

**BEFORE THE MASSAGE THERAPY BOARD
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF:

**JAMES HARRELL,
Unlicensed Practitioner**

Case No.: 11-07-06

Respondent.

DEFAULT ORDER

THIS MATTER came before the New Mexico Massage Therapy Board (hereinafter “Board”) during its regularly scheduled meeting on April 16, 2014, for a decision in the above-referenced matter. With board members Elizabeth Harris, Claudio Lopez, and Dawn Saunders present, and a unanimous vote of 3-0 in the affirmative, the Board finds as follows:

FINDINGS OF FACT

1. On or about July 4, 2013, the Board issued an NCA against Respondent. The NCA stated that the Board had sufficient evidence to impose a civil penalty in the amount of \$1,000.00, and issue a cease and desist order, for practicing without a license in violation of Section 61-12C-5 of the Massage Therapy Practice Act (hereinafter “Practice Act”), NMSA 1978, §§ 61-12C-1 to -28.

2. The NCA stated that, unless explained or rebutted at a formal hearing, Respondent’s alleged conduct justified the Board in taking action to action impose a fine and issue a cease and desist order. See NCA, attached hereto.

3. On or about July 9, 2013, the Board mailed Respondent an NCA in case number 11-07-06, via certified mail, return receipt requested, to his address of record – 616 Witt Road, Taos, NM 87571.

4. The United States Postal Service (“USPS”) attempted to deliver the package containing the NCA on July 23, 2013 and August 5, 2013; however, the package was ultimately returned to the Board Office with the following note: “unclaimed.”

5. Respondent did not request a hearing within twenty (20) days of service of the NCA, as contemplated by Sections 61-1-4 and 61-1-5 of the Uniform Licensing Act (“ULA”), NMSA 1978, Sections 61-1-1 to -34.

6. Respondent failed to otherwise respond to the NCA.

CONCLUSIONS OF LAW

Based on the findings of fact, the Board reaches the following conclusions of law:

1. The Board has jurisdiction over Respondent and the subject matter of this proceeding pursuant to the Practice Act and the ULA.

2. Section 61-1-5 of the ULA provides that, where notice is served via certified mail, “it shall be deemed to have been served on the date borne by the return receipt showing delivery or the last attempted delivery[.]” NMSA 1978, § 61-1-5.

3. In accordance with Section 61-1-5 of the ULA, service of the NCA upon Respondent was accomplished on August 5, 2013.

4. More than twenty (20) days have passed since Respondent was served with the NCA and Respondent has failed to request a hearing. Thus, the Board is authorized to take the action contemplated in the NCA pursuant to Section 61-1-4(E) of the ULA.

5. The Board has complied with all notice and other procedural requirements of the Practice Act and the ULA.

6. This order is final and not subject to judicial review. See NMSA 1978, § 61-1-4(E).

ORDER

Based on the above findings of fact and conclusions of law, the Board **THEREFORE ORDERS** that Respondent shall immediately **CEASE AND DESIST** from the unlicensed practice of massage therapy.

IT IS FURTHER ORDERED that Respondent **PAY** the Board a fine in the amount of one thousand dollars (\$1,000) for practicing massage therapy without a license.

FOR THE NEW MEXICO
MASSAGE THERAPY BOARD

DATE: May 6, 2014

Elizabeth Harris
Elizabeth Harris, LMT
Board Chair

**BEFORE THE MASSAGE THERAPY BOARD
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF:

**JAMES HARRELL,
Unlicensed Practitioner,**

Respondent.

Case No. 11-07-06

NOTICE OF CONTEMPLATED ACTION

YOU ARE HEREBY NOTIFIED that the New Mexico Massage Therapy Board (the "Board") has before it sufficient evidence that, if not rebutted or explained at a formal administrative hearing, will justify the Board in imposing such penalties as may be permitted by law.

The Board has jurisdiction to hear this matter and to take disciplinary action against you pursuant to the Massage Therapy Practice Act, NMSA 1978, § 61-12C-1 through § 61-12C-28, (the "Act"), and pursuant to the rules and regulations of the Board promulgated in Title 16, Chapter 7 of the New Mexico Administrative Code at 16.7.1 through 16.7.16 NMAC (the "Rules" or "Regulations"). Specifically, the Board has jurisdiction to regulate the massage therapy practice, to wit:

61-12C-2. Legislative purpose.

