STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MASSAGE THERAPY,	)	
Petitioner,	)	
vs.	)	Case No. 01-0322PL
DEBORAH LYNN KEYS,	)	
Respondent.	)	

RECOMMENDED ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings convened a formal hearing of this matter by video teleconference on May 22, 2001. The parties and witnesses appeared in Fort Lauderdale, Florida, and the Administrative Law Judge presided in Tallahassee, Florida.

APPEARANCES

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For Respondent: John G. George, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether, on December 29, 1997, Respondent, a licensed massage therapist, engaged or offered to engage a client in sexual activity while practicing massage therapy, in violation of Section 480.0485, Florida Statutes, and Rule 61G11-30.001(1)(d), Florida Administrative Code (1997).

PRELIMINARY STATEMENT

On June 28, 1999, Petitioner Department of Health (the "Department"), through the Agency for Health Care Administration (the "Agency"), which is under contract with the Department to perform prosecutorial services for, among other boards within the Department's jurisdiction, the Board of Massage Therapy (the "Board"), brought an Administrative Complaint against Respondent Deborah Lynn Keys ("Keys"), charging her with one count of engaging or offering to engage a client in sexual activity while practicing massage therapy.

Keys timely requested a formal hearing. On January 23, 2001, the Agency referred this matter to the Division of Administrative Hearings for further proceedings. After the case was assigned to the undersigned, a final hearing was scheduled for May 22, 2001.

At the hearing, the Department called four witnesses: Detectives Edward Domako and Steven Drum of the Broward Sheriff's Office; Officer Jimmy Ho, City of Lauderhill Police

Department; and Louis Garriga, an Agency employee. In addition, the Department introduced seven exhibits into evidence, numbered 1 through 7; Petitioner's Exhibit 8 was rejected.

Keys, who appeared through counsel and was not physically present at the hearing, called no witnesses and offered two exhibits, numbered 1 and 2, which were received.

The Department timely filed a proposed recommended order, which was considered in the preparation of this Recommended Order. Keys did not submit any post-hearing papers.

FINDINGS OF FACT

The evidence presented at final hearing established the facts that follow.

The Parties

1. Keys is a Florida-licensed massage therapist. Her license, numbered MA 19097, was issued on March 27, 1995. She is subject to the regulatory and disciplinary jurisdiction of the Board.

2. At all times material, Keys worked at Shogun Health Spa, Inc. ("Shogun"), which was located in Lauderhill, Florida.

The Charge

3. The Department has charged Keys with one count of engaging or offering to engage a client in sexual activity, in violation of Rule 61G11-30.001(1)(d), Florida Administrative Code (1997).[1] The incident is alleged to have occurred at Shogun

on December 29, 1997. The "client," allegedly, was an undercover sheriff's detective.

Ultimate Factual Determination

4. The Department proved that on December 29, 1997, on the premises of Shogun, a white, brown-haired masseuse using the name "Debbie" offered sexual services to an undercover detective who was posing as a client in connection with an investigation of suspicions that Shogun was a bordello. Based on the evidence in the record, however, the factfinder is unable to form a firm belief or conviction, without hesitancy, that "Debbie" was, in fact, Keys. Therefore, Keys is not guilty of the offense charged.

5. It will be seen that the foregoing factual determination, which is dispositive, does not constitute an affirmative finding about what Keys did on the date in question. Nor is a finding made here regarding who "Debbie" actually was—— or that "Debbie" was not Keys. Although Keys argued that she was not at work on December 29, 1997, being instead, she claimed, on vacation, she adduced no evidence that she was someplace else that day, and so no affirmative finding can be made in this regard.

6. The Department's failure to prove, clearly and convincingly, that "Debbie" and Keys were one and the same person necessarily renders all of the other evidence irrelevant,

because it is immaterial that someone besides Keys engaged in misconduct. Understanding, however, that it may be enlightening to explicate what the evidence showed as a means of explaining how the evidence fell short of establishing the wrongdoer's identity by the requisite quantum of proof, the following summary of the pertinent proof, as viewed by the factfinder, is offered.[2]

Keys' Physical Description and
Identifying Information: A Baseline

7. According to the Application for Licensure that Keys submitted in January 1995, Keys is five feet, three inches tall with blue eyes. Her weight, at that time, was 131 pounds. She was born on November 25, 1956. Keys' social security number is disclosed in the application.

