

JUN -3 2010

BEFORE THE
BOARD OF CHIROPRACTIC EXAMINERS
STATE OF OREGON

OREGON BOARD OF
CHIROPRACTIC EXAMINERS

In the Matter of)	
)	STIPULATED FINAL ORDER
Brent Warner DC)	
)	
)	
Licensee No. 2125)	Case # 2009-1009
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The Oregon Board of Chiropractic Examiners (hereafter "Board" or "OBCE") is the state agency responsible for licensing, regulating and disciplining chiropractic physicians and certified chiropractic assistants in the State of Oregon. Brent Warner DC (hereafter "Licensee"), is a licensed chiropractic physician in Oregon.

Findings of Fact

1.

On March 24, 2010, Licensee was disciplined in case number 2009-1009 and received the following Final Order:

1. Pursuant to ORS 684.100(1), the Board suspends the license of Licensee's for 120 days to begin from issuance of this final order.
2. Pursuant to ORS 684.100(9)(b), the Board hereby places Licensee on probation for three years following the conclusion of his license suspension.
3. Pursuant to ORS 684.100(9)(e) orders Licensee to attend and complete the PROBE ethics program within six months of the date of the final order, and provide a certificate of successful completion of the program to the Board within 30 days of completion along with a final report as required by that program.
4. Pursuant to ORS 684.100(9)(f) the Board imposes a civil penalty in the sum of \$5,000 to Licensee to be paid within 30 days this order becomes final.
5. Pursuant to ORS 684.100(9)(g) the Board assess costs of the disciplinary proceeding in the following amounts which include the investigative costs and attorney fees in the following amounts:
 - a. OAH costs: \$3,952.35
 - b. DOJ costs: \$5,550.00.

The Final Order of May 24, 2010, is hereby incorporated by reference into this stipulation and is still in effect.

2.

Licensee attended the Probe class in March 2011 but did not pass the program as the order required. Licensee is now out of compliance with the March 24, 2010 Final Order.

Licensee has not made any payments towards his civil penalty or costs of discipline.

Conclusions of Law

3.

The Board finds that Licensee's conduct as described herein constitutes a violation of the Board Final Order. This is a violation of ORS 684.100 (1)(p); and OAR 811-035-0015(23).

Stipulations

4.

Licensee wishes to resolve this matter and hereby waives any right to appeal or to a contested case hearing. Licensee is aware of his right to an attorney in representing him in this matter and hereby agrees to the following stipulations. The Board orders Licensee to complete the following:

1. Licensee will be required to complete items 2, 4 and 5 of the March 24, 2010 Final Order.
2. Item # 3 (ProBE) is stayed pending completion of the evaluation below.
3. Licensee agrees to have a Board approved psychologist or psychiatrist perform an evaluation to determine Licensee's ability to practice with skill

and safety towards patients as regards professional boundaries and ethics. Licensee will direct the evaluator to provide his report directly to the Board along with any treatment recommendations. Licensee agrees to make contact and schedule an appointment with the evaluator within 10 days of being provided the name and contact information. The evaluation will be completed within 90 days of the date of this stipulated agreement.

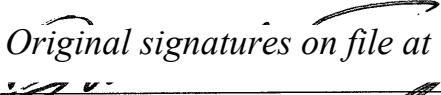
Licensee agrees that he will abide by these treatment recommendations, which could be for counseling, other treatment or attendance of specific classes, ProBE if indicated and agrees to fully comply with the recommendations as part of this stipulation.

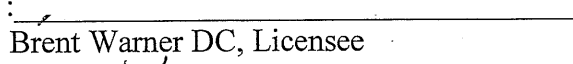
Licensee will also be responsible for any expenses of the evaluation.

4. Unless the OBCE is stayed by an actual bankruptcy proceeding, Licensee agrees to establish a payment plan toward his civil penalty and cost of discipline obligation within 30 days.
5. Further violations of this stipulation order may result in further discipline up to and including revocation of the license.