In the interest of public health, safety and welfare and to protect the public from unlawful, improper and incompetent practice of massage therapy, it is necessary to regulate that practice.

NMSA 1978, § 61-12C-2.

The Act provides that the Board has the power to issue a cease and desist order for violating the provisions of the Act:

61-12C-8. Board powers.

The board has the power to:

* * *

H. issue cease and desist orders to persons violating the provisions of the Massage Therapy Practice Act or any rule adopted by the board pursuant to that act[.] ...

NMSA 1978, § 61-12C-8 (H).

As set out in the "Nature of Evidence against Respondent" portion below of this Notice of Contemplated Action, the section of the Act alleged to have been violated in the matter is:

61-12C-5. License or registration required. (Repealed effective July 1, 2016.)

A. A person shall not provide or offer to provide massage therapy for compensation unless that person is a massage therapist.

B. A person shall not use the title of or represent himself to be a massage therapist or use any other title, abbreviations, letters, figures, signs or devices that indicate the person is a massage therapist unless he is a massage therapist.

C. A person shall not provide or offer to provide massage therapy training as a massage therapy instructor unless he is registered as a massage therapy instructor pursuant to Section 61-12C-9 NMSA 1978. ...

NMSA 1978, § 61-12C-5 (A) to (C). A license is required before massage therapy can be performed in New Mexico.

The law defining massage therapy in New Mexico is clear. "Massage therapy" is defined in the Act as follows:

61-12C-3. Definitions. (Repealed effective July 1, 2016.)

As used in the Massage Therapy Practice Act:

* * *

E. "massage therapy" means the treatment of soft tissues for therapeutic purposes, primarily comfort and relief of pain; it is a health care service that includes gliding, kneading, percussion, compression, vibration, friction, nerve strokes, stretching the tissue and exercising the range of motion and may include the use of oils, salt glows, hot or cold packs or hydrotherapy. Synonymous terms for massage therapy include massage, therapeutic massage, body massage, myomassage, bodywork, body rub or any derivation of those terms. "Massage therapy" does not include the diagnosis or treatment of illness or disease or any service or procedure for which a license to practice medicine, nursing, chiropractic, physical therapy, occupational therapy, acupuncture or podiatry is required by law[.] ...

NMSA 1978, § 61-12C-3 (E).

Further, the Act provides that certain modalities are exempt from regulations from the Act:

61-12C-5.1. Exemptions. (Repealed effective July 1, 2016.)

Nothing in the Massage Therapy Practice Act shall be construed to prevent:

- A. qualified members of other recognized professions that are licensed or regulated under New Mexico law from rendering services within the scope of their licenses or regulations; provided they do not represent themselves as massage therapists;
- B. students from rendering massage therapy services within the course of study of an approved massage therapy school and under the supervision of a licensed massage therapy instructor;
- C. visiting massage therapy instructors from another state or

territory of the United States, the District of Columbia or a foreign nation from teaching massage therapy; provided the instructor is duly licensed or registered, if required, and is qualified in the instructor's place of residence for the practice of massage therapy. The board shall establish by rule the duration of stay for a visiting massage therapy instructor; and

D. sobadores; Hispanic traditional healers; Native American healers; reflexologists whose practices are limited to hands, feet and ears; practitioners of polarity, Trager approach, Feldenkrais method, craniosacral therapy, Rolfing structural integration, reiki, ortho-bionomy or ch'i gung; or practitioners of healing modalities not listed in this subsection who do not manipulate the soft tissues for therapeutic purposes from practicing those skills. An exempt practitioner who applies for a license or registration pursuant to the Massage Therapy Practice Act shall comply with all licensure requirements of that act.

NMSA 1978, § 61-12C-5.1. It is important to note that the trigger point modality is not exempt from the Act.

61-12C-24. Denial, suspension, revocation and reinstatement of licenses. (Repealed effective July 1, 2016.)

B. The board has authority to take an action set forth in Section 61-1-3 NMSA 1978 upon a finding by the board that the licensee, registrant or applicant:

* * *

(12) is guilty of failing to comply with a provision of the Massage Therapy Practice Act or rules of the board adopted pursuant to that act and filed in accordance with the State Rules Act [14-4-1 NMSA 1978].

