

BEFORE THE WEST VIRGINIA BOARD OF CHIROPRACTIC

WEST VIRGINIA BOARD OF
CHIROPRACTIC,
Complainant,

v.

Case No. 2012-141

STEPHEN D. HERTO, D.C.,
Respondent.

FINAL ORDER

Upon review of the record in the above-styled matter, the West Virginia Board of Chiropractic ("Board") hereby ADOPTS, in its entirety, the Hearing Examiner' s Recommended Decision, dated October 7, 2015, which is attached hereto and incorporated by reference herein. Prior to the Hearing Examiner' s Recommended Decision, Judge Jennifer F. Bailey of the Kanawha County Circuit Court denied the Respondent' s Petition for Writ of Prohibition by Order dated October 20, 2014, wherein it was found that the Board had jurisdiction to take disciplinary action against the Respondent' s license even though he no longer held an active license to practice chiropractic medicine in the State of West Virginia. It was found that the Respondent was a Board licensee at the time of his conduct constituting professional negligence and, therefore, the Board had a duty to protect the public.

Based on the Hearing Examiner' s Findings of Fact and Conclusions of Law, it was shown by preponderance of evidence, and the Respondent' s own admission that his felony conviction of twelve counts of various offenses, including soliciting a minor for sex via computer who was his

patient, violated W. Va. Code § § 30-16-11(a)(3), (4), (11) and (16). As such, the Board hereby ORDERS the following:

1. That the Respondent' s license is hereby REVOKED, effective upon entry of this *Final Order*,
2. That the Respondent shall pay to the Board, its cost of these proceedings, including but not limited to, the administrative costs and legal fees incurred by the Board with this proceeding, which total \$14,365.20; and
3. That, in addition to all other requirements prescribed by law, Respondent shall not be eligible to apply for reinstatement of his license until such time that all the costs as listed in item number two are paid in full.

ENTERED this 16th day of November, 2015.

WEST VIRGINIA BOARD OF CHIROPRACTIC

BY: 

Dr. Roger A. Kritzer, D.C.
Board Chair

BEFORE THE WEST VIRGINIA BOARD OF CHIROPRACTIC

WV BOARD OF CHIROPRACTIC

**WEST VIRGINIA BOARD OF
CHIROPRACTIC,**

RECEIVED

Complainant,

v.

Case No. 2012-141

STEPHEN D. HERTO, D.C.,

Respondent.

**HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER**

This matter came on for evidentiary hearing on the 14th day of April, 2015, before the undersigned Hearing Examiner Jack C. McClung pursuant to a Third Notice of Hearing dated March 4, 2015, on the matter of the Third Amended Complaint filed on March 25, 2015, by Complainant West Virginia Board of Chiropractic against Respondent Stephen D. Herto, D.C.

Complainant West Virginia Board of Chiropractic (hereinafter "Board") appeared by its counsel, Katherine A. Campbell, Assistant Attorney General. Respondent Stephen D. Herto (hereinafter "Respondent" or "Hereto") appeared telephonically, *pro se*.

All witnesses were sworn, documents (Complainant Exhibits 1 - 9) were received into evidence, the hearing was recorded electronically, and a transcript prepared and distributed to the parties. .

After a review of the record and exhibits admitted into evidence at the hearing of this matter, after assessing the credibility of all testimony of witnesses of record and weighing the evidence in consideration of the findings as to credibility, and after consideration of the proposed findings of fact

and conclusions of law as were filed by the parties, the undersigned hearing examiner makes the following findings of fact, conclusions of law, and proposed order.

To the extent that these findings and conclusions are inconsistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are rejected by the hearing examiner. Conversely, to the extent that these findings and conclusions are generally consistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are accepted and adopted. To the extent that the testimony of any witness is not in accordance with these Findings and Conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed or submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

CREDIBILITY OF WITNESSES, TESTIMONY, AND EXHIBITS

The hearing examiner was and is satisfied that all records and documents entered as exhibits are complete, authentic and valid, and that they were entered with the proper evidentiary foundations.

The hearing examiner was and is satisfied that the witnesses brought on by the parties were credible and truthful except as noted below. Neither the demeanor of the witnesses nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below.

FINDINGS OF FACT

1. Complainant Board is a state administrative agency charged with the responsibility of administering and enforcing state laws and regulations pertaining to the practice of chiropractic in the state of West Virginia. *See W. Va. Code § 30-16-1 et seq.*

2. As part of the Board's authority and duty to enforce the said laws and regulations, it has the authority to investigate any alleged violation of the West Virginia Board of Chiropractic Act

and its accompanying rules. *See* W. Va. Code § 30-16-1 *et seq.* and W. Va. Code R. § 4-1-1 *et seq.*

3. Stephen D. Herto was a licensee of the Board as a Chiropractor from 1991 until he became voluntarily inactive in June 2011, and as such, was subject to the license requirements of the Board. *See* April 14, 2015, Hearing Record at pp. 34-35 (hereinafter “4/14/15 R. at ____”).

