

BEFORE THE STATE OF OREGON
BOARD OF MASSAGE THERAPISTS

In the Matter of the investigation of

Case No. 1515

WEYERS, TERRY M (*Unlicensed*)

NOTICE OF PROPOSED ACTION

(*Civil Penalties*)

Respondent

and

NOTICE OF RIGHT TO HEARING

1.

Pursuant to ORS chapter 687, the Oregon Board of Massage Therapists (*Board*) is the agency responsible for licensing, disciplining and regulating massage therapists and the practice of massage in the State of Oregon.

2.

Terry M. Weyers (*Respondent*) was initially licensed by the Board on 12/08/1993. His license lapsed on 07/31/2012. Respondent is not currently licensed to practice as a massage therapist in the State of Oregon. Respondent's last known address is PO BOX 966, SHADY COVE, OR 97539-0966.

FINDINGS OF FACTS

3.

The Board received information that the Respondent was advertising as a massage therapist after his Oregon massage license fell into a lapsed status. Contact was made, information was obtained and the Respondent was found to be in violation.

4.

4.1 On 12/08/2012 Respondent came into the Board office inquiring on the process to renew his Oregon massage license #4772. At that time, a check of his database record indicated that he had contacted the Board office on 08.07.2012 and left a message that he will not renew his massage license because of finances and that he is still continuing as a massage therapist and running his business. He stated that once his finances are better, he will reinstate his license. Respondent was told on 12/08/2012 that his license was lapsed as of 08/01/2013 and that as a result, he would need to pay a total of \$447.25, submit a fingerprint card for a background check, show 25 hours of continuing education and

1 provide a copy of a current CPR certification. At that point, Respondent was dissatisfied with the
2 requirements for reinstatement and left the Board office without renewing his license.

3 4.2 On 01/03/2013, the Board compliance department was notified that the Respondent was
4 advertising for and engaging in the practice of massage. The compliance coordinator was directed to the
5 Respondent's web page at http://shadycove.net/the_stress_reduction_center.htm which states, in part
6 "17 years of massage experience" and includes the license number 4772 as well as a photograph of the
7 Respondent. In response, a letter was issued to the Respondent by regular and certified mail stating that
8 the Board had received a complaint concerning possible violations of Oregon law, specifically practicing
9 massage while the license is lapsed, advertising for massage while the license is lapsed, advertising as a
10 LMT while the license is lapsed. The letter indicated that it is unlawful to engage in these acts and a
11 violation may result in issuance of civil penalties of up to \$1,000 per violation. The Respondent was
12 requested to respond to the letter within 21 days of the date of the letter. The certified letter signature
13 card was signed by the Respondent and returned to the Board office on 02/01/2013.

14 4.3 The Respondent failed to respond to the letter or contact the Board office and as a result,
15 on 03/20/2013, a second check of the website was conducted. It was noted that the website was still in
16 place, it still included the license number, and it still indicated that Respondent was a LMT. The
17 compliance coordinator also printed a list of offered services, which included: medical massage, senior
18 citizen massage (indicating that the Respondent contracts with 8 retirement homes in Medford), portable
19 table massage, integrated therapy, shut-in massages, hospital massages, in-home massages, on-site
20 massages, rehabilitation, event massages neuro linguistics programming, motorcycle ergonomics and
21 insurance billing. The web site also includes a list of benefits related to receiving massage. The certified
22 letter signature card was signed by the Respondent and returned to the Board office on 04/05/2013.

23 4.4 On 03/20/2013, a 2nd and Final Notice was issued to the Respondent by regular and
24 certified letter. The notice referenced the first letter from 01/24/2013 and included a copy for reference.
25 The letter stated that the Board had received a complaint concerning possible violations of Oregon law,
26 specifically practicing massage while the license is lapsed, advertising for massage while the license is
lapsed, advertising as a LMT while the license is lapsed. The letter indicated that it is unlawful to engage

1 in these acts and a violation may result in issuance of civil penalties of up to \$1,000 per violation. The
2 Respondent was requested to respond to the letter within 21 days of the date of the letter.