Effective last date signed below:

BOARD OF CHIROPRACTIC EXAMINERS
State of Oregon

Original signatures on file at OBCE office
BY: 
Dave McTeague, Executive Director
Date: 6-6-2011

Original signatures on file at OBCE office
BY: 
Brent Warner DC, Licensee
Date: 6/1/2011

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
BOARD OF CHIROPRACTIC EXAMINERS**

IN THE MATTER OF:

BRENT WARNER, DC,
Licensee

) FINAL ORDER

)

) OAH Case No.: 901235

) Agency Case No.: 2009-1009

HISTORY OF THE CASE

On July 21, 2009, the Board of Chiropractic Examiners (Board) issued a Notice of Proposed Disciplinary Action to Brent Warner (Licensee). On August 4, 2009, Licensee requested a hearing.

On August 6, 2009, the Board referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing. On September 21, 2009, a pre-hearing telephone conference was held with the parties. ALJ Gutman presided. Licensee represented himself. Assistant Attorney General (AAG) Lori Lindley represented the Board. On September 21, 2009, ALJ Gutman issued a Pre-Hearing Order.

On December 14, 2009, a hearing was held at the Board's offices in Salem, Oregon. Licensee represented himself. Ms. Lindley represented the Board. Licensee, Husband 1, Patient 1, OBCE Investigator Tom Rozinski, OBCE Executive Director Dave McTeague, and Dr. 1 all provided testimony. The record closed on December 14, 2009.

On February 18, 2010, Licensee filed written exceptions with the Board. On March 18, 2010 the Board considered those exceptions. The Board found those exceptions to be without merit.

ISSUES

1. Whether Licensee engaged in unprofessional conduct, in violation of ORS 684.100(1)(g)(A) and OAR 811-035-0015(1)(b)-(e).
2. Whether Licensee failed to keep chart notes and provide the Board with the requested documents, in violation of ORS 684.100(1)(g)(A), OAR 811-015-0005(1) and OAR 811-035-0015(19).
3. Whether Licensee failed to cooperate in a Board investigation, in violation of OAR 811-035-0015(20).

4. Whether Licensee's license shall be suspended for 120 days following the final order in this matter.

5. Whether Licensee shall be placed on probation for three years following the conclusion of his suspension.

6. Whether Licensee shall be required to attend and complete the PROBE ethics program within six months of the date of the final order, and provide a certificate of successful completion of the program to the Board within that time period along with his final report as required by that program.

7. Whether a civil penalty in the amount of \$5,000 shall be assessed against Licensee and payable within 30 days of the final order.

8. Whether Licensee shall pay the costs of this disciplinary proceeding, including investigative costs and attorney fees pursuant to ORS 684.100(9)(g).

EVIDENTIARY RULING

The Board's Exhibits A1 through A3 were admitted into the record without objection. Licensee's Exhibits R1 and R3 were excluded as irrelevant. Licensee's Exhibit R2 was excluded based on lack of authentication.

CREDIBILITY DETERMINATION

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

Termination of doctor/patient relationship

Licensee testified that Patient 1 verbally terminated the doctor/patient relationship prior to engaging in sexual relations with him. However, Patient 1 testified that she did not terminate the doctor/patient relationship because she did not think there was one. Patient 1's testimony was corroborated by the fact that both Licensee and Patient 1 told Mr. Rozinski that Patient 1 was not a "patient" during the Board's investigation. The board finds, more likely than not, that

Patient 1 did not verbally terminate the doctor/patient relationship prior to engaging in sexual relations with Licensee.

Treatment of Husband 1

Licensee testified that he did not treat Husband 1. However, Husband 1 credibly testified that Licensee treated him one time. Husband 1's testimony was corroborated by Patient 1. The Board finds, more likely than not, that Licensee treated Husband 1 one time.

Testimony by Licensee

Licensee initially testified that he did not go to a motel with Patient 1, but later admitted that he did go to a motel with Patient 1. A witness false in one part of his testimony may be distrusted in others. *See* ORS 10.095(3).