4. This matter arises from a Board initiated complaint filed due to a conviction for numerous offenses, including soliciting sex from a minor who was the Respondent’s patient. *See* 4/14/15 R. at Complainant’s Exhibits 1 and 7.

5. Barbara Johnson (hereinafter “Johnson”), Executive Secretary for the Board, testified on behalf of the Board.

6. Johnson testified that the Respondent allowed his license to become inactive by failing to renew and notifying the Board of such action in June 2011. 4/14/15 R. at 34.

7. Johnson further testified that a licensee may reinstate his inactive license by simply being up to date with continuing education hours and paying the appropriate back fees to the Board. However, should more than two years pass before such reinstatement, the licensee would be required to sit and take the national SPEC examination and West Virginia jurisprudence examination; although such examination would be a shortened version of the initial examination required for a new applicant for licensure. 4/14/15 R. at 35-37.

8. Johnson further testified as to the complaint procedure that the Board is required by its governing statute and rules to adhere to, including the procedure for Board initiated complaints. 4/14/15 R. at 32-34.

9. Johnson testified that upon receiving information in May 2012 that the Respondent had pled guilty to felony offenses for soliciting a minor for sex, the Board immediately suspended

his license and initiated a Board complaint adhering to all the Board's governing statutory and regulatory guidelines for processing such a complaint. 4/14/15 R. at 39.

10. The basis of these criminal charges stemmed from solicitation of sex from a minor individual who was the Respondent's patient during the time period of October 2010 and March 2011 when the Respondent had an active license to practice chiropractic. 4/14/15 R. at 37.

11. Johnson testified that this was not the first incident of discipline by the Board for the Respondent. In 1995, his license to practice chiropractic was suspended for inappropriate physical contact with minor female patients by a *Consent Agreement and Order*. The Respondent eventually had his license reinstated upon successful completion of all the terms of the Consent Agreement and Order. 4/14/15 R. 37-38.

12. Johnson further testified that this matter was not the typical complaint case as it took exceptionally longer due to many factors, including the Respondent's filing of a *Writ*, and that there were multiple amendments to the Complaint. 4/14/15 R. at 55-56.

13. Johnson testified that after the initial Board initiated Complaint it had to be amended to reflect the vacated criminal conviction as evidenced by the filing of the Second Amended Complaint. See 4/14/15 R. at Complainant's Exhibit 1 and 40.

14. Johnson testified that at some point after the filing of the Second Amended Complaint, the Respondent filed a *Writ of Prohibition* in Kanawha County Circuit Court. She further testified that the *Writ* was ultimately denied by the Court and the Board was able to proceed forward with resetting the matter for hearing in April 2015. See 4/14/15 R. at Complainant's Exhibit 2 and 42-43.

15. Johnson further testified that prior to the April 2015 hearing she received information that the Respondent had been re-indicted and convicted on twelve counts of a thirteen count indictment for various offenses, including soliciting a minor via computer. See 4/14/15 R. at Complainant's Exhibit 3 (Verdict Form) and 45.

16. Johnson testified that she received a certified copy of the *Order Following Jury Trial* which adjudged the Respondent guilty based upon the jury trial verdict entered on February 18, 2015, from which no appeal followed by the Respondent. See 4/14/15 R. at Complainant's Exhibit 4 and 46-47.

17. Johnson testified that she had received information that the Respondent seemed to indicate that he would be willing to enter into a *Consent Agreement and Order* with the Board, and therefore, a *Consent Agreement and Order* was forwarded to the Respondent for his review but Respondent did not agree to its terms. See 4/14/15 R. at Complainant's Exhibit 5 and 48-49.

18. Respondent asserted by a letter dated March 5, 2015, that he could not sign as a Licensee even though he was at the time of the incidents of wrongdoing and that he intended to appeal the matter. However, Respondent failed to file any appeal. See 4/14/15 R. at Complainant's Exhibit 6 and 48-49.

19. Johnson testified that the complaint was amended for a third time in March 2015 to reflect the Respondent's recent felony conviction. See 4/14/15 R. at Complainant's Exhibit 7 and 49-51.

20. Johnson testified that the Respondent notified the Board on April 8, 2015, less than one week prior to the April 14, 2015, hearing that he was unable to attend the hearing due to travel

restrictions. The record reflects that in response to Respondent's asserted travel restrictions, counsel for the Board responded on behalf of the Board by letter dated April 9, 2015, stating that the hearing was still scheduled to be held on April 14, 2015, and the Respondent could appear telephonically should he choose, which in fact he did so appear. *See* 4/14/15 R. at Complainant's Exhibit 8 and 9 and 51-53.

21. Respondent asserted in the course of the hearing (but did not raise the issue in his post-hearing filing) that he did not receive the Board's hearing exhibits prior to the hearing date. In her testimony, Johnson asserted that Respondent had received Complainant's Exhibits 2, 5, 7, and 9 as proffered by the Board. *See* Complainant's Exhibits 2, 5, 7, and 9 and 50-51. Moreover, Complainant's Exhibits 6 and 8 are letters authored by the Respondent, and Complainant's Exhibits 3 and 4 are the Verdict Form and Order Following Jury Trial. *See* Complainant's Exhibit 3 and 4. That leaves only Complainant Exhibit 1 without a return receipt green card showing delivery nor testimony from Ms. Johnson indicating delivery by the Respondent; however, this was for the Second Amended Complaint and Notice of Hearing which was not the last amendment to the complaint nor did the hearing take place on the date noticed by the Board. *See* Complainant's Exhibit 1.

