

BEFORE THE
BOARD OF CHIROPRACTIC EXAMINERS
STATE OF OREGON

OCT 12 2022

In the Matter of

Mario J. Tomaino, D.C.

)
) Case # 2021-3029
)
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) Final Default Order;
) Revocation of License
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The Oregon Board of Chiropractic Examiners (Board) is the state agency responsible for licensing, regulating, and disciplining chiropractic physicians in the State of Oregon. Mario J. Tomaino, D.C. (Licensee), is currently licensed by the Board to practice as a chiropractic physician in Oregon and is subject to the jurisdiction of the OBCE.

Findings of Fact

1.

On or about December 15, 2021, the Board became aware that Licensee was arrested and charged with crimes that occurred in Clackamas County, Oregon. In Clackamas County Case number 21 CR 61762, filed on December 20, 2021, Licensee was charged by indictment on January 7, 2022, for the following:

1. Luring a minor; ORS 167.057 (Class C felony);
2. Online sexual corruption of a child; ORS 163.433 (Class B Felony); and
3. Online Sexual corruption of a child; ORS 163.432 (Class C felony).

The information alleged that Licensee unlawfully and knowingly furnished to or use, with police officer posing as minor, visual representation, an explicit verbal description or narrative account of sexual conduct, for the purpose of inducing the minor or purported minor to engage in sexual conduct and, in the other counts, that Licensee knowingly, as a person who is 18 years of age or older, did unlawfully and for the purpose of arousing and gratifying person's sexual desire,

Final Default Order (Revocation)

knowingly use an online communication to solicit child to engage in sexual contact and sexually explicit conduct and offered and agreed to physically meet with the child and intentionally took substantial step toward physically meeting with and encountering the child.

Licensee was previously disciplined by the Board in case 2005-3014, for inappropriate sexual boundary violations that resulted in a reprimand, requirement to take an ethics class, and a civil penalty of \$1,000.

2.

The Board has received credible information from law enforcement of Licensee's inappropriate attempts to lure a minor for criminal intent. This type of conduct to a minor amounts to acts of unprofessional conduct. In addition, the Board has credible information that Licensee has been arrested and charged with three different counts of luring a minor and online sexual corruption of a minor, crimes in Clackamas County, Oregon.

In view of the nature of the alleged misconduct and its repeated nature, there is a high probability of recurrent acts of endangerment of patients if Licensee is to continue to practice chiropractic prior to any completion of a hearing and/or finalization of this investigation. The Board has grave concerns that the Licensee is unable to safely and competently practice chiropractic. The nature of the complaints and the current behaviors of Licensee place great risk of potential harm to individual patients.

3.

On June 28, 2022, the Board issued a Proposed Notice of Revocation to Licensee. In that notice, the Board notified Licensee that he had a right to request a hearing within a 30-day time period. Notices were sent to Licensee's last known address provided to the Board, and to the county jail where Licensee was being held. The Board also notified Licensee that if he failed to request a hearing, the Board's record could be used as prima facie evidence of the violations and be relied on for purposes of default.

Licensee failed to timely request a hearing and is now in default.

4.

The Board finds that the acts and conduct of Licensee described above constituted grounds for immediate license suspension and revocation and amounts to unprofessional conduct and lack of good moral character and Licensee was emergency suspended on December 29, 2021. As of the date of this order, Licensee has not requested a hearing on that emergency suspension.

Conclusions of Law

5.

The allegations as noted above in paragraphs 1-3, would constitute multiple violations of ORS 684.100(1) (f) (A), ORS 684.040, OAR 811-010-0005(5), ORS 670.280(3) as these acts were substantially related to the fitness and ability of Licensee to engage in chiropractic care in the state of Oregon.

ORDER

6.

Based on the above, Licensee's license to practice chiropractic is hereby revoked.

DATED this 12th day of September, 2022.

BOARD OF CHIROPRACTIC EXAMINERS
State of Oregon

Signature is on file with the OBCE office

By: _____

Cassandra C. McLeod-Skinner, J.D.
Executive Director

Appeal Rights:

You are entitled to judicial review of this order in accordance with ORS Chapter 183.480.

