

1 **BEFORE THE ARIZONA STATE BOARD OF BEHAVIORAL HEALTH EXAMINERS**

2
3 **In the Matter of:**

4 **Gary A. Tupper, LMFT-15134**
5 **Licensed Marriage and Family Therapist, in**
6 **the State of Arizona**

7 **Respondent**

ORDER DENYING RESPONDENT'S
MOTION FOR REHEARING

8 At its November 4, 2022 Board meeting, the Board considered the Administrative Law
9 Judge's ("ALJ") Recommended Decision for revocation of Respondent's license LMFT-15134,
10 which had been issued after a Formal Hearing in the above referenced matter. After considering
11 all of the evidence and testimony presented at the Formal Hearing, and arguments from both
12 parties presented at the time of the Board's meeting, the Board voted to adopt the ALJ's
13 recommendations, with modifications to the Conclusions of Law.
14

15 On November 17, 2022, the Arizona Board of Behavioral Health Examiners ("Board")
16 received Respondent's timely filed Motion for Rehearing and Stay of Order of Revocation. On
17 December 2, 2022, the Board received the State's Response to Motion for Rehearing and Stay of
18 Order of Revocation, and on December 8, 2022, the Board received Respondent's Revised Reply
19 to Motion for Rehearing and Stay of Revocation. This matter came before the Board for oral
20 argument and decision on December 9, 2022. The State was represented by Assistant Attorney
21 General Mona Baskin and the Board was advised independently by Assistant Attorney General
22 Carrie Smith. Respondent and his attorney, Dennis Wilenchik, participated in person and both
23 presented arguments in support of Respondent's motion.
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1 During deliberations, Board members agreed that authority to modify the recommended
2 decision from the ALJ was found in A.R.S. § 41-1092.08(B). Board members discussed the
3 modifications made at the previous Board meeting to the ALJ's recommended Conclusions of
4 Law, striking references to the preponderance of the evidence standard and replacing them with
5 reference to the correct burden of proof, clear and convincing evidence. Board members noted
6 that after reviewing the evidence and testimony presented at the Formal Hearing, it was
7 unanimously agreed that the allegations of unprofessional conduct had been established by clear
8 and convincing evidence; the Board's standard of proof for most disciplinary matters Board
9 members understood that the modification was substantive in nature, not a typographical
10 correction. Board members recalled that Respondent did not contest any of the Findings of Fact,
11 either at the November 4, 2022 Board meeting, or in his request for rehearing. The Board
12 discussed that the unprofessional conduct statutes were not limited to conduct occurring within
13 the therapeutic setting, and that the Board has a duty to protect the public. Board members
14 further commented that it did not appear that Respondent could be regulated. After having
15 considered all the evidence and the arguments of both parties, the Board moved to deny
16 Respondent's motion for rehearing for the reason that he failed to demonstrate that he was
17 entitled to a rehearing for any of the reasons set forth in A.A.C. R4-6-1002.
18

19 **ORDER**

20 Respondent's Motion for Rehearing is DENIED. The Board's Order dated November 10,
21 2022, is effective as of the date of this Order.
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1 **RIGHT TO APPEAL TO SUPERIOR COURT**

2 Respondent is hereby notified that this Order is the final administrative decision of the
3 Board and that Respondent has exhausted his administrative remedies. Respondent is advised
4 that an appeal to superior court in Maricopa County may be taken from this decision pursuant to
5 Title 12, Chapter 7, article 6, within thirty-five (35) days from the date this decision is served.

6 Dated this 21st of December 2022

7 

8 _____
9 Tobi Zavala, Executive Director
10 Arizona Board of Behavioral Health Examiners

11 **ORIGINAL** of the foregoing filed
12 This 21st day of December 2022, with:

13 The Board of Behavioral Health Examiners
14 1740 West Adams Street, Suite 3600
15 Phoenix, AZ 85007

16 **COPY** of the foregoing mailed via Certified Mail No. 9489 0090 0027 6384 9803 09
17 This 21st day of December 2022, to:

18 Gary A. Tupper
19 Address of Record
20 Respondent

21 **COPY** of the foregoing mailed via Certified Mail No. 9489 0090 0027 6384 9803 23
22 This 21st day of December 2022, to:

23 Janis Pelltier, Esq.
24 Dennis Wilenchik, Esq.
25 Wilenchik & Bartness
2810 North 3rd Street
Phoenix, Arizona 85004

Attorney for Respondent

COPY of the foregoing emailed this 21st day of December 2022, to:

janisp@wb-law.com
Attorney for Respondent

1 mona.baskin@azag.gov
Counsel for the State

2
3 carrie.smith@azag.gov
Independent Legal Advisor

4 **COPY** of the foregoing mailed, pursuant to A.R.S. § 41-1092.08(B),
5 This 21st day of December 2022, to:

6 Karen Fann
7 President of Arizona State Senate
8 Arizona State Capitol Complex, Rm 205
1700 W Washington St
Phoenix, AZ 85007

9 Russell Bowers
10 Speaker of the Arizona House of Representatives
11 Arizona State Capitol Complex, Rm 223
1700 W Washington St
Phoenix, AZ 85007

12 By: _____
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1 **BEFORE THE ARIZONA BOARD OF**
2 **BEHAVIORAL HEALTH EXAMINERS**
3 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