3 4.5 On 04/08/2013, the Board office received a fax from Shady Cove Chiropractic, which was
4 the written explanation from the Respondent. In the faxed response, the Respondent explains his
5 hardships to the Board. He also states that he presently works as a CCA with a local chiropractic
6 physician; though he does wish to continue to work as a LMT he feels that the fees are burdensome and
7 difficult to comply with.

8 4.6 On 05/03/2013, a final check of the website was conducted and it was noted that the
9 Respondent continues to advertise as a LMT and includes his license number in the advertisement.

10 4.7 On 05/17/2013, the Board reviewed the facts of the case and voted to issue a Notice of
11 Proposed Action in this matter.

12 CONCLUSIONS OF LAW

13 5.

14 Based on the acts and conduct described above, Respondent committed the following violations of
15 Board Rules and Laws:

16 5.1 One violation of ORS 687.021(2)(a), advertising for massage without a license;

17 5.2 One violation of OAR 334-010-0017(2), during lapsed status, no such person shall practice
18 massage in the State of Oregon;

19 5.3 One violation of OAR 334-040-0010(1), practicing massage or representing one's self as a
20 massage therapist without a current active license issued by the Board;

21 5.4 One violation of OAR 334-040-0010(11), practicing or purporting to practice massage
22 when the license has been revoked or suspended, lapsed or inactive;

23 5.5 One violation of OAR 334-010-0025(6), any person who holds a license as a massage
24 therapist in this state may use the abbreviation LMT. No other person(s) may assume such title or such
25 abbreviation or any other word[s], letters, signs or figures to indicate that the person using the title is a
26 licensed massage therapist; and

1 5.6 One violation of ORS 687.021(2)(b), use of "massage" in the business name, without a
2 license.

3
4 6.

5 Based on the foregoing, the Board proposes to assess against Respondent, a civil penalty for:

6 6.1 One violation of ORS 687.021(2)(a), advertising for massage without a license;

7 6.2 One violation of OAR 334-010-0017(2), during lapsed status, no such person shall practice
8 massage in the State of Oregon;

9 6.3 One violation of OAR 334-040-0010(1), practicing massage or representing one's self as a
10 massage therapist without a current active license issued by the Board;

11 6.4 One violation of OAR 334-040-0010(11), practicing or purporting to practice massage
12 when the license has been revoked or suspended, lapsed or inactive;

13 6.5 One violation of OAR 334-010-0025(6), any person who holds a license as a massage
14 therapist in this state may use the abbreviation LMT. No other person(s) may assume such title or such
15 abbreviation or any other word[s], letters, signs or figures to indicate that the person using the title is a
16 licensed massage therapist; and

17 6.6 One violation of ORS 687.021(2)(b), use of "massage" in the business name, without a
18 license;

19 6.7 For a total civil penalty of \$2,500.

20 **NOTICE OF RIGHT TO HEARING**

21 7.

22 You have the right, if you so request, to have a formal hearing to contest the matter set out above,
23 as provided by the Administrative Procedures Act (Chapter 183), Oregon Revised Statutes. You may be
24 represented by an attorney at the hearing. Your request for hearing must be made in writing to the Board
25 and **received by the Board** within 21 days from the date of mailing of this notice (or if not mailed, the
26 date of personal service).

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8.

If you request a hearing, before commencement of that hearing, you will be notified of the date, time, and location of the hearing, and you will be given information on the procedures, rights of representation, and other rights of the parties relating to the conduct of the hearing.

9.

If you fail to timely request a hearing, withdraw a hearing request, notify the Board or Administrative Law Judge that you will not appear at a scheduled hearing, or fail to appear at a scheduled hearing, you shall have waived your right to a hearing and the Board may issue a Final Order by Default and impose against you the above sanctions. If the Board issues a Final Order by Default, it designates its file on this matter as the record for the purposes of proving a *prima facie* case.

DATED AND SERVED upon the above-named Respondent by regular and certified mail, addressed to Respondent at last known address, this 4th day of June, 2013.