...

NMSA 1978, § 61-12C-24 (B) (12).

Additionally, although not a part of this civil contemplated action, the Respondent is hereby notified that the unlicensed practice of massage

therapy can form the basis of a separate criminal investigation and possible criminal fines. See NMSA 1978, § 61-12C-27.

The Board's Rules require that a person must be licensed by the Board before they can provide or offer to provide massage therapy services for payment:

**TITLE 16 - OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 7 MASSAGE THERAPISTS
PART 4 REQUIREMENTS FOR LICENSURE**

16.7.4.8 LICENSE OR REGISTRATION REQUIRED:

A. Massage therapists: A person must be licensed by the board in order to legally provide or offer to provide massage therapy services for compensation, as defined in 16.7.1.7 NMAC; or to use the title or represent him/herself to be a massage therapist; or to use any other title, abbreviations, letters, figures, signs or devices that indicate the person is a massage therapist.

* * *

New Mexico Administrative Code ("NMAC"), 16.7.4.8 A.

The Regulations that authorize the Board to take action against the

Respondent are:

**TITLE 16 - OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 7 - MASSAGE THERAPISTS
PART 1 - GENERAL PROVISIONS**

16.7.1.7 DEFINITIONS:

* * *

EE. "Notice of contemplated action" means the administrative process used by the board for a licensee, registrant or applicant for licensure or registration to be afforded notice and an opportunity to be heard in a formal hearing before the board, before the board has authority to take any action which would result in denial, suspension, revocation, restriction,

probation, monitoring, censuring, etc., of a license, registration, application or licensure or registration. . .

NMAC 16.7.1.7 (EE).

The Board is authorized by its Regulations to issue a Notice of Contemplated Action for matters alleged to be in violation of the Act and the Regulations:

**TITLE 16 - OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 7 - MASSAGE THERAPISTS
PART 14 - COMPLAINTS**

16.7.14.11 BOARD ACTION:

* * *

C. If the board determines that there is sufficient evidence or cause to issue a notice of contemplated action, the board may vote to issue a notice of contemplated action.

* * *

E. The board may take any other action with regard to a complaint which is within its authority and which is within the law, including referring the complaint to the attorney general for injunctive proceedings, or referring the complaint to district attorneys for prosecution of persons alleged to be practicing massage therapy without a proper license or registration.

NMAC 16.7.14.11 (C) and (E).

The following Regulations also provide:

16.7.14.13 NOTICE OF CONTEMPLATED ACTION:

A. All disciplinary proceedings will be conducted in accordance with the Uniform Licensing Act.

B. The board chair, or his/her designee, will serve as hearing officer for disciplinary proceedings for the purpose of administering pre-hearing procedural matters. The hearing officer will be fully authorized to make all necessary procedural decisions on behalf of the board, including, but not limited to, matters related to discovery, continuances, time

extensions, amendments, pre-hearing conferences, and proposed findings of fact and conclusions of law.

C. The hearing officer may make such orders as he or she determines may be necessary to implement the authority conferred by Subsection B of 16.7.14.13 NMAC above, including but not limited to discovery schedules, pleading schedules, and briefing schedules.

D. No party will engage in ex-parte communications with the hearing officer or any member of the board in any matter in which a notice of contemplated action has been issued.

E. Licensees and registrants who have been found culpable and sanctioned by the board will be responsible for the payments of all costs of the disciplinary proceedings.

F. Any license or registration, including a wall certificate, issued by the board and subsequently suspended or revoked will be promptly returned to the board office, but no later than 30 days of receipt by the licensee or registrant of the board's order suspending or revoking the license.

NMAC 16.7.14.13 (A) to (F).

Finally, the Board has the express power to impose a civil penalty on any person proved to have engaged in the unlicensed practice of massage therapy:

**TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 7 MESSAGE THERAPISTS
PART 12 LICENSE/REGISTRATION RENEWAL**

16.7.12.16 UNLICENSED PRACTICE PROHIBITED:

* * *

B. In accordance with the Uniform Licensing Act, Section 61-1-3.2, NMSA 1978 (2003 Repl. Pamph), any person, company, firm, or entity who is not licensed or registered by the board is subject to disciplinary actions and proceedings by the board if it is determined that he, she, or it, has been offering or providing massage therapy, offering or providing massage therapy instruction; or offering or providing educational training in massage therapy in New Mexico without a valid New Mexico license or registration.