8. A photograph of Keys was attached to the application. The original was probably a color picture, but the copies introduced in evidence (four copies are included in Petitioner's Exhibit 1) are black and white. The photograph is grainy from being reproduced more than a few times. Nevertheless, the image of a woman's face is sufficiently visible that anyone familiar with Keys' appearance should be able to tell that it is her. To everyone else, the photograph depicts a white female adult of indeterminate age with long, dark hair.

9. The descriptive data from Keys' application is considered to be highly reliable because it was put together nearly three years before the incident in question, at a time when Keys had no discernable motive to be untruthful. Moreover, Keys signed the application before a notary public under a certificate that provided, in part, as follows:

> I have carefully read the questions in the foregoing application and have answered them completely, without reservation of any kind, and I declare that my answers and all statements made by me herein are true and correct and that the photograph attached to the application is a photograph of me. Should I furnish any false information on this application, I understand that such action shall constitute cause for the denial, suspension or revocation of any license to practice in the state of Florida the profession for which I am applying.

(Emphasis added).

The Department's Evidence

10. The "Event Report." Detective Edward Domako of the Broward Sheriff's Office was involved in the undercover investigation of Shogun. Through Detective Domako, the Department introduced a one-page exhibit which he described as a Broward Sheriff's Office event report. This undated document contains information about two "arrestees," one of whom is "Debbie Lynn Keys."

11. In response to a leading question from the Department's counsel, Detective Domako agreed that he had

prepared this report around January 5, 1998. On cross-examination, however, the detective admitted that he had never personally been involved with Keys.

12. It is undisputed that the information set forth in this event report was not based on Detective Domako's personal knowledge. Rather, he claimed to have taken the data from another detective's probable cause affidavit, which is discussed below. Detective Domako also testified that "some of this information [in the event report] may have been garnered from" Keys herself, but this statement has been given no weight because (a) the witness was simply speculating and clearly did not know one way or the other if he were correct and (b) no other evidence corroborated his speculation.

13. In this event report, Keys is described as a white female, five feet, three inches tall, 136 pounds, with long, straight, brown hair, blue eyes, and no visible scars, marks, tattoos, or deformities. A residence address is listed which matches her known address at the time.

14. The description of Keys in the event report is similar to that contained in her application for licensure. The problem, however, is that the information in the event report is not consistent with the description of Keys contained in the probable cause affidavit from which Detective Domako asserted he had derived the data. See Paragraph 29, infra.

15. Ironically, the undated event report prepared by a detective without personal knowledge concerning Keys' physical appearance is the only piece of evidence that the Department offered which matches the description of her found in the Department's application file.

16. Because Detective Domako was plainly mistaken about the source of the information he put in the event report; because the event report was not based on the preparer's personal knowledge; and because the undated report was based not on information provided by someone who allegedly had seen Keys engage in the alleged misconduct (for that witness described her differently) but instead upon information acquired after-the-fact from a source or sources unknown, Detective Domako's testimony and the event report are unreliable proof of Keys' identity as the wrongdoer. Hence, this evidence has little or no probative value and is certainly not clear and convincing proof that Keys engaged in the alleged misconduct on December 29, 1997.

17. Officer Ho's Testimony. Jimmy Ho is a police officer with the City of Lauderhill. Officer Ho was involved in the undercover investigation of Shogun.

18. Officer Ho was present at Shogun on January 5, 1998, when detectives from the Broward Sheriff's Office executed a search warrant on the premises. He was there to assist the

sheriff's detectives and described his role as that of "spectator."

19. Officer Ho detained several suspects in a room at Shogun. He claimed that Keys was one of the detainees, and that she had identified herself to him by providing her driver's license, which he reviewed to make a positive identification at the time.

20. Neither Officer Ho nor anyone else at the scene on January 5, 1998, however, bothered to make a copy of the driver's license supposedly tendered by "Keys." No one took "Keys'" fingerprints or photograph either.

21. Officer Ho had not seen "Keys" before January 5, 1998. At no time did he observe her performing or offering to perform any improper acts.