In addition, Licensee testified that he contacted Patient 1 prior to hearing and discussed the case, despite agreeing with the Board not to do so. Accordingly, the testimony provided by Licensee will not be relied upon when it contradicts that evidence presented by the Board.

Testimony by Patient 1

Patient 1 testified that she contacted Licensee prior to hearing and discussed the case, despite agreeing with the Board not to do so. Therefore, Patient 1's testimony will not be relied upon when it contradicts the evidence presented by the Board.

FINDINGS OF FACT

1. Licensee has been a Chiropractic Physician for approximately 23 years. (Test. of Licensee.)
2. In 2003, Licensee met Husband 1 and Patient 1 at an open house held by Dr. 2. (*Id.*; Ex. A2 at 3.)
3. Husband 1 is married to Patient 1 and has been for approximately 10 years. Husband 1 and Patient 1 are employed at United Food Ingredients (UFI). (Test. of Patient 1; test. of Husband 1.)
4. From 2003 through early 2008, Licensee provided chiropractic treatment to Patient 1 in exchange for her help with Licensee's business venture in Taiwan. Licensee treated Patient 1 approximately 12-20 times at UFI and her home. Licensee also treated Husband 1 one time at UFI. (Test. of Licensee; test. of Husband 1; test. of Patient 1; Ex. A2.)
5. Licensee did not charge Patient 1 or Husband 1 for the chiropractic treatment he provided to them. (Test. of Patient 1.)

6. Licensee did not chart Patient 1's chiropractic treatment. He did not chart Husband 1's chiropractic treatment. (Test. of Licensee.)

7. In September 2008, Patient 1 went to Licensee's apartment to have her knee adjusted. Licensee and Patient 1 began having a sexual relationship at that time. (Ex. A2 at 3-4.)

8. In early March 2009, Husband 1 arrived home early and found his wife in their bedroom with Licensee. Husband 1 was devastated. (Test. of Husband 1.)

9. On March 9, 2009, Licensee wrote a letter to Husband 1 admitting to the affair and placing the blame, in part, on Husband 1's long work hours. (Ex. A1.)

10. On or about March 11, 2009, Licensee and Patient 1 continued their sexual affair at a motel. (Test. of Licensee; Ex. A2 at 4.)

11. On March 12, 2009, the Board received a complaint of sexual misconduct against Licensee and subsequently began an investigation. (Ex. A2 at 1.)

12. On June 19, 2009, Thomas Rozinski, Board Investigator, interviewed Patient 1 regarding the complaint against Licensee. Patient 1 stated, among other things, the following:

- Licensee was a friend. She had never been his patient.
- Licensee treated her in trade for help on his corkscrew project.
- She received dozens of treatments from Licensee, which took place at her work or home.
- She never paid for the treatment.
- She had an affair with Licensee. She was not a victim.

(Test. of Rozinski; Ex. A2 at 1-2.) Patient 1 agreed not to contact Licensee during the investigation. (Test. of Rozinski; Ex. A2 at 2.) After Mr. Rozinski left, Patient 1 called Licensee and warned him about the investigator. (Ex. A2 at 4.)

13. On June 19, 2009, Mr. Rozinski interviewed Licensee regarding the sexual misconduct complaint. Throughout the interview, Licensee vacillated between being openly hostile and angry, and being compliant. Licensee yelled and cursed at the investigator, and refused to answer some of the questions posed. Licensee also demanded that Mr. Rozinski leave the clinic two different times. At one point, Mr. Rozinski asked Licensee to produce the patient files on Patient 1 and Husband 1. Licensee replied that there were no files. Licensee also stated, among other things, the following:

- Patient 1 was not a patient. She was a friend.
- He treated Patient 1 roughly a dozen times.
- In September 2008, he and Patient 1 began having a sexual affair, which continued for several months.
- Husband 1 caught them in bed together.
- He wrote a letter to Husband 1 admitting to the affair.

- After they were caught, he and Patient 1 met at a Motel 6.

