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**NEW JERSEY BOARD OF  
CHIROPRACTIC EXAMINERS**

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
BOARD OF CHIROPRACTIC EXAMINERS

IN THE MATTER OF THE SUSPENSION  
OR REVOCATION OF THE LICENSE OF

SHARON AYERS, D.C.  
License No. 38MC00479400

TO PRACTICE CHIROPRACTIC  
IN THE STATE OF NEW JERSEY

Administrative Action

FINAL DECISION AND ORDER  
SUSPENDING LICENSE AND  
ASSESSING CIVIL MONETARY  
PENALTIES

This matter was opened to the New Jersey Board of Chiropractic Examiners (hereinafter the "Board") on April 24, 2007, by the filing of an Administrative Complaint by Stuart Rabner, then Attorney General of New Jersey, (Alan R. Niedz, Deputy Attorney General, appearing), (hereinafter "Complainant") against Sharon Ayers, D.C. (hereinafter "Respondent"), Jeffrey B. Randolph, Esq., counsel appearing on behalf of Respondent. The Administrative Complaint alleges in the first of four counts that Respondent, who is the holder of a license to practice chiropractic in this State, employed an unlicensed assistant in her practice to whom she delegated, directed and/or supervised the performance of acts upon patients for which a license or certification is required: to wit, active release stretching, range of motion stretching and/or the performance of physical therapy, contrary to N.J.A.C. 13:44E-2.7(c).

Count II alleges that Respondent regularly referred patients to an independent contractor for massage therapy rendered on Respondent's premises and received from the massage therapist a fee of twenty dollars (\$20.00) for each patient referred, contrary to N.J.A.C. 13:44E-2.6.

Count III alleges that an undercover investigator purchased a bottle of a glucosamine-based nutritional supplement from Respondent's practice, and in the presence of Respondent, for the sum of \$15.00, contrary to N.J.A.C. 13:44E-1.1(d).

Count IV alleges that Respondent advertised her practice with a business card which offered a complimentary chiropractic consultation, but failed to indicate the value of the free service being offered or to state that the service was routinely or ordinarily performed free of charge, contrary to N.J.A.C. 13:44E-2.1(g).

It was asserted by the Complainant that the aforesaid actions form the basis for disciplinary action by the Board, pursuant to N.J.S.A. 45:1-21(h) and (e).

On May 24, 2007, an Answer was filed on behalf of Respondent admitting that she maintained a solo practice at 183 High Street, Suite 2400, Newton, NJ, but denying the remainder of the allegations of the Administrative Complaint.

On April 10, 2008, a hearing was held before a quorum of the Board at a special meeting scheduled for the purpose. Respondent was represented by counsel at the hearing, but did not appear in person. With the Board's assent, the parties agreed that the record would be held open until May 2, 2008<sup>1</sup> to allow for supplemental submissions from both parties.

The following documents were introduced at the hearing and admitted into evidence:

- S-1 Complete transcript of Respondent's prior sworn testimony dated December 1, 2005
- S-2 Business card advertising Respondent's practice
- S-3A Copy of the front label of a supplement bottle
- S-3B Copy of the back label of a supplement bottle
- S-4 Copy of a receipt in the amount of \$15.00 for the purchase of "Disc-Gard"
- S-6 Bottle labeled "Disc-Gard" contained in an evidence bag labeled

Case# 31-394-03-2011

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<sup>1</sup>Respondent's supplemental submission was due by April 25, 2008. However, because the submission was not received until on or about April 30, 2008, the time for Complainant's responsive submission was extended to May 9, 2008.