BOARD OF MASSAGE THERAPISTS
State of Oregon

Signature on File

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
BOARD OF MASSAGE THERAPISTS**

IN THE MATTER OF:) **RULING ON MOTION FOR SUMMARY**
) **DETERMINATION AND FINAL**
TERRY M. WEYERS) **ORDER**
)
) OAH Case No.: 1303413
) Agency Case No.: 1515

HISTORY OF THE CASE

On June 4, 2013, the Board of Massage Therapists (Board) issued a Notice of Proposed Action and Notice of Right to Hearing to Terry M. Weyers, proposing to assess a civil penalty in the total amount of \$2,500. On June 25, 2013, Weyers requested a hearing.

On September 12, 2013, the Board referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Joe Allen to preside at hearing. On October 17, 2013, ALJ Allen convened a prehearing conference and scheduled the hearing for January 15, 2014 and set deadlines for submission of motions, exhibits and witness lists.

On October 23, 2013, the Board filed a Motion for Summary Determination (Motion). Pursuant to the deadline established at the prehearing conference, the record closed on November 18, 2013 without receipt of any response from Weyers. On December 5, 2013, the OAH reassigned the matter to ALJ Samantha Fair.

On December 10, 2013 the ALJ filed the Ruling on Motion for Summary Determination and Proposed Order granting the motion. In that order the exceptions period was provided to Weyers. No exceptions were filed.

ISSUES

1. Whether there is a genuine issue as to any material fact. OAR 137-003-0580.
2. Whether Weyers advertised for massage without a license. ORS 687.021(2)(a).
3. Whether Weyers practiced massage in Oregon when his license was lapsed. OAR 334-010-0017(2).
4. Whether Weyers practiced massage or represented himself as a massage therapist without a current active license. OAR 334-040-0010(1).

5. Whether Weyers practiced or purported to practice massage when his license was lapsed or inactive. OAR 334-040-0010(13).

6. Whether Weyers used the abbreviation of LMT when he was not licensed as a massage therapist. OAR 334-010-0025(6).

7. Whether Weyers used "massage" in his business name when he was not licensed as a massage therapist. ORS 687.021(2)(b).

8. Whether the Board may assess Weyers a civil penalty in the amount of \$2,500. ORS 687.250(2).

EVIDENTIARY RULING

Exhibits A through D and the Declaration of Kate Coffey (Declaration), offered by the Board, were admitted into the record.

FINDINGS OF FACT

1. In September 1993, the Board issued Weyers a massage therapist license, license number 4772. He has performed massage therapy for approximately 20 years under the business name of The Stress Reduction Center thru Therapeutic Massage. (Exs. C at 1; D at 1.)

2. On July 31, 2012, Weyers's massage therapist license lapsed. (Declaration at 1.)

3. On August 1, 2012, the Board sent Weyers written notification to his Oregon address that his license lapsed on July 31, 2012. In the written notification, the Board advised Weyers that a criminal background check, requiring fingerprint cards, was required for licensees applying to reinstate a lapsed license. The Board included in the written notification a warning that advertising or practicing massage without a current active massage license was a violation of state law and could subject the licensee to civil penalties up to \$1,000 per violation. (Ex. C at 1.)

4. On January 24, 2013, the Board sent Weyers written notification by certified mail to his Oregon address that a complaint had been received by the Board, alleging that he was advertising massages. In the written notification, the Board again warned Weyers that it was unlawful to engage in, purport to, or advertise for the practice of massage without an active license that could subject him to civil penalties up to \$1,000 per violation. (Ex. C at 2.) Weyers signed the return receipt for this notification on February 1, 2013. (*Id.* at 3.)

5. On March 20, 2013, the Board again sent Weyers written notification to his Oregon address about the complaint that had been filed against him. (Ex. C at 3.)