You may request judicial review by filing a petition in the Court of Appeals in Salem, Oregon within 60 days from the date of this order.

Certificate of Service

I, Cassandra C. McLeod-Skinner, certify that on the 12th day of September, 2022, I served the foregoing Final Default Order (Revocation) upon the party hereto by email and by mailing, postage prepaid, a true, exact and full copy thereof to:

Mario J. Tomaino
6516 N. Maryland Avenue
Portland OR 97217
drtomaino@gmail.com

Signature is on file with the OBCE office

Cassandra C. McLeod-Skinner, J.D.
Executive Director
Oregon Board of Chiropractic Examiners

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

You should read this information to prepare for the hearing

1. **Law that applies.** The matter set for hearing is a contested case. The hearing will be conducted as provided in chapter 183 of the Oregon Revised Statutes and the administrative rules and statutes of the Oregon Board of Chiropractic Examiners (OBCE), OAR chapter 811, ORS chapter 684, and the Attorney General's Office of Administrative Hearing Rules, OAR Chapter 137-003-0501 to 137-003-0700.
2. **Right to attorney.** The OBCE will be represented by an attorney. You are not required to be represented by counsel, unless you are an agency, corporation or association. You have a right to be represented by an attorney at your own expense. If you are not represented at the hearing and determine in the course of the hearing that an attorney is necessary you may request a recess to allow you an opportunity to secure the services of an attorney. The ALJ will decide whether to grant such a request. Legal Aid Organizations may be able to assist you if you have limited financial resources.
3. **Subpoenas.** You may subpoena witnesses. The OBCE will issue subpoenas upon request and upon a showing of good cause and general relevance of the evidence sought. If you are represented by an attorney, your attorney may issue subpoenas. Payment of witness and mileage fees to a witness you subpoena is your responsibility.
4. **Administrative Law Judge.** The person presiding at the hearing will be an Administrative Law Judge from the Office of Administrative Hearings. The ALJ will rule on all matters that arise at the hearing, subject to any agency consideration of matters transmitted for agency decision under OAR 137-003-0635 or matters subject to agency review under OAR 137-003-0640 and 137-003-0570. The ALJ will be assigned by the Chief ALJ from the Office of Administrative Hearings. The Office of Administrative Hearings consists of employees of the Employment Department and independent contractors with the Office of Administrative Hearings. The ALJ does not have the authority to make the final decision in the case. The final determination will be made by the Board.
5. **Discovery.** Discovery is permitted by the parties and requests for discovery should be in writing. Discovery should be requested first by informal means by the parties. You have the right to respond to all issues properly before the ALJ and should present evidence and witnesses. Discovery is provided in OAR 137-003-0570, OAR 137-003-0572 and OAR 137-003-0570(8).
- 6.. **Order of evidence.** A hearing is similar to a court proceeding but is less formal. Its general purpose is to determine the facts and whether the OBCE's actions are appropriate. The order of presentation of evidence is normally as follows:
 - a. Testimony of witnesses and other evidence of the Board in support of its proposed action.
 - b. Testimony of your witnesses and your other evidence.
 - c. Rebuttal evidence by the Board and by you.
6. **Burden of presenting evidence.** The burden of presenting evidence to support a fact or a position rests upon the party who proposes that fact or position. If you have the burden of proof on an issue, or if you intent to present evidence on an issue in which the agency has the burden of proof you should approach the hearing prepared to present the testimony of witnesses, including yourself, and other evidence that will support your position. All witnesses are subject to cross-examination and also to questioning by the ALJ.

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7. **Witnesses.** All witnesses must testify under oath or affirmation to tell the truth. All witnesses, including yourself, are subject to cross-examined by other parties or by the ALJ.
8. **Admissible Evidence.** Evidence that may be admitted at the hearing is that which is commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much reliance the Board will place on it in reaching a decision.

Four kinds of evidence may be admitted.