(Test. of Rozinski; Ex. A2 at 2-5.) Licensee agreed not to contact Patient 1 during the investigation. Licensee admitted that he had already talked to Patient 1 twice that day. (Test. of Rozinski; Ex. A2 at 4.)

14. Licensee and Patient 1 continued to contact each other and discuss the case during the investigation and prior to the hearing. (Test. of Patient 1; test. of Licensee.)

CONCLUSIONS OF LAW

1. Licensee engaged in unprofessional conduct, in violation of ORS 684.100(1)(g)(A) and OAR 811-035-0015(1)(b)-(e).

2. Licensee failed to keep chart notes and provide the Board with the requested documents, in violation of ORS 684.100(1)(g)(A), OAR 811-015-0005(1) and OAR 811-035-0015(19).

3. Licensee failed to cooperate in a Board investigation, in violation of OAR 811-035-0015(20).

4. Licensee's license shall be suspended for 120 days following the final order in this matter.

5. Licensee shall be placed on probation for three years following the conclusion of his suspension.

6. Licensee shall be required to attend and complete the PROBE ethics program within six months of the date of the final order, and provide a certificate of successful completion of the program to the Board within that time period along with his final report as required by that program.

7. A civil penalty in the amount of \$5,000 shall be assessed against Licensee and payable within 30 days of the final order.

8. Licensee shall pay the costs of this disciplinary proceeding, including investigative costs and attorney fees pursuant to ORS 684.100(9)(g).

OPINION

The Board contends that Licensee engaged in unprofessional conduct, failed to keep chart notes and provide the Board with the requested documents, and failed to cooperate in a Board investigation. The Board has the burden of proving the allegations by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Cook v. Employment Division*, 47 Or App 437 (1980) (the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are

more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). As set forth below, the Board has met its burden.

Violations by Licensee

1. Whether Licensee engaged in unprofessional conduct, in violation of ORS 684.100(1)(g)(A) and OAR 811-035-0015(1)(b)-(e).

The Board contends that Licensee engaged in unprofessional conduct by having sexual relations with a patient. The ALJ agreed with the Board.

ORS 684.100(1) provides, in pertinent part:

The State Board of Chiropractic Examiners may refuse to grant a license to any applicant or may discipline a person upon any of the following grounds:

(g) Unprofessional or dishonorable conduct, including but not limited to:

(A) Any conduct or practice contrary to recognized standard of ethics of the chiropractic professional or any conduct or practice that does or might constitute a danger to the health or safety of a patient or the public or any conduct, practice or condition that does or might impair a physician's ability safely and skillfully to practice chiropractic.

OAR 811-035-0015 is titled "Unprofessional Conduct in the Chiropractic Profession" and provides, in material part:

Unprofessional conduct means any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable chiropractic practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established. Unprofessional conduct shall include, but not be limited to, the following acts of a Chiropractic physician:

(1)(a) Engaging in any conduct or verbal behavior with or towards a patient that may reasonably be interpreted as sexual, seductive, sexually demeaning or romantic (also see ORS 684.100).

(b) A licensee shall not engage in sexual relations or have a romantic relationship with a current patient unless a consensual sexual relationship or a romantic relationship existed between them before the commencement of the doctor-patient relationship.

(c) "Sexual relations" means:

(A) Sexual intercourse; or

(B) Any touching of sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the licensee for the purpose of arousing or gratifying the sexual desire of either licensee or patient.

(d) In determining whether a patient is a current patient, the Board may consider the length of time of the doctor-patient contact, evidence of termination of the doctor-patient relationship, the nature of the doctor-patient relationship, and any other relevant information.

(e) A patient's consent to, initiation of or participation in sexual behavior or involvement with a licensee does not change the nature of the conduct nor lift the prohibition.

"Patient" means "any person who is examined, treated, or otherwise provided chiropractic services whether or not the person has entered into a physician/patient relationship or has agreed to pay a fee for services." OAR 811-010-0005(4).

