law judge. The Court also addressed whether an agency's misrepresentation of the proper procedures to seek judicial review of an adverse order can, at least under some circumstances, violate the appellant's right to procedural due process.

The Department of Aging and Disability Services placed Patricia Mosley, an employee of a licensed facility, on an Employee Misconduct Registry based on allegations concerning her care of a group-home resident. As the Court noted, placement in the registry is effectively career ending. Mosley administratively appealed the decision to the Health and Human Services Commission. An administrative law judge (ALJ) sustained the determination and sent Mosley a final decision and order informing her she had the right to seek judicial review of the decision within thirty days. The letter, which relied heavily on a now-repealed rule promulgated by the Department of Family and Protective Services (DFPS), did not indicate that filing a motion for rehearing of the ALJ's decision was a prerequisite to judicial review.

Claiming she relied on the letter's instructions, Mosley filed for judicial review without seeking rehearing. The Commission and DFPS argued that the trial court lacked jurisdiction, insisting the APA required Mosley to

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