

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
BOARD OF COSMETOLOGY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-3100
)	
TIMOTHY C. TROUTMAN,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 10, 1998, in Jacksonville, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elizabeth C. Masters, Esquire
7960 Arlington Expressway
Suite 230
Jacksonville, Florida 32211

For Respondent: Michael R. Yokan, Esquire
204 Washington Street
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Respondent's license as a cosmetologist should be disciplined for the reasons cited in the Administrative Complaint filed on June 20, 1997.

PRELIMINARY STATEMENT

On June 27, 1997, Petitioner, Department of Business and

Professional Regulation, Board of Cosmetology, issued an Administrative Complaint alleging that Respondent, Timothy C. Troutman, a licensed cosmetologist, was guilty of misconduct in the practice or instruction of cosmetology in violation of Section 477.028(1)(b), Florida Statutes. The complaint further alleged that by violating the foregoing statute, Respondent also violated Section 477.029, Florida Statutes, which makes it unlawful to violate any provision within Section 477.028, Florida Statutes. The primary underlying allegations are that Respondent improperly touched three women while employed as an instructor at a cosmetology school in 1995 and 1996. Respondent denied the allegations and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges.

The matter was referred by Petitioner to the Division of Administrative Hearings on July 8, 1997, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated July 31, 1997, a final hearing was scheduled on November 10, 1997, in Jacksonville, Florida. At the parties' request, the matter was rescheduled to February 10, 1998, at the same location.

At final hearing, Petitioner presented the testimony of Neva Alexandra Choulatt, a former student; Cynthia Summers, a former student; Donald H. Jacques, a deputy sheriff with the Jacksonville Sheriff's Office; Joanna Flowers, a former student; Norah Homan Maszey, a former student; and Myra Jowers, a licensed

cosmetologist. Also, it offered Petitioner's Exhibits 1-6. All exhibits were received in evidence. Respondent testified on his own behalf and offered the testimony of Carol Engells, an agency environmental health specialist; and his father, Howard Troutman, a licensed cosmetologist. Also, he offered Respondent's Exhibits 2, 3, and 5-11. All exhibits were received in evidence. Finally, the undersigned took official recognition of Chapters 455 and 477, Florida Statutes, and Chapter 61G5, Florida Administrative Code.

The transcript of hearing was filed on March 17, 1998. Proposed Findings of Fact and Conclusions of Law were due on March 31, 1998, and they were timely filed by Petitioner. They have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. This proceeding involves a complaint that Respondent, Timothy C. Troutman, a licensed cosmetologist since 1981, engaged in "misconduct" while employed as an instructor at Riverside Hairstyling Academy (RHA) in Jacksonville, Florida. When the events herein occurred, Respondent was licensed as a certified cosmetologist having been issued license number CL 0134716 by Petitioner, Department of Business and Professional Regulation,

Board of Cosmetology (Board).

2. RHA is certified as a cosmetology school and has several campuses, including one on Beach Boulevard in Jacksonville, Florida. The school is owned by Respondent's father, Howard Troutman.

3. Respondent was employed as a floor instructor at RHA. In this capacity, he supervised the activities of approximately twenty students at any given time, as they performed cosmetology services. The underlying charges in this matter are that: (a) Respondent improperly touched Neva A. Choulat, a former student; (b) he made threatening telephone calls to, and improperly touched, Joanna Flowers, a customer; and (c) he made sexually explicit remarks to, and inappropriately touched, Nora Maszey, a former student. As to Maszey, it is also alleged that Respondent threatened to "affect her school credits if she made trouble for him." Each set of charges will be discussed separately below.

B. Count I

4. In this count, it is alleged that, while giving a facial to Choulat, Respondent "proceeded to massage her bare breasts underneath [her] smock," "directly touched her nipples and rubbed her breasts," and "rubbed his hands up and down her sides to include the sides of her breasts."

5. On December 5, 1995, when she was sixteen years of age, Choulat enrolled at RHA in order to pursue her goal of completing

RHA's 1200-hour cosmetology course and ultimately obtaining a cosmetology license. At that time, she was a full-time high student and attended RHA as a night/weekend student in addition to her high school studies.

6. Prior to August 24, 1996, Choulatt had no problems of any kind with Respondent, and they had a normal student-teacher relationship.

7. On August 24, 1996, Choulatt was performing cosmetology services on four clients. Throughout the morning, Respondent repeatedly asked Choulatt if she wanted him to give her a facial. She agreed, and after lunch, Respondent took Choulatt to a small room that was used for the giving of facials.

8. The room had no windows, and the door was closed during the giving of the facial. Respondent instructed Choulatt to remove her shirt and bra and don a smock. He left the room while she did so. When he returned to the room, he closed the door and told Choulatt to lie down and close her eyes.

9. Respondent then took Choulatt's arms out of the smock. At that point, she had nothing covering her torso, except for a large towel that Respondent had placed over her chest. Respondent started performing the facial, but he quickly moved beyond the acceptable scope of a facial.

