

**STATE OF VERMONT
BOARD OF CHIROPRACTIC**

In re: Marvin O. Smith, II
License No. Applicant

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Docket No. 2011-216

**Decision on
Unprofessional Conduct Charge
and Application for Licensure**

Board Members Participating:

Palmer Peet, D.C.

Daniel Coane

Vernon Temple D.C.

John Webber

Appearances:

for Petitioner, State of Vermont: Edward G. Adrian

for Respondent: James Valente

Presiding Officer: Larry S. Novins

**Findings of Fact, Conclusions of Law,
and Order**

The Board of Chiropractic held a hearing in the above matter on February 7, 2012 at the Office of Professional Regulation hearing room in the National Life Building in Montpelier, Vermont.

The prosecution has the burden of proof in this matter. To prevail on any unprofessional conduct charge, it must prove the charge by a preponderance of the evidence.

Background

Dr. Smith applied for a Vermont license to practice chiropractic. His application was preliminarily denied because of disciplinary action taken against him in the State of Arizona. Dr. Smith appealed the denial, and the State filed the unprofessional conduct charges upon which this hearing was based. The prosecution alleges in its Specification of Charges that Dr. Smith was sanctioned by the Arizona Board of Chiropractic for various violations of Arizona laws relating to the practice of chiropractic medicine, that he failed to abide by an Order of the Arizona Board, and that those violations constitute unprofessional conduct under Vermont law.

Findings of Fact

Based upon the evidence presented, the Board finds as follows:

1. Dr. Smith is an applicant for licensure in Vermont as a chiropractor and is thus subject to the regulatory and disciplinary authority of this Board. 26 V.S.A. § Chapter 10, 3 V.S.A. §§ 129, 129(a), the Rules of the Board of Chiropractic, and the Rules of the Office of Professional Regulation.
2. Under 3 V.S.A. § 129(a)(5) this Board may "Discipline any licensee or refuse to license any person who has had a license application denied or a license revoked, suspended, limited, conditioned, or otherwise disciplined by a licensing agency in another jurisdiction for conduct which would constitute unprofessional conduct in this state, or has surrendered a license while under investigation for unprofessional conduct."
3. Dr. Smith resides in Vermont. He was previously licensed as a chiropractor by the State of Arizona.
4. The evidence at the hearing consisted of copies of the Arizona licensing Board Orders, correspondence between Dr. Smith and the Arizona Board, testimonial letters from former patients and others familiar with his Arizona practice, and the testimony of Dr. Smith.
5. Exhibit 1, offered by the prosecution is a copy of the August 3, 2004 Arizona State Board of Chiropractic Examiners Decision which found among other things that Dr. Smith had committed multiple instances of "unprofessional or dishonorable conduct of a character likely to deceive or defraud the public or tending to discredit the profession," practicing "contrary to recognized standards of chiropractic or conduct or practice that constitutes a danger to the health, welfare or safety of the patient or the public or any conduct, practice of condition that impairs the ability of the licensee to safely and skillfully practice chiropractic."
6. The detailed sixteen page August 3, 2004 Arizona decision revoked Dr. Smith's license, with the revocation stayed for five years so long as Dr. Smith abided by professional probation by complying with certain conditions.
7. Dr. Smith was informed of his right to petition the Arizona licensing board for rehearing or review the Arizona Board's decision. He chose not to.
8. On March 22, 2005, Dr. Smith in a hand-delivered letter surrendered his license to the Arizona Board. In his letter he claimed he was unable to afford the costs of a required record keeping class. Dr. Smith has three brothers, three cousins, and two nephews all of whom are chiropractors. Dr. Smith's father was a chiropractor. Dr. Smith testified that in 2005 he could not afford the \$700 it would have cost him to travel to another part of the state for an examination required for his probation.
9. Dr. Smith's surrender letter called the earlier prosecution against him "illegal." He claimed he had been wrongfully punished for practicing a technique of Chiropractic he had been taught at Western States Chiropractic College. Our review of the Order shows no such Finding. Rather, Dr. Smith was sanctioned for making, among other things, diagnoses of coronary and related irregularities, anemia, and severe heart problems, all of which were contradicted by several medical specialists and laboratory examinations. Dr. Smith was sanctioned because he failed to consult with appropriate health care professionals or to refer the patients with those diagnoses to appropriate health care professionals. He was sanctioned because his patient records were in parts illegible, because they lacked explanations for why certain tests were performed, and because notes