22. Asked at hearing to describe "Keys," Officer Ho testified: "All I can remember, she's a white female, that time, short hair. . . . I think [her hair] was brown color [and not blonde]. . . . I'd say she was somewhere between five [feet]-three [inches] and five [feet]-four [inches tall]." Final Hearing Transcript ("T.") at pp. 107-08.

23. The facts to which Officer Ho testified regarding "Keys'" appearance were not distinctly remembered; his recollection was neither precise nor explicit. Undoubtedly hundreds if not thousands of women in Broward County would

satisfy "Keys'" physical profile as generally described by Officer Ho. Moreover, incidentally, his testimony that "Keys'" hair was short does not match the description in Detective Domako's event report, where she is said to have long hair.

24. For these reasons, Officer Ho's testimony is minimally useful at best. Moreover, even if Officer Ho's testimony clearly and convincingly proved that Keys was present at Shogun on January 5, 1998, that fact would not establish, even by a preponderance of evidence, that Keys engaged in the alleged misconduct on December 29, 1997.

25. The Investigative Action Report. Detective Steven Drum of the Broward Sheriff's Office, who was involved in the undercover investigation of Shogun, was the Department's key witness. He is, in fact, the one and only witness to the alleged sexual misconduct that Keys is charged with having engaged in on December 29, 1997.

26. Detective's Drum's account of his visit to Shogun on December 29, 1997, is set forth in an Investigative Action Report that he prepared on January 5, 1998. In his report, Detective Drum recounted a one-hour massage session with "Debbie" who, he claimed, had offered to perform various sexual services.

27. According to Detective Drum's report, "Debbie" was a white female in her mid-30's with brown hair, brown eyes, and a medium build.

28. The Probable Cause Affidavit. Detective Drum wrote a summary of his December 29, 1997, encounter with "Debbie" in a probable cause affidavit signed January 6, 1998.

29. In his probable cause affidavit, Detective Drum described "Debbie" as a white female with brown hair, brown eyes, five feet, six inches tall, with no visible scars, marks, or tattoos. The affidavit contains Keys' social security number and date of birth.

30. Detective Drum's Testimony. At hearing, Detective Drum's testimony regarding the December 29, 1997, incident closely followed the Investigative Action report and probable cause affidavit. Asked to describe Keys, Detective Drum responded: "She's a white female, approximately five-six, medium build with brown hair." T. 144.

31. Detective Drum testified that he saw "Debbie" again at Shogun on January 5, 1998, when the search warrant was served, and that "Debbie" identified herself to him as Keys. He testified that there was "no doubt" in his mind that the woman who identified herself as Keys on January 5, 1998, was the "Debbie" who had offered him sexual services on December 29, 1997.

32. The factfinder, however, has considerable doubt that Detective Drum possessed any meaningful present recollection either of "Debbie's" appearance or his encounter with her nearly four years ago. The details of his testimony obviously were drawn from the written documents he had prepared contemporaneously.

33. Significantly, moreover, Detective Drum did not mention in either the Investigative Action Report or the probable cause affidavit that on January 5, 1998, the woman he now has no doubt was "Debbie" had told him her name was Deborah Keys——a fact that, had it occurred, would or should have been worthy of note.

34. Taken as a whole, Detective Drum's testimony does not convincingly link Keys to the December 29, 1997, incident. He described "Debbie" contemporaneously as having brown eyes——but Keys' eyes are blue. He also wrote, soon after the alleged misconduct, that "Debbie" was five feet, six inches tall; Keys, however, is a material three inches shorter than that.

35. Detective Drum is an experienced law enforcement officer whose business it is to observe details about suspected perpetrators. It is telling, therefore, that he was mistaken about two obvious details concerning Keys' appearance. Given that there were only a few physical characteristics with which to work in this case (hair color and length, eye color, height,

weight, age), and most of them subject to change, Detective Drum's failure to identify accurately two relatively immutable characteristics of Keys was sufficient to render his testimony that the "Debbie" of December 29, 1997, was the "Keys" of January 5, 1998, less than clear and convincing.[3]

Other Considerations

36. The factfinder found it striking that the Department made relatively little effort to identify Keys conclusively as the wrongdoer. It would have been a simple matter to have subpoenaed her for the final hearing, so that a definitive identification could be made, or, failing that, to have obtained photographs or videotapes of her during discovery upon which a persuasive in-hearing identification could be based. The Department's failure to take these or similar steps toward meeting its heavy evidential burden——particularly given the paucity of information that it had concerning Keys' appearance, about which nothing unique or distinguishing was elicited—— reflected negatively on its entire case.