4 **In the Matter of:**

5
6 Gary Tupper, LMFT
7 Licensed Marriage and Family Therapist, In
8 the State of Arizona

9 **Respondent**

Docket No. 2022F-1111-BHE

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER FOR REVOCATION**

10 This matter came before Adam D. Stone, Administrative Law Judge (“ALJ”) for the Office
11 of Administrative Hearings on September 23, 2022 in the Office of Administrative Hearings, for
12 the purpose of determining whether good cause exists for the Arizona Board of Behavioral Health
13 Examiners (“Board”) to take disciplinary action against (“Respondent”). Pursuant to A.R.S. §41-
14 1092.08(I), the Board also held a meet and confer with Respondent and his attorney to consider
15 the proposed modifications to the Recommended Decision.
16

17 At its regularly scheduled monthly meeting held on November 4, 2022, the Board
18 considered the ALJ’s recommended decision for the revocation of the Respondent’s license.
19 Assistant Attorney General Jeanne Galvin was present to provide the Board with independent legal
20 advice. Respondent and his attorney, Janis Pelletier, appeared and addressed the Board. Assistant
21 Attorney General Roberto Pulver appeared on behalf of the State. Mr. Pulver presented proposed
22 modifications to the ALJ’s Conclusions of Law for the Board’s consideration.
23

24 After hearing from the parties and discussing the recommended decision, the Board voted
25 to adopt the ALJ’s Findings of Fact and Conclusions of Law with the following modifications
26 proposed by the State:
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1 Based on the ALJ's Recommended Decision (which is attached hereto and incorporated by
2 reference with the exceptions as noted), the administrative record in this matter and modifications
3 adopted by the Board, the Board issues the following Order:

4 **FINDINGS OF FACT**

5 The Board adopts the Findings of Fact set forth in the Administrative Law Judge's
6 Recommended Decision, in their entirety.

7 **CONCLUSIONS OF LAW**

8 The Board adopts Conclusions of Law, paragraphs 1, 4, 5, 6, 7, 8, and 9. With respect to
9 Conclusion of Law no. 2, strike the entirety of Conclusion of Law 2, and insert the following:
10

11 "The Board has the burden of proof, with the standard of proof being clear and convincing
12 evidence. A.R.S. §32-3281(X). Clear and convincing evidence is a "heightened standard of proof
13 that indicates that the thing is highly or reasonably certain." *Kent K. v. Bobby M.*, 210 Ariz. 279,
14 284-85, ¶25 (2005)(quoting BLACK'S LAW DICTIONARY 7th ed.); *see also* BLACK'S LAW
15 DICTIONARY 674 (10th ed. 2014)(clear and convincing evidence is "[e]vidence indicating that
16 the thing to be proved is highly probable or reasonably certain.").

17 With respect to Conclusion of Law no. 3, line 27, strike everything after "(A.R.S. §41-
18 1092.07(F)(1))" (except the period).
19

20 **ORDER**

21 Based on the Findings of Fact and Conclusions of Law, the Board adopts the
22 recommended Order in the Administrative Law Judge's Decision and orders that Respondent's
23 license be REVOKED.
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Right to Petition for Rehearing or Review

Respondent is hereby notified that he has the right to file a motion for rehearing or review. Pursuant to A.R.S. § 41-1092.09(B) and A.A.C. R4-30-126(A) the motion for rehearing or review must be filed with the Board's Executive Director within thirty (30) days after service of this Order. Service of this Order is defined as five (5) calendar days after mailing. A.A.C. R4-30-126(A).

The motion for rehearing or review must set forth legally sufficient reasons for granting a rehearing or review. A.A.C. R4-30-126(C). If a petition for rehearing or review is not filed, the Board's Order becomes effective thirty-five (35) days after it is mailed to Respondent. Respondent is further advised that the filing of a motion for rehearing or review is required to preserve any rights of appeal to Superior Court.

DATED this 10th day of November, 2022.

By: 
TOBI ZAVALA, Executive Director
Arizona Board of Behavioral Health Examiners

ORIGINAL filed this 10th day of November, 2022, with:

Arizona Board of Behavioral Health Examiners
1740 West Adams Street, Suite 3600
Phoenix, AZ 85007

COPY mailed via Certified Mail No. 7022 0410 0003 2550 0975

First Class mail this 10th day of November, 2022, to:

Gary Tupper
3536 S 157th Way
Gilbert, AZ 85297

COPY of the foregoing e-mailed this 10th day of November, 2022, to:

janisp@wb-law.com

1 mona.baskin@azag.gov

2 jeanne.galvin@azag.gov

3 **COPY** mailed, pursuant to A.R.S. § 41-1092.08(B),
4 this 10th day of November, 2022, to:

5 Karen Fann
6 President of Arizona State Senate
7 Arizona State Capitol Complex, Rm 205
8 1700 W Washington St
9 Phoenix, AZ 85007

10 Russell Bowers
11 Speaker of the Arizona House of Representatives
12 Arizona State Capitol Complex, Rm 223
13 1700 W Washington St
14 Phoenix, AZ 85007

15 **COPY** of the foregoing submitted through the OAH Portal 10th day of November, 2022, to:

16 Adam D. Stone
17 Office of Administrative Hearing
18 1740 W Adams St
19 Phoenix, AZ 85007
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26
27
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