C. The board may impose a civil penalty in an amount not to

exceed one thousand dollars (\$1,000) against any person, company, firm, or entity that violates the Massage Therapy Practice Act by practicing without a valid New Mexico license.

D. In addition, the board may assess the person, company, firm, or entity engaging in the unlicensed practice of massage therapy, massages therapy instruction, or massage therapy education, the administrative costs, including investigative costs and the costs of conducting a hearing.

NMAC 16.7.12.16 (B) to (D).

The Board has the power to take action against the Respondent, an allegedly unlicensed massage therapy practitioner, for failing to comply with a provision of the Massage Therapy Practice Act or the rules and regulations adopted by the Board. Specifically, the practice of massage therapy without a license is prohibited in New Mexico. Based on the state statutes and regulations cited above, the Board contemplates imposing a civil penalty of up to one thousand dollars (\$1,000.00) and contemplates issuing a cease and desist order against the Respondent.

NATURE OF EVIDENCE AGAINST RESPONDENT

1. On or about June 30, 2011, Respondent was identified in a newspaper article as providing trigger point therapy in Taos, New Mexico.
2. In that newspaper article, Respondent is quoted as saying, "You know all the little muscle knots that you get? Those muscle knots are like a blockage, . . . and they're always on your nerve and energy medians."
3. Trigger point therapy is not exempt from the Act under NMSA 1978,

§ 61-12C-5.1 (A) to (D). As such, trigger point therapy is a type of massage therapy requiring a license by the Board.

4. A Complaint was lodged with the Board on or about July 4, 2011.

5. A certified letter was mailed to Respondent on July 14, 2011 advising him of the filing of the Complaint, and requesting a response from the Respondent.

6. On or about August 2, 2011, Respondent responded in a letter to the Board's Compliance Liaison expressing his opinion that he was not practicing unlicensed massage therapy according to his understanding of the statutes and rules in his case.

7. There is no record of Respondent having a massage therapy license in New Mexico.

RESPONDENT'S RIGHT TO A HEARING

The hearing, if requested, will be conducted in accordance with the Uniform Licensing Act ("ULA"). A licensee entitled to a hearing has the following rights under the ULA:

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

A. A person entitled to be heard under the Uniform Licensing Act 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 therefor 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 Section 61-1-4 NMSA 1978 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.

NMSA 1978, § 61-1-8.

CONCLUSION

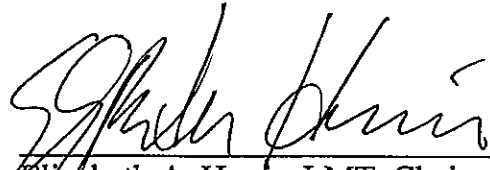
The evidence before the Board, summarized above, if not rebutted or explained at a formal hearing, is sufficient to justify the Board imposing a fine, revoking or suspending your license to practice as a Massage Therapist in the State of New Mexico, and imposing such other penalties as may be permitted 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 Jackie Holmes, Administrator; New Mexico Massage Therapy Board; P.O. Box 25101; Santa Fe, NM 87504-5101.

July 4 2013
Date


Elizabeth A. Harris, LMT, Chairperson
NM Massage Therapy Board
c/o Laura Romero Halama,
Compliance Team Leader
NM Regulation & Licensing Department
2550 Cerrillos Road, Second Floor
Santa Fe, New Mexico 87505-3260
(505) 476-4870

Administrative Prosecutor:


David Dayog Black
Assistant Attorney General
NM Attorney General's Office
408 Galisteo Street
Santa Fe, NM 87501-2645
(505) 827-6624

CERTIFICATE OF SERVICE

A true copy of this Notice of Contemplated Action was sent to Respondent by certified mail, return receipt requested, on this 9th day of July 2013 as follows:

James Harrell
616 Witt Road
Taos, NM 87571

Certified Mail No.: 7099 3400 009 5298 1942
Return Receipt Requested

By:  (for)

Laura Romero Halama
Compliance Team Leader
NM Massage Therapy Board
2550 Cerrillos Road, Second Floor
Santa Fe, New Mexico 87505-3260