During the period of 2003 through early 2008, Licensee provided chiropractic treatment to Patient 1. As such, Patient 1 was Licensee's patient.

In September 2008, Licensee began having sexual relations with Patient 1. At that time, Licensee and Patient 1 had not terminated the doctor/patient relationship. Accordingly, Licensee engaged in unprofessional conduct and violated ORS 684.100(1)(g)(A) and OAR 811-035-0015(1)(b)-(e).

2. Whether Licensee failed to keep chart notes and provide the Board with the requested documents, in violation of ORS 684.100(1)(g)(A), OAR 811-015-0005(1) and OAR 811-035-0015(19).

The Board contends that Licensee failed to keep chart notes and provide the Board with the requested documents. The ALJ agreed with the Board.

OAR 811-015-0005 is titled "Records" and provides, in relevant part:

(1) It will be considered unprofessional conduct not to keep complete and accurate records on all patients, including but not limited to case histories, examinations, diagnostic and therapeutic services, treatment plan, instructions in home treatment and supplements, work status information and referral recommendations.

OAR 811-035-0015 provides, in material part:

Unprofessional conduct means any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable chiropractic practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established. Unprofessional conduct shall include, but not be limited to, the following acts of a Chiropractic physician:

(19) Failing to provide the Board with any documents requested by the Board[.]

During 2003 through early 2008, Licensee provided chiropractic treatment to Patient 1. In addition, Licensee provided chiropractic treatment to Husband 1 one time. However, Licensee failed to keep chart notes on Patient 1 and Husband 1. In addition, Licensee failed to provide the Board with the chart notes when Mr. Rozinski requested the files during the investigation. Therefore, Licensee engaged in unprofessional conduct and violated ORS 684.100(1)(g)(A), OAR 811-015-0005(1) and OAR 811-035-0015(19).

3. Whether Licensee failed to cooperate in a Board investigation, in violation of OAR 811-035-0015(20).

The Board contends that Licensee failed to cooperate in a board investigation. The ALJ agreed with the Board.

OAR 811-035-0015 provides, in pertinent part:

Unprofessional conduct means any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable chiropractic practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established. Unprofessional conduct shall

include, but not be limited to, the following acts of a Chiropractic physician:

(20) Failing to fully cooperate with the Board during the course of an investigation, including but not limited to, waiver of confidentiality privileges, except attorney-client privilege[.]

On June 19, 2009, Mr. Rozinski investigated the sexual misconduct complaint against Licensee. During the interview, Licensee yelled and cussed at the investigator and refused to answer some of the questions posed. Consequently, Licensee failed to fully cooperate with the Board during the course of an investigation. As such, Licensee engaged in unprofessional conduct and violated OAR 811-035-0015(20).

Discipline of Licensee

1. Whether Licensee's license shall be suspended for 120 days following the final order in this matter.

The Board contends that Licensee's license should be suspended for 120 days. The ALJ agreed with the Board.

ORS 684.100(9) provides:

In disciplining a person as authorized by subsection (1) of this section, the board may use any or all of the following methods:

- (a) Suspend judgment.
- (b) Place the person on probation.
- (c) Suspend the license of the person to practice chiropractic in this state.
- (d) Revoke the license of the person to practice chiropractic in this state.
- (e) Place limitations on the license of the person to practice chiropractic in this state.
- (f) Impose a civil penalty not to exceed \$10,000.
- (g) Take other disciplinary action as the board in its discretion finds proper, including assessment of the costs of the disciplinary proceedings.

Pursuant to the authority cited above, in disciplining a person under ORS 684.100(1), the Board may, among other things, suspend the license of the person to practice chiropractic in this state. Having reviewed the record, the ALJ believed that a suspension of Licensee's license for 120 days is appropriate in this case.

2. Whether Licensee shall be placed on probation for three years following the conclusion of his suspension.

The Board contends that Licensee should be placed on probation for three years. The ALJ agreed with the Board.