22. Respondent was sworn in and gave testimony in the form of a statement on behalf of himself 4/14/15 R. at 84-86, but refused to answer any questions upon cross examination by counsel for the Board. 4/15/15 R. at 86-87..

23. Respondent asserted that he was not giving testimony, but instead a brief closing statement. The record reflects, however, that Respondent did testify but did then refuse to answer

questions on cross-examination. 4/14/15 R. at 83-89.

24. Counsel for the Board asserts that any testimony given under oath should be disregarded if the witness refuses to answer questions on cross-examination, and the undersigned hearing examiner agrees. The testimony of Respondent shall therefore be disregarded as evidence and accepted instead as a closing statement of Respondent.

25. Respondent admits that he has a felony conviction. *See* 4/14/15 R. at 25-26, 72, and Respondent's *Proposed Findings of Fact and Conclusions of Law*.

26. Respondent argues at hearing and in his post-hearing filing that there is no evidence of record that the subject minor victim was a patient of his chiropractic practice and that he had treated her as a patient.

27. While the Board may have not offered any direct evidence of the minor victim being the Respondent's patient it may be inferred from the evidence as submitted.

28. Respondent never testified that the minor victim was not a patient. Instead, he argued that there had been no evidence of such presented during the hearing. Moreover, he did not testify that she was not a patient, but only argued again that the Board had presented no evidence of such.

29. Respondent refused to answer any questions upon cross-examination, and as such, the Board was hampered in its efforts to impeach the Respondent. *See* 4/14/15 R. at 86-88.

30. Additionally, the Respondent had four opportunities to answer the allegation that the minor victim was a patient by answering the first Complaint filed by the Board and its three subsequent amendments which all alleged that the minor victim was a patient. By not answering and denying the allegations of the complaint, the Respondent waives his right to do so.

CONCLUSIONS OF LAW

1. The Board is a regulatory board created for the purpose of regulating the practice of chiropractic. W. Va. Code § 30-16-1 *et seq.*

2. In order to carry out its regulatory duties, the Board is empowered to hold a hearing and to place on probation or suspend, revoke or otherwise discipline an individual's chiropractic license because of authority granted to it by W. Va. Code § 30-16-11.

3. Respondent was given proper notice of the hearing and the charges pending against him pursuant to the law and rules of the Board. *See* 4/14/15 R. at Exhibit 2 and 7.

4. Respondent was given the opportunity to be heard on this matter and cross-examine any and all witness presented by the Board. Moreover, he was able to give his own testimony on behalf of himself in this matter and as shown had access to all admitted Exhibits during and prior to the hearing.

5. The Board's rule at W. Va. Code R. § 4-5.7 states that "[t]he Board will send a copy of the complaint, including any supportive documentation, by certified mail to the chiropractor in question for his or her written comment, and he or she must submit a written response to the Board within thirty (30) days of the date of the correspondence, or waive the right to do so."

6. W. Va. Code § 30-16-11(a), states that "[t]he board may take disciplinary action against any licensee . . . after giving reasonable notice and an opportunity to be heard . . . when it finds any person has engaged in . . . the following: . . . (3) [b]eing found guilty of a crime in any jurisdiction, which offense is a felony, involves moral turpitude or directly relates to the practice of chiropractic. . . ."

7. W. Va. Code R. § 4-1-5.2 defines sexual misconduct as including any “doctor/patient relations, whether or not initiated by, or consented to, by the patient, and engaging in any conduct with a patient that is sexual or may be reasonably interpreted as sexual.”

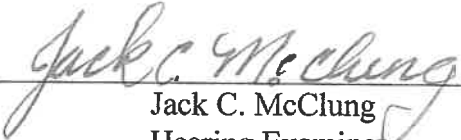
8. Based on a review of the entire record of this matter, it is concluded that the Board has shown by a preponderance of the evidence that the Respondent’s actions as shown and by his own admission of a felony conviction demonstrate clear violations of W. Va. Code §§ 30-16-11(a)(3), (4), (11) and (16) as alleged in the Third Amended Complaint. .

9. The Board has therefore met its burden of proof in this matter to prove by a preponderance of the evidence, the allegations as stated in the said Third Amended Complaint and may therefore discipline the license of Respondent Herto accordingly.

RECOMMENDED ORDER

It is therefore recommended as to the Third Amended Complaint filed on March 25, 2015, in this matter that the allegations stated in the said Complaint as to Respondent Stephen D. Herto be SUSTAINED, that any objections or defenses thereto by Respondent be DENIED, and that the Board act under authorization of law to discipline the license of Respondent Stephen D. Herto accordingly.

RECOMMENDED THIS 7th DAY OF October, 2015.



Jack C. McClung
Hearing Examiner