37. But worse than that, the Department did not show to a single witness the one photograph of Keys that it did have in its possession, and which it introduced into evidence. If, for example, Detective Drum had testified that the woman in the picture attached to Keys' Application for Licensure is "Debbie," then the Department might have proved its case; at least the

decision would have been closer. But Detective Drum was not asked to identify the photograph of Keys.

38. Because the Department knew that it had this photograph of Keys, its failure to question Detective Drum (or anyone else) about the picture is inexplicable——unless the detective could not identify the photograph and therefore his answer to the obvious question would not have been helpful.

39. In this case, where the accused was not physically present at hearing and the only eyewitness to the alleged misconduct described her inaccurately and was not asked to identify an available photograph, the Department's heavy burden of proof has not been met; to find otherwise, the factfinder, in effect, would need to assume that the right person was charged, which he will not do.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

41. A proceeding to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Keys by clear and convincing evidence. Department of Banking and Finance, Div. of

Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935-36 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

42. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where

the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (1992)(citation omitted).

43. Whether Keys committed the wrongful act of which she stands accused is a question of fact for the trier to resolve—— not an issue of law. See Hoover v. Agency for Health Care Administration, 676 So. 2d 1380, 1384 (Fla. 3d DCA 1996). As set forth in the Findings of Fact, the trier has determined as a matter of ultimate fact that the Department failed to establish, by the requisite level of proof, that Keys is guilty as charged.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the Department having failed to prove the charges brought against Keys by clear and convincing evidence, it is RECOMMENDED that the Board enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 4th day of September, 2001, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of September, 2001.

ENDNOTES

[1]/ The Rule under which Keys was charged no longer exists, having been substantially revised and renumbered, effective September 14, 1998, after the date of the incident in question. The current rule governing misconduct and negligence in the practice of massage therapy is Rule 64B7-30.001, Florida Administrative Code. Interestingly, the present Rule does not explicitly forbid sexual misconduct per se, although the failure to appropriately drape a client without first obtaining specific informed consent is a punishable offense. Sexual misconduct in the practice of massage therapy is proscribed by statute, however, and has been since July 1, 1997. See Section 480.0485, Florida Statutes (2000); see Chapter 97-264, Laws of Florida. Somewhat confusingly, in its Administrative Complaint, the Department accused Keys of breaking Rule 64B7-30.001(1)(d)——a provision that seems never to have existed——and did not cite Section 480.0485. The former was probably a typographical error (the Department no doubt meant Rule 61G11-30.001(1)(d)) and the latter an oversight. At any rate, Keys was adequately put on notice of the charge against her.

[2]/ Occasionally, a reviewing court will examine the record to determine whether an administrative law judge's finding that there was not clear and convincing evidence for an element of the agency's case is supported by competent and substantial evidence. E.g. Williams v. Davis, 459 So. 2d 406, 408 (Fla. 1st

DCA 1984). Respectfully, however, this analytical approach is, in addition to being logically suspect, difficult to square with the evidential burden imposed by the clear and convincing standard.

From a logical standpoint, one struggles to envision competent substantial evidence in support of a determination that the agency's proof is not clear and convincing. Such a determination, as noted in the text, does not "find" any fact and therefore does not appear to be subject to conventional methods of proof. Put another way, a determination that X was not convincingly proved is not functionally equivalent to a finding that "Y, not X" occurred, with Y being either an exculpatory alternative or an unknown event; rather, the possibility that X happened is left open. With that in mind, consider: What evidence would support an ultimate factual determination that "X is possibly true, but the trier is not convinced that it is highly probable that X happened as alleged"? In the end, the factfinder's determination that the evidence has failed to convince him of the truth of an allegation sought to be established reflects his subjective judgment about the quality and quantity of the evidence adduced, taking into account "intangibles" such as witnesses' demeanor and body language that a reviewing court cannot reliably assess.

