

**BEFORE THE BOARD OSTEOPATHIC MEDICAL EXAMINERS  
STATE OF NEW MEXICO**

Case No.: O-COM-11-12

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**DEFAULT ORDER**

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**IN THE MATTER OF DON K. SMITH, MT**

**Respondent.**

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This matter came before the New Mexico Board of Osteopathic Medical Examiners (the "Board") for a decision and order on Tuesday, February 21, 2012. After a review of the record and due consideration of the matter, the Board finds and concludes that:

1. On November 12, 2011, a Notice of Contemplated Action was properly served upon the Respondent in accordance with the Uniform Licensing Act, NMSA 1978, §§ 61-1-4 (D) and 61-1-5.
2. The Respondent did not mail a request for hearing within the time and in the manner required by NMSA 1978, §§ 61-1-4(D)(3) and (E) and is, therefore, in default.

Based upon the above findings and conclusions, the Board enters the following decision and order:

1. The Respondent shall immediately pay a civil penalty to the New Mexico Osteopathic Medical Examiners Board in the amount of one thousand dollars (\$1,000.00) pursuant to NMSA 1978, §§ 61-1-3.2.
2. This action is final and not subject to judicial review. *See* NMSA 1978, §§ 61-1-4 (E).

DONE AND SIGNED this 8 day of March, 2012.



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**Dr. James Shiveley, D.O., Chairperson**  
New Mexico Board of Osteopathic Medical Examiners  
2550 Cerrillos Road  
Santa Fe, New Mexico 87505

**BEFORE THE NEW MEXICO  
BOARD OF OSTEOPATHIC MEDICAL EXAMINERS**

IN THE MATTER OF:

**DON K. SMITH, MT** .  
Respondent.

**CASE No. O-COM-11-12**

LICENSE NO.: #NONE

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**NOTICE OF CONTEMPLATED ACTION**

YOU ARE HEREBY NOTIFIED that the New Mexico **THE NEW MEXICO BOARD OF OSTEOPATHIC MEDICAL EXAMINERS** ("Board") has before it sufficient evidence that, if not rebutted or explained at a formal hearing, will justify the Board in assessing and seeking civil penalties against you and/or imposing such other penalties as may be permitted by law.

**THE APPLICABLE LAW AND REGULATIONS**

The Board has jurisdiction to hear this matter, and to take disciplinary action against you, pursuant to the *Uniform Licensing Act* ("the Act") and the Rules and Regulations of the Board. The Board has authority to impose a civil penalty against a person who, without a license, engages in a profession or occupation regulated by the board. NMSA 1978, § 61-1-10.

Chapter §61-10-3 of the New Mexico Statutes provides, in pertinent part:

“It shall be unlawful for any person to practice as an osteopathic physician in this state without a license so to do, issued by the board of osteopathic medical examiners...” §16-10-3 NMSA 1978.

**FACTUAL BASIS**

1. At all times relevant to this Notice of Contemplated Action, Donald K. Smith was a licensed massage therapist under the *New Mexico Massage Therapy Act*.
2. At all relevant times relevant to this Notice of Contemplated Action, Respondent held himself out as an osteopath and as providing osteopathic services.
3. At no time relevant to this action has Donald K. Smith been a licensed osteopath.
4. Donald K. Smith allowed the public to understand that he was an osteopath by false and deceptive advertising using business cards, resume, and business letterhead.
5. Donald K. Smith permitted third parties to advertise that he was an osteopath by advertising, business cards, resume, and business letterhead.
6. On October 12, 2011, a preliminary injunction was issued against the Respondent proscribing him which stated:
  - “1. Defendant Smith did hold himself out to be an osteopath,

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2. Defendant Smith shall not advertise or otherwise hold himself out as an osteopath,
  3. Defendant Smith shall not use the word "osteopath" or the word "osteopathic" in conjunction with himself, techniques he uses, or with his practice of massage therapy, and:
  4. Plaintiff's petition for a preliminary injunction is therefore granted and shall remain in force until further action by the court."
7. Prior to the grant of a preliminary injunction against the Respondent, Donald K. Smith, Respondent took no action to stop third parties he knew or should have known were falsely advertising his credentials as an osteopath from doing so.
8. Respondent has facilitated third parties to advertise that he was an osteopath.
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9. Discovery has not commenced. The factual basis as stated herein above may be incomplete and subject to amendment as discovery commences.

### **RESPONDENT'S RIGHT TO A HEARING**

The formal hearing, if requested, will be conducted pursuant to the *New Mexico Uniform Licensing Act*, NMSA 1978, § 61-1-1 through 61-1-31 (Repl. Pamp. 1999). Pursuant to NMSA 1978, § 61-1-8 the licensee is specifically advised as follows:

#### **61-1-8. Rights of person entitled to hearing**

A. A person entitled to be heard under the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978] shall have the right to be represented by counsel or by a licensed member of his own profession or occupation, or both; to present all relevant evidence by means of witnesses and books, papers, documents and other

evidence; to examine all opposing witnesses who appear on any matter relevant to the issues; and to have subpoenas and subpoenas duces tecum issued as of right prior to the commencement of the hearing to compel discovery and the attendance of witnesses and the production of relevant books, papers, documents and other evidence upon making written request therefore to the board or hearing officer. The issuance of such subpoenas after the commencement of the hearing rests in the discretion of the board or the hearing officer. All notices issued pursuant to NMSA 1978, § 61-1-4 shall contain a statement of these rights.

B. Upon written request to another party, any party is entitled to: (1) obtain the names and addresses of witnesses who will or may be called by the other party to testify at the hearing; and (2) inspect and copy any documents or items which the other party will or may introduce in evidence at the hearing. The party to whom such a request is made shall comply with it within ten days after the mailing or delivery of the request. No such request shall be made less than fifteen days before the hearing.

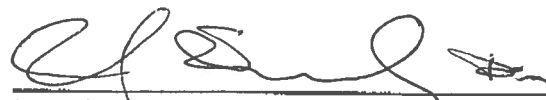
C. Any party may take depositions after service of notice in accordance with the Rules of Civil Procedure for the District Courts. Depositions may be used as in proceedings governed by those rules.

### CONCLUSION

The evidence before the Board, summarized above, if not rebutted or explained at a formal hearing, is sufficient to justify the Board imposing such penalties as may be permitted by law. **The Board will take the contemplated**

**action unless, within twenty (20) days after service of this Notice, the Respondent requests a formal hearing by certified mail return receipt requested. Such a request for a formal hearing should be mailed to Ms. Amanda Chavez, Compliance Liaison; New Mexico Board of Osteopathic Medical Examiners 2550 Cerrillos Road Santa Fe, NM 87505.**

11/1/11  
Date

  
For the New Mexico Board of Osteopathic  
Medical Examiners  
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