At the hearing in this matter, Complainant called as witnesses two state investigators. Investigator Marianne Nucci ("Nucci") identified her affidavit of June 2, 2004, which was attached to an investigative report (not in evidence) labeled S-5 for identification, and testified that on March 29, 2004, she had visited the office of Respondent in an undercover capacity as described in her affidavit. Using her affidavit to refresh her recollection, Nucci testified that on that date she was introduced by Respondent to "Dr. Chen." Nucci read her affidavit and indicated that she was advised by Respondent at that time that Dr. Chen would be performing "physical therapy" in the office, as he was trained as a physician in China, but was not licensed in the United States. (2T13:5-14)<sup>2</sup>

Nucci further testified that while in Respondent's office she had picked up a business card from the front desk (S-2), and that she had purchased a bottle of "Disc-Gard"<sup>3</sup> (S-6). Nucci explained that she had conducted the transaction for the purchase of the Disc-Gard with the receptionist, "Jamie," as the Respondent stood approximately four feet away. (2T15:2 -20) Nucci testified that she left the office, but returned almost immediately to request a receipt (S-4) for the Disc-Gard, which was provided to her by Jamie. (2T16:12-25) On cross-examination, Nucci testified that Respondent, although present, did not participate in the conversation she had with Jamie regarding the Disc-Gard. (2T19:7) Also on cross, Nucci testified that Jamie had put the payment for the Disc-Gard into a desk in the reception area of the practice. (2T19:24)

Investigator Susan Thompson ("Thompson") was then called to testify by the Complainant. Thompson described to the Board how she had maintained surveillance outside Respondent's

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<sup>2</sup>"2T" designates the Transcript of Proceedings before the Board dated April 10, 2008.

<sup>3</sup>The front and back labels on the bottle of "Disc-Gard" were photocopied and offered into evidence as S-3A and S-3B without objection. The ingredients of the supplement are listed on S-3B and were read into the record (2T44:1-9).

office while Nucci was inside. Thompson identified the bottle of Disc-Gard (S-6) (2T41:7-12), the business card (S-2), and the receipt (S-4) brought to her in her car by Nucci. Thompson testified that she took custody of these items and placed them into a locked location which is maintained by the Enforcement Bureau of the Division of Consumer Affairs for safeguarding evidence. (2T31:1 to 34:10; 2T41:13 to 42:11)

Complainant also offered into evidence, without objection, the testimony under oath of Respondent, previously given before a committee of the Board on December 1, 2005, as admissions of a party opponent. (2T6:2-7) Specifically, Complainant cited a page of the transcript (T29:3-8)<sup>4</sup> to establish that Respondent admits to having employed Dr. Chen in her practice. Regarding the services rendered by Dr. Chen in the practice, Complainant cited to another portion of the transcript, (T32:12-18), wherein Respondent testified: "Chen does – he does stretching for me which I didn't know needed (sic) to be licensed to do that because I have been in a few chiropractor offices and I have seen, you know, other people doing, not ultrasound or anything like that, but doing stretching. I thought that was fine."

In addition, Complainant pointed to transcript cites (T33:1-5, 8-10 and T36:8-10), wherein Respondent describes the actions of Dr. Chen in her practice as: "an active release kind of stretching," and testifies that Dr. Chen: "was an orthopedic surgeon and acupuncturist in China and he's here in the United States." Asked about the range of services offered in her practice, Respondent described a protocol in which: "... I adjust them [patients] and then if Mr. Chen is around, he will come in and stretch them."

As to Count II, Complainant quotes Respondent's testimony at (T31:5-11) with reference to the fee arrangement between her and a massage therapist "renting space" in her office, as:

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<sup>4</sup>"T" indicates the Transcript of Proceedings dated December 1, 2005 before the Preliminary Investigation Committee of the Board.

“Well, if it was one person – it was actually by the person so it was twenty dollars a person.”