Pursuant to ORS 684.100(9)(b), in disciplining a person under ORS 684.100(1), the Board may place the person on probation. Having reviewed the record, The ALJ believed that it is appropriate to place Licensee on probation for three years following the conclusion of his license suspension.

3. Whether Licensee shall be required to attend and complete the PROBE ethics program within six months of the date of the final order, and provide a certificate of successful completion of the program to the Board within that time period along with his final report as required by that program.

The Board contends that Licensee should be required to attend and complete the PROBE ethics program. The ALJ agreed with the Board.

Pursuant to ORS 684.100(9)(e), in disciplining a person under ORS 684.100(1), the Board may place limitations on the license of the person to practice chiropractic in this state. Having reviewed the record, the ALJ believed that it is appropriate for Licensee to attend and complete the PROBE ethics program within six months of the date of the final order, and provide a certificate of successful completion of the program to the Board within that time period along with his final report as required by that program.

4. Whether a civil penalty in the amount of \$5,000 shall be assessed against Licensee and payable within 30 days of the final order.

The Board contends that Licensee should pay a civil penalty in the amount of \$5,000. The ALJ agreed with the Board.

Pursuant to ORS 684.100(9)(f), in disciplining a person under ORS 684.100(1), the Board may impose a civil penalty not to exceed \$10,000. Having reviewed the record, the ALJ believed that a civil penalty in the amount of \$5,000 is appropriate in this matter.

5. Whether Licensee shall pay the costs of this disciplinary proceeding, including investigative costs and attorney fees pursuant to ORS 684.100(9)(g).

The Board contends that Licenses should pay the costs of the disciplinary proceeding.

The ALJ agreed with the Board.

Pursuant to ORS 684.100(9)(g), in disciplining a person under ORS 684.100(1), the Board may take other disciplinary action as the board in its discretion finds proper, including assessment of the costs of the disciplinary proceedings. Having reviewed the record, the ALJ believed that it is appropriate for Licensee to pay for the costs of the disciplinary proceeding, including the investigative costs and the attorney fees.

ORDER

The Board of Chiropractic Examiners issues the following order:

1. Pursuant to ORS 684.100(1), the Board suspends the license of Licensee's for 120 days to begin from issuance of this final order. This suspension is effective April 1, 2010.
2. Pursuant to ORS 684.100(9)(b), the Board hereby places Licensee on probation for three years following the conclusion of his license suspension.
3. Pursuant to ORS 684.100(9)(e) orders Licensee to attend and complete the PROBE ethics program within six months of the date of the final order, and provide a certificate of successful completion of the program to the Board within 30 days of completion along with a final report as required by that program.
4. Pursuant to ORS 684.100(9)(f) the Board imposes a civil penalty in the sum of \$5,000 to Licensee to be paid within 30 days this order becomes final.
5. Pursuant to ORS 684.100(9)(g) the Board assesses costs of the disciplinary proceeding in the amount of \$9532.35 which include the investigative costs and attorney fees. (Office of Administrative Hearings \$3952.35, Department of Justice \$5,550.00) within 30 days this order becomes final.
6. Licensee may propose and the Board may accept a payment plan for the civil penalty and cost recovery assessments.

Original signature on file at OBCE

Dave McTeague

Executive Director

Oregon Board of Chiropractic Examiners

ISSUANCE AND MAILING DATE: March 24, 2010

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.

State of Oregon) Case # 2009-1009
County of Marion) Brent Warner DC

I, Dave McTeague, being first duly sworn, state that I am the Executive Director of the Oregon Board of Chiropractic Examiners, and as such, am authorized to verify pleadings in this case: and that the foregoing Notice of Proposed Disciplinary Action is true to the best of my knowledge as I verily believe.

[Signature]
Original signature on file at OBCE

Dave McTeague, Executive Director
Oregon Board of Chiropractic Examiners



SUBSCRIBED AND SWORN to before me

this 24th day of March, 2010

[Signature]
Original signature on file at OBCE

NOTARY PUBLIC FOR OREGON

My Commission Expires: May 11, 2010