6. On March 20, 2013 and again on May 3, 2013, Weyers posted an advertisement on an Internet website for the Stress Reduction Center thru Therapeutic Massage. (Exs. A at 1; B at 1; Declaration at 2.) In the advertisement, he listed his name, asserted that he was a "L.M.T. (Licensed Massage Therapist)," and offered "the perfect integrative massage tailored to your individual needs." (Exs. A at 1; B at 1.) The advertisement also referenced "OBM# 4772"

directly below a statement regarding his 17 years of massage experience. (Exs. A at 1; B at 1.) The advertisement listed at least eight different types of massages as the offered services of the business. (Exs. A at 2-3; B at 2-3.) The advertisement urged the reader to “Set-up an appointment today” by calling Weyers’s Oregon phone number. (Exs. A at 4; B at 4.) This advertisement was the same advertisement posted in January 2013 that led to the filing of the complaint. (Declaration at 2.)

7. In the past 2.5 years, both of Weyers’s parents have died, which resulted in him assuming physical custody of his 52-year-old disabled brother. In the process, he depleted his finances. (Ex. D at 1.)

8. On September 17, 2013, Weyers renewed his massage therapist license. (Declaration at 1.)

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact and the Board is entitled to a favorable ruling.
2. Weyers advertised for massage without a license.
3. Weyers did not practice massage in Oregon when his license was lapsed.
4. Weyers represented himself as a massage therapist without a current active license.
5. Weyers purported to practice massage when his license was lapsed.
6. Weyers used the abbreviation of LMT when he was not licensed as a massage therapist.
7. Weyers used “massage” in his business name when he was not licensed as a massage therapist.
8. The Board should assess Weyers a civil penalty in the amount of \$2,500.

OPINION

The Board seeks to assess civil penalties against Weyers based on allegations that he advertised for massage, used the abbreviation LMT, used the word “massage” in his business name, and purported to practice massage when he did not have an active massage therapist license. As the proponent of the allegations, the Board has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that the proposed civil penalty is the appropriate sanction. ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position”); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position). Proof by a preponderance of the evidence

means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

Pursuant to OAR 137-003-0580(6)(a), in making my ruling, I considered the Board's Motion, the Declaration, and Exhibits A through D. Pursuant to OAR 137-003-0580(7), I reviewed the evidence in the light most favorable to Weyers, the non-moving party, and I determined there are no genuine issues as to the material facts of the Board's allegations that are relevant to resolution of the legal issues and that the Board is entitled to a favorable ruling as a matter of law. Because the ruling on the Motion resolves all issues in this matter, a proposed order is issued and the hearing is canceled.

Advertised for Massage Without a License

ORS 687.021(2) provides, in part:

It is unlawful to advertise by printed publication or otherwise:

(a) The giving of massage treatments in this state by a person not licensed[.]

OAR 334-010-0017(1) provides:

The massage therapist license is considered lapsed if an individual fails to complete the renewal process prior to the expiration of license.

Weyers's massage therapist license lapsed on July 31, 2012. He did not renew his license until September 17, 2013. In January, March and May 2013, he posted an advertisement on the Internet, urging readers to schedule an appointment for any of at least eight different types of massages. Weyers advertised the giving of massage treatments in Oregon when his license was lapsed. Weyers's conduct violated ORS 687.021(2).

Practiced Massage When License Was Lapsed

OAR 334-010-0017(2) provides:

During the lapsed status, no such person shall practice massage in the State of Oregon.

ORS 687.011(7) provides, in part:

"Practice of massage" means the performance of massage[.]

Although he advertised his services as a massage therapist during the period when his license was lapsed, there was no evidence that Weyers actually performed a massage. The evidence failed to establish that Weyers violated OAR 334-010-0017(2).

Represented Self as a Massage Therapist Without an Active License

OAR 334-040-0010 provides, in part:

The Board may deny, conditionally grant, restrict, suspend or revoke a license, impose probation, reprimand, censure, impose remedial education or corrective actions, and/or impose a civil penalty for any of the following reasons:

(1) Practicing massage or representing one's self as a massage therapist without a current active license issued by the Board[.]

During the period when his license was lapsed, Weyers advertised his services for the performance of massages. In the advertisement, he asserted that he was a licensed massage therapist and included a reference to his Board-issued massage therapist license number. Weyers represented himself as a massage therapist when he did not hold a current active license. His

conduct violated OAR 334-040-0010(1).