More critical than the logic, perhaps, is the notion, implicit in a review to determine whether there is evidence in support of a determination that an agency's proof was not clear and convincing, that the party against whom a clear and convincing case must be made needs to come forward with evidence proving the deficiencies in the agency's presentation. Indeed, in Williams the court ruled that unrebutted testimony made out a clear and convincing "prima facie" showing that the factfinder was "bound" to believe, even though he had chosen to reject the evidence as insufficiently persuasive. Id. This, it seems, cannot be followed as a general rule: A factfinder must be permitted to reject testimony that, in his judgment, is incredible, untrue, unreliable, or mistaken——even if that testimony is not contradicted either by cross-examination or direct evidence. Further, for any number of reasons unique to a particular case, evidence that is unrebutted may not be so persuasive and of such weight that it produces in the factfinder's mind a firm conviction regarding the truth of the matter to be proved, despite its unchallenged status. The clear and convincing standard presupposes that the proponent may introduce some credible evidence in support of its position——may

even prove that its allegations are more likely than not true—— and yet lose. The raison d'etre of a heightened standard of proof, after all, is to reduce the margin for error in favor of the respondent whose substantial property interests (in a disciplinary proceeding such as this) are at stake.

Here, the correct and applicable legal principle, it is held, is that the respondent was not required to come forward with any evidence unless and until the agency first introduced proof that turned out to be, in the factfinder's ultimate judgment, clear and convincing if left unchallenged. See Greenfield Estate Development Corp. v. Merritt, 348 So. 2d 1199, 1201 (Fla. 3d DCA 1977)(defendant has no duty to go forward with evidence until plaintiff establishes prima facie case). Needless to say, where, as here, the standard of proof is clear and convincing evidence, the agency's "prima facie" case must be made with clear and convincing evidence——and nothing less than that will shift the burden of going forward with the presentation of evidence to the respondent. Steinhardt v. Steinhardt, 445 So. 2d 352, 355-56 (Fla. 3d DCA), pet. rev. denied, 456 So. 2d 1181 (1984)(plaintiffs' failure to adduce clear and convincing evidence, which must be presented to make prima facie case for imposition of constructive trust, justified involuntary dismissal at conclusion of plaintiffs' case-in-chief). Obviously, a respondent takes a substantial risk when she chooses not to offer evidence in support of an exculpatory alternative to the agency's theory of guilt, because she does not know, during the hearing, whether the agency has convinced the administrative law judge that its version of history is correct. Cf. Willingham v. Secretary of Health, Education and Welfare, 377 F.Supp. 1254, 1257 (S.D.Fla. 1974)(plaintiff always has burden of persuasion, which never shifts, but he may produce sufficient proof that his opponent's failure to adduce contradictory evidence may, and in some cases must, lead to a decision for plaintiff). She is entitled, however, to take that chance.

In the instant case, the Department's proof was not clear and convincing in the first instance, even if unchallenged. The Department, in short, failed to establish a prima facie case. Consequently, the burden of moving forward with the presentation of evidence never shifted to Keys. The discussion of the (irrelevant) facts that follows in the text will demonstrate that the factfinder did not simply choose to disbelieve the Department's witnesses but, in the deliberative exercise of his prerogatives as the arbiter of credibility and weigher of evidence, concluded that the Department's proof simply lacked

the persuasive force that the clear and convincing standard demands.

3/ The factfinder has not forgotten that Detective Drum's probable cause affidavit contains Keys' social security number and date of birth, or that Detective Domako's event report contains a known residence address of Keys. These facts do not convincingly establish that Keys was "Debbie," however, because, by January 5, 1998, after the search warrant was served on Shogun, the authorities were clearly aware of Keys' name——from Shogun's employment records if from no other source; and, while Shogun's records probably would have revealed Keys' social security number, date of birth, and residence address as well, the detectives, armed with Keys' name at least, could easily have obtained that additional information about her, regardless whether she had, in fact, offered to engage Detective Drum in sexual activities on December 29, 1997.

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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 agency that will issue the Final Order in this case.