With reference to Count IV of the Complaint, Complainant points out Respondent's prior testimony to the effect that her initial chiropractic consultations have always been conducted free of charge (T27:11-19), and that she did not appreciate that her business card was an advertisement, subject to N.J.A.C. 13:44E-2.1(g). (T44:16 to 45:7)

Respondent argued that the testimony of Nucci and Thompson did not include any claim of “direct visualization” of any services being performed in the practice by Dr. Chen. (2T50:3-4) Regarding the sale of vitamins or supplements, Respondent's counsel pointed out that Nucci had testified to a conversation with the receptionist only, and that the receipt was provided by the receptionist. (2T51:3-7)

Complainant rejoined that the receipt, (S-4) in evidence, for the Disc-Gard was written on Respondent's letterhead; and reiterated that Respondent was, according to the testimony, standing only four feet from the receptionist when the transaction occurred. (2T54:16-24)

By letter brief dated April 22, 2008, and received by the Board on or about April 30, 2008, Respondent argued that the regulation of the Board addressing the delegation of tasks or functions to an unlicensed assistant, N.J.A.C. 13:44E-2.7, does not expressly prohibit delegation of the “active release kind of stretching” described by Respondent as having been delegated to the unlicensed Dr. Chen; unless this task or function falls within the description of non-delegable tasks or functions set out in N.J.A.C. 13:44E-2.7(c)7, which states:

(c) A licensee shall not permit an unlicensed assistant to:

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7. Perform any task or function for which the skill, training and judgment of a licensed chiropractor is required to safely and competently perform such task or function.

Respondent also argued in the letter that no guidance was contained in the public minutes of the Board to alert her to the inclusion of an “active release kind of stretching” in the category of task

or function for which the skill, training and judgment of a licensed chiropractor is required to safely and competently perform. Citing to her own prior testimony at (T41:22-25), Respondent's letter brief further asserted that no one in her practice had represented that Dr. Chen would perform "physical therapy," contrary to the testimony of Nucci.

Attached to the letter brief filed on behalf of Respondent after the hearing, was an affidavit signed by her on April 26, 2008.<sup>5</sup> Relying on assertions made in her affidavit that: "[she] had stated \$20 per patient by accident at [her] EUO [examination under oath] as [she] had equated one patient to one hour's time that a massage takes to perform," Respondent argued in the letter brief that her prior sworn testimony had been "unclear," because she "meant to state" that the massage therapist working in her office as an independent contractor paid her for the use of her office space by the hour, and not "by the person," as she had actually testified.

As to the sale of the supplement Disc-Gard from her practice, Respondent's supplementary brief suggested that the sale to Nucci may have resulted from the independent action of the receptionist in Respondent's practice.

Finally, Respondent argued in the letter brief that her offer of a complimentary consultation should not be required to disclose that she typically offered such a consultation free of charge because: "the inclusion of the term 'complimentary' on the card served as an indication to the prospective patient that [the] services that (sic) are routinely or ordinarily performed free of charge

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<sup>5</sup>Complainant objected to the Board's consideration of the post-hearing affidavit, as its content was not subject to cross-examination, and therefore, not competent evidence to prove the truth of its assertions. The Board notes that, pursuant to N.J.A.C. 17:27-15.5(a), hearsay evidence shall be admissible in administrative proceedings and shall be accorded whatever weight the Board deems appropriate, taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. Respondent provided no evidence of any particular circumstances which constrained her use of an affidavit not subject to cross-examination; and the Board weighed the affidavit accordingly.

by the plain meaning of the term 'complimentary.' (Respondent's letter brief p. 10 of 11). This argument is proffered notwithstanding the directive of N.J.A.C. 13:44E-2.1(g), which states:

(g) Offers of discounts or fee reductions or free services shall indicate the advertiser's fixed or stated range of fees against which said discount is to be made and/or the value of the free services. **Chiropractic services that are routinely or ordinarily performed free of charge, shall be clearly and conspicuously stated in the body of the advertisement as such.** (emphasis supplied)

In response to Respondent's letter brief, Complainant essentially relied upon the testimony of the investigators, which had been subjected to cross-examination, the documents and bottle of Disc-Gard in evidence, and the prior sworn testimony of Respondent herself, to assert that the allegations of the Administrative Complaint had been proven by a preponderance of the credible evidence and had not been rebutted in any significant or reliable manner by the arguments or post-hearing affidavit offered by Respondent. Complainant also offered into evidence counsel's certification of attorney fees, and investigative and transcript costs.