10. Without asking Choulatt's permission, Respondent rubbed his hand down her lower back, touched her breasts and nipples,

and rubbed his hands down her sides, touching the sides of her breasts.

11. At first, Choulatt was too frightened to cry out or protest. However, Respondent asked her if she wanted him to stop, to which she replied "yes." Respondent then left the room, and Choulatt put her clothes back on.

12. After dressing, Choulatt went to the beginner's room and began crying. She then told another student, Cynthia Summers, that Respondent had touched her breasts in the facial room. Summers advised Choulatt to tell her mother.

13. Later that afternoon, Summers confronted Respondent and told him that she was aware of his actions with Choulatt and that this was a stupid thing to do with a seventeen-year-old student. In response, Respondent stated that "it was stupid of me." When Summers asked Respondent what would happen if Choulatt went to the police or his father, Respondent replied "I hope she don't."

14. At approximately 2:30 p.m. the same day, Choulatt filed a complaint with the Jacksonville Sheriff's Office regarding Respondent's conduct. Choulatt reported that Respondent had touched her breasts without her permission. She followed up by telling her parents, filing a complaint with the Office of the State Attorney, and reporting the incident to Respondent's father.

15. Choulatt disenrolled from RHA a few weeks later, despite having invested more than \$2,400.00 in tuition payments. She

stopped her course of studies and is now employed in another field.

16. Although Choulat has a pending civil action against Respondent and RHA, her testimony is found to be credible. This finding is based on Choulat's consistent account of the incident over time, her actions immediately after the incident occurred, the corroborating testimony of Summers, an impartial witness, and the admissions made by Respondent to Summers immediately after the incident. Respondent's contentions that Choulat had initiated the subject of getting a facial, that the smock was never removed, that nothing improper occurred during the fifteen-

minute demonstration, and that he made no incriminating admissions to witness Summers have been rejected.

17. The evidence established that while a facial may extend below the neck, at no point does it include massaging of breasts and nipples, nor should it extend below the upper portion of the shoulder blades in the back, or below the armpit level on the front of the body. Further, it is not an acceptable teaching practice to give a private facial to a student outside of a classroom setting. Therefore, Respondent's conduct with student Choulat equates to misconduct in the practice of cosmetology.

C. Count II

18. The second count alleges that while giving a hair cut to Joanna Flowers in 1995, Respondent "placed her long hair over her breasts" and "stroked her breast under the pretext of stroking her hair." The complaint also alleges that he "rubbed his penis up against Ms. Flowers' hands and/or arms while they were resting on the arms of the chair," and that he thereafter telephoned Flowers "numerous times at her home" and she "felt threatened by [the calls]."

19. Flowers, who is now twenty-two years of age, occasionally went to RHA in 1992 or 1993 for hair cuts. RHA records show that she went only twice. On both occasions, a receptionist would assign a staff member to cut her hair. On her second visit in the fall of 1993, Respondent was assigned by the receptionist to cut her hair.

20. Flowers had long hair which went over her upper chest and fell to a length that was below her breasts. Following the initial haircut, Respondent checked the cut to determine whether it was even.

21. While checking the length of the cut, Respondent pulled the hair down in front of Flowers and his hand may have accidentally touched her breasts. However, if such touching occurred, it was not intentional, and it was not inappropriate to check the length of the cut in this manner. At the same time, Respondent's "crotch area [was] at the same level that the arm rest is on the chair," and while leaning over the chair, Respondent may have accidentally come into contact with Flowers' arm. Again, however, if a touching occurred, it was unintentional. Finally, there was no testimony to support the allegation that Respondent called Flowers on numerous occasions at home in a threatening fashion.

D. Count III

22. The last count alleges that "on numerous occasions" between 1995 and 1996, Respondent "touched the chest and buttocks [of Norah Homan, now Norah Maszey] in an inappropriate manner." The complaint also alleges that Respondent made "sexual references and innuendos regarding her," and that Respondent "implied" to her that "he could affect her school credits if she made trouble for him." Based on Respondent's alleged misconduct, Maszey subsequently filed a civil action against Respondent and

RHA.

23. Maszey, now twenty-seven years of age, was a cosmetology student at RHA between March 1995 until her

graduation in March 1996. During her tenure at RHA, Respondent was one of her instructors.

24. In September 1995, while in a floor setting learning how to cut and style hair, Maszey went to the supply room to "get a tube of color off the shelf." As she was bending over with her back to the door, Respondent came up behind her and placed "his hands right on the inside of [her] buttocks." Although Respondent did not touch the vaginal area, "he was as close as he could have been without" actually touching it. Maszey jumped up and Respondent "just smiled and acted kind of scared" and said he was "sorry." By inappropriately touching Maszey in this fashion, Respondent committed misconduct in the practice of cosmetology. Except for this incident, however, there was no other credible evidence that Respondent inappropriately touched Maszey "on numerous occasions," as alleged in the complaint.