- for each patient visit were not made.
10. On August 1, 2005, five months after Dr. Smith surrendered his license, the Arizona Board found that he had violated the terms of its 2004 Order. (Exhibit 2). Dr. Smith had earlier been given 30 additional days to complete the required continuing education. He did not. Dr. Smith's probation was terminated, and his license to practice Chiropractic in Arizona was revoked. The Board further Ordered that Dr. Smith not be allowed to re-apply for licensure until he complied with all conditions of the 2004 Order and paid all costs related to the 2005 proceeding. The Board made its order immediately effective finding that Dr. Smith was "unregulatable and that he poses a threat to the public's welfare and safety if allowed to practice chiropractic."
 11. While in Arizona, Dr. Smith decided to seek licensure as a naturopathic physician. He completed one naturopathic training program. But the Arizona Naturopathic licensing Board determined that the program was not acceptable. Dr. Smith then enrolled and completed a second naturopathic program. In total, Dr. Smith spent approximately \$252,000 on his naturopathic education. Dr. Smith testified that he was unable to become licensed as a naturopath in Arizona because of the action the Chiropractic Board took against him.
 12. Dr. Smith and his wife moved to Vermont in August 2006. They purchased a \$970,000 home, putting \$400,000 down toward the purchase price.
 13. Dr. Smith did not, when he had the money, complete the requirements necessary for reinstatement of his license in Arizona.
 14. Dr. Smith does not dispute that his license was sanctioned in the State of Arizona. He admits that he still has not fully met the requirements necessary for him to apply for reinstatement in Arizona.
 15. While not challenging the legality of the Arizona proceedings, Dr. Smith submits that they were flawed for many reasons and that they should not bar his quest for licensure in Vermont.
 16. Dr. Smith submits that in 2005 he would have completed his probation in the time allotted him in Arizona had he had enough money then to do so. We do not find that testimony credible.
 17. We decline to speculate on the propriety of the Arizona decisions. As a licensing Board we lack the authority to set aside an Order of another jurisdiction's licensing Board. Nor can we second guess the motives or conduct of the Arizona Board when Dr. Smith did not avail himself of his legal remedies in Arizona. We consider the Arizona Board's decision to be final.

Conclusions of Law

1. The 2005 Arizona Order shows that Dr. Smith has violated an order of a chiropractic licensing board. Failing to comply with an order of the board or violating any term or condition of a license restricted by the Board is unprofessional conduct in Vermont. 3 V.S.A. § 129a(a)(4).
2. The 2004 Order of the Arizona Board revoking Dr. Smith's license and placing him on probation for failing to maintain records and failing to meet acceptable standards for the

practice of chiropractic sets forth facts that would constitute unprofessional conduct had they occurred in Vermont. This is unprofessional conduct. 26 V.S.A. §§ 541(b)(3) and (5), and 26 V.S.A. § 541(b)(10) (Conduct which evidences unfitness to practice chiropractic.), 3 V.S.A. § 129a(b) (Failure to practice competently by reason of any cause on a single occasion or on multiple occasions - which includes: (1) performance of unsafe or unacceptable patient or client care; or (2) failure to conform to the essential standards of acceptable and prevailing practice).

Discussion

Dr. Smith asks this Board to look beyond the Orders of the Arizona Board and permit him to be examined for licensure to practice chiropractic in Vermont. He asks us to consider in our deliberations, the flaws he claims in the Arizona proceedings. We can not speculate as to what may have "really happened" in Arizona.

Dr. Smith asks that his failure to complete the reinstatement requirements in Arizona either be forgiven, or that those conditions be set as a pre-condition or condition of licensure here. The Arizona Orders reveal serious violations of professional standards of conduct and practice. We find a disturbing dissonance between the Findings of Fact recited in the Arizona Order on one hand, and Dr. Smith's characterization of the case against him in his surrender letter and in his testimony to this Board on the other. In 2005, Arizona found Dr. Smith to be "unregulatable." The Arizona Orders compel us to deny his application for licensure. We cannot conclude that granting Dr. Smith a license is consistent with our responsibility to protect the public health, safety and welfare.

When Dr. Smith obtained his license in Arizona, he subjected himself to the jurisdiction of the Arizona board. The Arizona Board examined Dr. Smith's practice and found it to be lacking. That Arizona Board is best able to judge whether he has taken the steps necessary to rehabilitate himself and re-enter practice. We decline to assume that board's responsibility to assure Dr. Smith's rehabilitation.

Order

On the record before us, for the unprofessional conduct and violations of law above, Dr. Smith's application for licensure is **denied**. The Board will not entertain another application for licensure until and unless Dr. Smith has satisfied the Arizona Board of Chiropractic that he has complied with the full terms and conditions of its 2004 and 2005 Orders. If he is able to do so, he may apply again for a Vermont license. At that time he will still bear the burden to show that he has sufficiently rehabilitated himself so as to be fit to practice chiropractic.

APPEAL RIGHTS

This is a final administrative determination by the Vermont Board of Chiropractic:

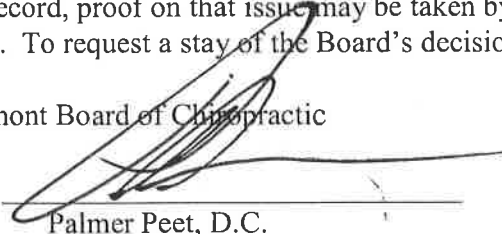
A party aggrieved by a final decision of a board may appeal this decision by filing a

written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, National Life Bldg., North, FL2, Montpelier, VT 05620-3402 within 30 days of the entry of this order.

If an appeal is filed, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The review shall be conducted on the basis of the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, proof on that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a. To request a stay of the Board's decision, please refer to the attached stay instructions.

Vermont Board of Chiropractic

by:


Palmer Peet, D.C.

Dated: February 14, 2012

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 2/17/12