#### Discussion

The Board has considered the evidence and the arguments of counsel and finds that the Complainant has established by a preponderance of the credible evidence that Respondent permitted an unlicensed assistant, "Dr. Chen," to perform tasks or functions for which the skill, training and judgment of a licensed chiropractor is required to safely and competently perform.

The express language of the regulation governing what tasks or functions may be delegated to an unlicensed assistant cannot possibly anticipate and name specifically any and all tasks or functions which would fit the description that they require the skill, training and judgment of a licensee of the Board. Consequently, licensees are required, based upon their education and training, to appreciate which tasks or functions not specifically named in the regulation fit the regulation's description at N.J.A.C. 13:44E-2.7(c)7. The Board must in turn use its collective expertise and discretion to make the same assessment in a given case. This is the purpose for

which N.J.A.C. 13:44E-2.7(c)7 was promulgated and adopted.

Respondent argues that Dr. Chen, although unlicensed, possessed the training and expertise to perform "active release type stretching" safely and competently. This assertion serves only to confirm that Respondent recognized the need for such training and expertise to perform this task or function safely and competently. The Board agrees; and so finds the delegation of the task or function to Dr. Chen, who is unlicensed, to violate the regulation notwithstanding his purported knowledge and training. Respondent's argument misses the mark in that it fails to recognize that such tasks or functions cannot lawfully be delegated to unlicensed assistants, whether or not those unlicensed assistants appear to be capable of performing the tasks or functions.

The Board further finds that the Complainant has established by a preponderance of the credible evidence that Respondent received payments from a massage therapist acting as an independent contractor within her practice, which payments constituted the receipt of fees for the referral of patients to receive massage. The Board finds Respondent's own prior testimony regarding the "per person" basis of the fees she received to be more credible than the subsequent re-characterization of those fees in her post-hearing affidavit as "per hour" rental of office space.

The Board finds also that the Complainant has established by a preponderance of the credible evidence that Respondent, incidental to the offer of chiropractic care in her office, sold, dispensed or derived a financial benefit from the sale of vitamins or nutritional supplements; to wit: "DiscGard." The Board finds the testimony of Nucci that she purchased the product (S-6) in front of Respondent while in her office in an undercover capacity more credible than the assertions in Respondent's prior testimony (T21:11 to 22:1) and in her post-hearing affidavit that she had no knowledge of such sales from her office. The Board relies as well on the reinforcement of the testimony of Nucci by her obtaining of a receipt printed on Respondent's letterhead (S-4), also in Respondent's presence.

With regard to Count IV of the Administrative Complaint, the Board finds that the Complainant has established by a preponderance of the credible evidence that Respondent utilized an advertisement for her practice (S-2) which reads: "Present this card for a complimentary Chiropractic Consultation....," without stating the value of the consultation being offered or stating clearly and conspicuously on the business card that such consultations were routinely or ordinarily performed in her practice free of charge, in violation of N.J.A.C. 13:44E-2.1(g). Respondent's argument that the word "complimentary" denotes that the service is free of charge misses the point. The regulation applies even to offers which expressly declare that a service is being offered "free." It's purpose is to insure that consumers are informed that there is no exceptional or fleeting benefit to such an offer, as the service is commonly or routinely provided without charge. Respondent's card fails to so inform its recipients, and the Board finds it to be a violation.

The Board therefore grants the relief sought by Complainant with respect to all of the allegations of the Administrative Complaint. Accordingly, the Board finds that Respondent failed to comply with the aforesaid regulations, and thus the Board concludes that violations of N.J.S.A. 45:1-21(h) and (e) occurred. In addition, the Board finds that the amounts set forth in the submission of Complainant in support of his request pursuant to N.J.S.A. 45:1-25(d) for the assessment of costs of investigation and attorney fees incurred by the Board, are reasonable and appropriate given the need for an undercover investigation that involved two trained investigators for the purpose of their personal safety, and the number of hours required thereafter over the course of more than eleven months time, by Complainant's counsel and two paralegals in order to prepare and present this matter to the Board, dealing with violations having serious implications for the chiropractic profession. Nevertheless, the paralegal hours were reduced by ten.