25. During Maszey's tenure as a student at RHA, Respondent occasionally told her that she "was pretty." But this remark alone does not rise to the level of constituting "sexual references and innuendos," as alleged in the complaint. Indeed, Maszey simply described these comments as being "way too much complimenting," but nothing more. Finally, there is less than clear and convincing evidence to support the allegation that Respondent threatened to take away her credits if she "made trouble for him."

E. Mitigating and Aggravating Factors

a. Mitigating factors

26. Respondent has been licensed as a cosmetologist for seventeen years. Except for the two inappropriate touchings of Choulat and Maszey, which occurred more than two years ago, he has an unblemished record. Respondent has worked in his father's school since the age of twenty. The loss of a license will deprive him of working in his life-long profession and cause financial harm to Respondent and his family. Contrary to Petitioner's suggestion, Respondent is not found to be a "grave danger to the public" should he retain his license.

b. Aggravating factors

27. Respondent improperly touched two young women, each on one occasion. By doing so, he breached the position of trust he held as an instructor.

28. After being inappropriately touched in 1996, Choulat lost her desire to pursue a career field in cosmetology and left the school. She also lost approximately \$2,463.00 she had invested in the school. In addition, she sought counseling from a social worker.

29. Although Maszey eventually graduated from RHA, she no longer works in the profession and now prefers to work alone at home. At the same time, however, she stated that "Tim is [not] responsible for absolutely all of that, but he sure did not help."

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.569, Florida Statutes.

31. Because Respondent's license as a professional is subject to possible revocation, Petitioner bears the burden of proving by clear and convincing evidence that the allegations in the complaint are true. See, e.g., Nair v. Dep't of Bus. and Prof. Reg., 654 So. 2d 205 (Fla. 1st DCA 1995).

32. The complaint alleges that Respondent violated Section 477.028(1)(b), Florida Statutes, by engaging in misconduct in the practice or instruction of cosmetology. By inappropriately touching students Choulet and Maszey on one occasion, which has been established by clear and convincing evidence, Respondent is guilty of misconduct within the meaning of Section 477.028(1)(b), Florida Statutes, as alleged in Counts I and III of the complaint. This in turn constitutes a violation of Section 477.029(1)(h), Florida Statutes, which makes it unlawful to violate any provision in Section 477.028, Florida Statutes. The remaining allegations have not been sustained.

33. Rule 61G5-30.001, Florida Administrative Code, sets forth the penalties which may be imposed upon a licensee who is found guilty of violating any provision within Section 477.029, Florida Statutes. Subsection (3) of the rule provides that "[w]hen the Board finds that any person licensed or registered under Chapter 477, Florida Statutes, has committed any of the acts set forth in Section 477.028, Florida Statutes, it is recommended that the Board issue a final order imposing a revocation of the license or registration."

34. Rule 61G5-30.001(4), Florida Administrative Code, provides that the Board may impose disciplinary action other than the penalty recommended above upon consideration of certain mitigating or aggravating factors. They include the severity of the offense; the danger to the public; the number of repetitions of offenses; the length of time since the date of violations; the number of complaints filed against the licensee; the length of time the licensee has practiced; the actual damage, physical or otherwise, caused by the violation; the deterrent effect of the penalty imposed; the effect of the penalty upon the licensee's livelihood; any efforts for rehabilitation; the actual knowledge of the licensee pertaining to the violation; any attempts by the licensee to correct or stop the violations or the refusal by the licensee to correct or stop the violations; related violations against the licensee in another state; actual negligence of the licensee; penalties imposed for related offenses under Subsection (1) of the rule; and any other mitigating or aggravating circumstances.

35. Given the mitigating and aggravating circumstances found in findings of fact 26-29, together with the other relevant considerations dictated by the rule, revocation of Respondent's license is appropriate. Contrary to Petitioner's suggestion, in making this determination, the undersigned has not considered Respondent's lack of remorse as an aggravating factor. See, e.g., Bernal v. Dep't of Prof. Reg., 517 So. 2d 113, 115 (Fla. 3d

DCA 1987)(a licensee's lack of remorse may not be a basis for "an upward deviation from the [disciplinary] guidelines"). Finally, Petitioner's suggestion that a maximum administrative fine in the

amount of \$1,500.00 be imposed on Respondent is not found to be appropriate.

36. At hearing, Petitioner requested that Respondent reimburse Petitioner for all investigative and legal costs incurred in this proceeding. Because the imposition of such costs is discretionary with the Board under Section 455.227(3), Florida Statutes, Petitioner may renew its request when the Board convenes to take final agency action. Respondent should, however, be given an opportunity to verify the legitimacy and accuracy of the requested costs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of Cosmetology enter a Final Order finding Respondent guilty of violating Sections 477.028(1)(b) and 477.029 (1)(h), Florida Statutes, by inappropriately touching students Choulet and Maszey, and that Respondent's license number CL 0134716 be revoked. All other charges should be dismissed.

DONE AND ENTERED this 21st day of April, 1998, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 21st day of April, 1998.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Board of Cosmetology.