- a. Knowledge of the OBCE. The ALJ may take "official notice" of commonly known facts and of facts and conclusions developed from the experience in the specialized field of activity. This includes notice of technical or scientific facts. You will be informed at the hearing if the OBCE takes "official notice" of any fact so that you may contest those facts. The agency may also take "judicial notice" of a fact that is not subject to reasonable dispute in that it is generally known or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
 - b. Testimony of witnesses. This includes your own testimony.
 - c. Writings. This includes letters, maps, diagrams and other written material offered as evidence.
 - d. Photographs, experiments, demonstrations and similar means to prove a fact.
9. **Objections to evidence.** Evidence may be objected to on any legal grounds; including:
 - a. Irrelevant. The evidence has no tendency to prove or disprove any issue involved in the hearing.
 - b. Immaterial. The evidence is offered to prove a proposition which is not a matter in issue at the hearing.
 - c. Unduly repetitious. The evidence is merely repetitive of what has already been offered and admitted.
 - d. Hearsay, authenticity or foundation. To the extent that such evidence would not commonly be relied upon by reasonably prudent persons in the conduct of their serious affairs.
 10. **Continuances.** Unless allowed by the OBCE or ALJ, there will be no continuance and the record will not be reopened regarding any matters determined at the conference or hearing. However, if you can show that the record should remain open for additional evidence, the ALJ may grant you additional time to submit such evidence.
 11. **Proposed Order and Exceptions to proposed order.** The ALJ will issue a proposed order in the form of findings of fact, conclusions of law and recommended agency action. You will be provided with a copy and you will be given an opportunity to make written objections, called "exceptions" to the ALJ's recommendations. You will be notified when exceptions to the proposed order must be filed. You will also be notified when you may appear and make oral argument to the Board if applicable

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Not later than 10 days after the date of the filing of the proposed order with the Board, you may file and serve on the OBCE and the ALJ, your written exceptions to the proposed order.

- a. The exceptions shall be confined to the factual and legal issues which are essential to the ultimate and just determination of the proceeding, and shall be based only on grounds that:
 - A. A necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence on the record;
 - B. A necessary legal conclusion is omitted or is contrary to law or the Board's policy; or
 - C. Prejudicial procedural error occurred.
- b. The exceptions shall be numbered and shall specify the disputed findings, opinions or conclusions. The nature of the suggested error shall be specified and the alternative or corrective language provided.

After the OBCE has received and reviewed the proposed order and the exceptions, if any, the OBCE shall:

- a. Entertain such oral argument as it determines necessary or appropriate to assist it in the proper disposition of the case; and
 - b. Remand the matter to the hearings officer for further proceedings on any issues of fact which the OBCE believes were not fully or adequately developed; or
 - c. Enter a final order adopting the recommendation of the ALJ as the OBCE's order or rejecting the recommendation of the ALJ. If the OBCE elects to reject the recommendation of the ALJ, the final order shall contain necessary findings of fact and conclusions of law.
12. **Final Order.** The agency will render the final order in this matter. The agency may modify the proposed order issued by the ALJ. If the agency modifies the proposed order in any substantial matter, the agency in its order will identify the modification and explain why the agency made the modification. The agency may modify a proposed finding of "historical" fact only if the proposed finding is not supported by clear and convincing evidence in the record.
13. **Conferences.** Prior to a hearing, the ALJ may schedule conferences to:
- a. Establish a procedural schedule, including dates for prefiled testimony and exhibits;
 - b. Identify, simplify or clarify issues;
 - c. Eliminate irrelevant or immaterial issues;
 - d. Obtain stipulations, authenticate documents, admit documents into evidence and decide the order of proof; and

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- e. Consider other matters which may expedite the orderly conduct and disposition of the proceeding.

Except as provided in the following paragraph, the record shall reflect the results of any conferences, which shall be binding on all parties.

14. **NOTICE TO ACTIVE DUTY SERVICEMEMBERS:**

Active duty service members have a right to stay these proceedings under Service Members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

15. **Record.** A record will be made of the entire hearing to preserve the testimony and other evidence for appeal. This will be done by a tape recorder. Ordinarily the record will not be transcribed unless you appeal to the Court of Appeals. If you appeal, you will not have to pay for the cost of transcribing the record, unless the petition is frivolous or you unreasonably refuse to stipulate to a limited record. If you do not appeal, a copy of the record will be made available to you upon payment of the cost of making it.
16. **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 on you. See Oregon Revised Statutes 183.480 et seq.