Based on the foregoing findings of fact and conclusions of law, on June 26, 2008, after deliberating in closed session, the Board returned to open public session and announced its

determination, which is set out below.

IT IS THEREFORE on this 24 day of July, 2008,

ORDERED that:

1. Respondent's license to practice chiropractic in the State of New Jersey be and hereby is suspended for a period of two (2) years, which suspension shall be stayed and become a period of probation. Such stayed period of suspension shall be activated upon a showing of Respondent's non-compliance with any of the terms and conditions set forth herein.

2. Respondent shall be, and hereby is formally reprimanded for the aforesaid violations of N.J.A.C. 13:44E-2.7(c)7; N.J.A.C. 13:44E-2.6; N.J.A.C. 13:44E-1.1(d); and N.J.A.C. 13:44E-2.1, and shall cease and desist from these violations.

3. Respondent is hereby assessed a civil penalty, pursuant to N.J.S.A. 45:1-22, in the total amount of \$6,500.00, comprised of the following: \$2,500.00 for permitting an unlicensed assistant to perform a task or function for which the skill, training and judgment of a licensed chiropractor is required to safely and competently perform, in violation of the rule governing the delegation of tasks by a licensee, N.J.A.C. 13:44E-2.7(c)6; \$2,000.00 for engaging in the sale and dispensing of nutritional supplements from her office, in violation of the scope of chiropractic practice, N.J.A.C. 13:44E-1.1(d); \$1,500.00 for violation of the rule prohibiting the acceptance of fees for patient referrals, N.J.A.C. 13:44E-2.6; and \$500.00 for violation of the rule requiring any offer of free services in an advertisement to state the value of the services or to state clearly and conspicuously on the advertisement that such services are routinely or ordinarily performed free of charge. Said payment shall be made by certified check or money order payable to the State of New Jersey and shall be delivered within ten (10) days of service of this order to Jonathan

Eisenmenger, Executive Director, Board of Chiropractic Examiners, P. O. Box 45004, Newark, New Jersey 07101. Subsequent violations will subject Respondent to enhanced penalties pursuant to N.J.S.A. 45:1-25.

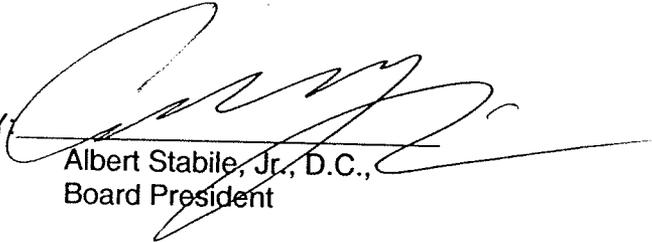
4. Pursuant to N.J.S.A. 45:1-25(d), Respondent shall pay costs of investigation and attorney fees incurred by the Board in the total amount of \$15,921.70, comprised of investigative costs of \$4,914.20 and attorney fees of \$11,007.50. Payment for the costs and fees shall be made within ten (10) days of service of this order in the manner set out in paragraph 3 above.

5. Failure to comply with any provisions of this Order or remit any and all payments required by this Order will result in the filing of a certificate of debt and may result in subsequent disciplinary proceedings for failure to comply with an Order of the Board.

6. The Directives of the Board applicable to any Chiropractic Board licensee who is suspended, revoked or whose surrender of licensure has been accepted are incorporated by reference as though fully set forth herein, whether or not they are attached hereto.

NEW JERSEY STATE BOARD OF  
CHIROPRACTIC EXAMINERS

BY

  
Albert Stabile, Jr., D.C.,  
Board President