Purported to Practice Massage When License Was Lapsed

OAR 334-040-0010

The Board may deny, conditionally grant, restrict, suspend or revoke a license, impose probation, reprimand, censure, impose remedial education or corrective actions, and/or impose a civil penalty for any of the following reasons:

* * * * *

(13) Practicing or purporting to practice massage when the license has been revoked or suspended, lapsed or inactive[.]

During the period when his license was lapsed, Weyers advertised his services for the performance of massages. By posting such an advertisement on the internet, Weyers purported to practice massage. His conduct violated OAR 334-040-0010(13).

Used the Abbreviation of LMT When License Lapsed

OAR 334-010-0025(6) provides:

Any person who holds a license as a massage therapist in this state may use the abbreviation "LMT." No other person(s) may assume such title or such abbreviation or any other word[s], letters, signs, or figures to indicate that the person using the title is a licensed massage therapist.

Weyers advertised services offering massages in January, March and May 2013. In that advertisement, he described himself as a "L.M.T. (Licensed Massage Therapist)." Because his license was lapsed during those months, he was prohibited from using that abbreviation. Weyers's conduct violated OAR 334-010-0025(6).

Used "Massage" in Business Name When Not Licensed

ORS 687.021(2) provides, in part:

It is unlawful to advertise by printed publication or otherwise:

* * * * *

(b) The use of "massage" in the business name unless the person providing the massage is licensed[.]

In the advertisements Weyers posted in January, March and May 2013, Weyers listed his business name as Stress Reduction Center thru Therapeutic Massage. Because his license was lapsed during those months, he was prohibited from using the word "massage" in his business name. Weyers's conduct violated ORS 687.021(2)(b).

Assessment of Civil Penalties

ORS 687.250(2) provides, in part:

The board may, in its own name, assess a civil penalty against any licensed or unlicensed person violating a provision of ORS 687.011 to 687.250, 687.895 and 687.991. The board may assess the civil penalty instead of or in addition to disciplinary action under ORS 687.081, an injunction issued under ORS 687.021 or criminal prosecution by the district attorney under this section. The amount of the civil penalty may not exceed \$1,000 for any single violation[.]

As shown above, Weyers's conduct in posting advertisements for massage services and his use of the word "massage" in his business name violated ORS 687.021(2). Pursuant to ORS 687.250(2), the Board may assess civil penalties against Weyers up to \$1,000 for each violation. Additionally, OAR 334-040-0010 allows the Board to assess civil penalties against Weyers because he represented himself as a massage therapist and he purported to practice massage when his license was lapsed. Weyers posted the advertisement on a minimum of three different dates, in January, March and May 2013. Weyers posted the advertisement after receiving notice from the Board of his lapsed license and a warning that advertising massage services without an active massage therapist license violated Oregon law. He continued to post the advertisement after the Board notified him that a complaint had been received, alleging that he was advertising massages in violation of Oregon law. Because of these notifications, Weyers was aware that his conduct was unlawful. Because he violated ORS 687.021(2) on at least three different occasions and because he was aware that his conduct violated Oregon law, the Board's proposed civil penalty of \$2,500 is reasonable and not an abuse of its discretion. Weyers must pay a civil penalty of \$2,500.

RULING AND ORDER

The Board of Massage Therapist's Motion for Summary Determination is granted. The hearing, scheduled for January 15, 2014, is cancelled.

The Board of Massage Therapist issues the following order:

Terry M. Weyers must pay the Board a civil penalty totaling \$2500. However, if Licensee pays the total of \$1,300 in civil penalties by payment of \$100 per month beginning February 20, 2014 and due on the 20th of each month thereafter and continues for 13 months to make payments in addition to also timely renewing his license for the next license period without any violations of laws and rules, the Board will agree to the following: if Terry Weyers completes these two items successfully, the Board agrees to waive the further amount due of \$1,200.00.

If Terry Weyers does not make full payment as noted above for 13 months, fails to make any amounts of the payments or fails to timely and without violation renew his license for the next renewal period, the total amount of \$2500 becomes due and payable and failure to do so may result in further discipline, up to and including revocation of his license.

Dated:

01/15/2014

Signature on File

Oregon Board of Massage Therapists

APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.480 et seq.