

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF )  
MASSAGE THERAPY, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-0280PL  
 )  
MEHDI SAFDARI, L.M.T., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Jeff B. Clark, an Administrative Law Judge of the Division of Administrative Hearings, in Orlando, Florida, on March 15, 2002.

APPEARANCES

For Petitioner: Ruby Seymour-Barr, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive  
Building 3, Mail Station 39  
Tallahassee, Florida 32308

For Respondent: Scott L. Richardson, Esquire  
126 East Jefferson Street  
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Mehdi Safdari, L.M.T., committed the offenses alleged in the Administrative Complaint issued August 8, 2001, and, if so, to

what extent should his license be disciplined or should he be otherwise penalized.

PRELIMINARY STATEMENT

On August 8, 2001, Petitioner, the Department of Health, Board of Massage Therapy, issued an Administrative Complaint alleging that Respondent had violated Chapters 455 and 480, Florida Statutes, and seeking to discipline his license or otherwise penalize him for said violations. On August 31, 2001, Respondent filed an Election of Rights denying all allegations of the Administrative Complaint and requesting a formal administrative hearing.

By letter dated January 16, 2002, the Agency for Health Care Administration filed the Administrative Complaint and the Election of Rights with the Division of Administrative Hearings and requested the assignment of an Administrative Law Judge to conduct a formal administrative proceeding. On January 17, 2002, an Initial Order was sent to the parties.

Based on the response of the parties to the Initial Order, the case was scheduled for final hearing on March 15, 2002. Petitioner's Motion for Continuance based on the lack of availability of a witness was denied. Petitioner was given the option of taking the witness' deposition after the final hearing; Petitioner later elected not to take the deposition.

At the final hearing Petitioner presented the testimony of Sarene Willingham, a licensed massage therapist, and R.C., the complaining witness. No exhibits were received in evidence at the final hearing, but Petitioner requested leave to submit Respondent's "licensing package" after the hearing. The "licensing package" was filed with the Clerk of the Division of Administrative Hearings on May 24, 2002, and is admitted into evidence as Petitioner's Exhibit 1. No testimony was presented on behalf of Respondent.

A Transcript of the hearing was filed on April 4, 2002. Proposed Recommended Orders were timely submitted by both parties and were fully considered in entering this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner, the Department of Health, Board of Massage Therapy (hereinafter referred to as the "Board") is the state agency charged with the authority and duty to regulate the practice of massage therapy in the State of Florida. Pursuant to Subsection 20.43(3)(g), Florida Statutes, the Department of Health has contracted with the Agency for Health Care Administration to provide consumer complaint, investigative, and prosecutorial services required by the Board, as appropriate.

2. Respondent, Mehdi Safdari, was a licensed massage therapist in the State of Florida at all times material to the

allegations in the Administrative Complaint. Respondent's license number is MA 11488. He was originally certified on January 14, 1991; his current license will expire on August 31, 2003.

3. The complainant, R.C., a 44-year-old female who has an associate's degree in social services from Hesston College in Hesston, Kansas, is a certified activities director. At all times material to the allegations in this matter, she was employed as an activities director at an assisted living facility, Altera Wynwood.

4. On May 4, 2000, Respondent and another person presented an educational program on occupational therapy, physical therapy, and speech and massage therapy for the residents of Altera Wynwood. Incidental to the program, Respondent brought his massage chair and performed massages at the facility. On that day, Respondent performed a chair massage on R.C. R.C. had not known Respondent prior to that day.

5. R.C. advised Respondent that she had been involved in an automobile accident and had injured three discs in her neck. Respondent suggested that she allow him to perform massage therapy on her to alleviate discomfort incidental to the neck injury.

6. On May 15, 2000, R.C. presented herself to Respondent's place of employment for massage therapy. After disrobing, R.C.

dressed herself in a hospital gown and towel which was provided. She wore the towel like a diaper. Respondent massaged R.C.'s head and neck and around her breasts. R.C. testified that Respondent "touched her genital area in a very, very subtle manner, almost as if it was an accident." The remainder of the "full body" massage consisted largely of leg stretching.

7. On May 17, 2000, R.C. presented herself for a second massage. On this occasion she found no gown, but was provided a sheet and towel. During this massage, Respondent pulled down the sheet and exposed R.C.'s breasts without her consent. During the massage, Respondent touched R.C.'s breasts, but she was uncertain as to whether the touching was "out of line."

8. Her next massage was on May 19, 2000. She again found only a sheet and towel in which to dress. During this massage, Respondent got up on the massage table and straddled R.C., sitting on her hips and buttocks with his legs on each side of her body. She advised him that the pressure of him sitting on her buttocks was causing her pain in the back, so he got off. At all times she was covered by the sheet and had the towel between her legs. Respondent did not advise her that he was going to straddle her nor did he have her permission to do so.

9. On her fourth and final visit, she dressed herself in the sheet that was provided, but left her underpants on because she was having a menstrual period. After massaging R.C.'s upper

body, Respondent turned her over on her stomach. He then got up on the massage table, straddling R.C., and pulled her underwear back. He then unzipped the zipper of his trousers and placed his penis between R.C.'s buttocks. Respondent was leaning up against R.C. and pumping against her. She advised Respondent that he was hurting her and, as a result, he got off. He then told her to lie on her side and face the wall; he then got up on the massage table beside her and with his full body began pushing up against her from behind. She was afraid she was going to be raped and was afraid to say anything.

10. Respondent remained behind R.C. for a short period of time and then left. R.C. went to the bathroom and washed herself but did not discover any semen on herself. She then left, seeking to avoid Respondent.

11. R.C. believed that she had been sexually assaulted and filed a report with an appropriate law enforcement agency.

12. R.C.'s testimony in this matter was clear, consistent, and credible.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction of the parties to, and the subject matter of, this proceeding. Section 120.57, Florida Statutes.

14. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the

issue in the proceeding. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996); Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

15. License revocation, suspension and discipline proceedings are penal in nature. Therefore, Petitioner must demonstrate the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

16. As noted by the Supreme Court of Florida:

[C]lear 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 in confusion as to the facts in issue. The evidence must be of such weight that it produces in mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In Re: Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

17. As mentioned in paragraph 15, supra, if determined to be guilty of the violations as alleged, Respondent may suffer a

suspension or revocation of his license. Statutes that authorize the imposition of penal sanctions must be strictly construed and any ambiguity must be construed in favor of Respondent. Elmariah v. Department of Professional Regulation, 574 So. 2d 164, 165 (Fla. 1st DCA 1990). The Florida lenity statute, Subsection 775.021(1), Florida Statutes, provides that: "offenses" defined by any Florida Statute must be construed most favorably to the offender if the language is susceptible to different meanings. Pasquale v. Florida Elections Commission, 759 So. 2d 23, 26 (Fla. 4th DCA 2000).

18. Petitioner has alleged that Respondent violated the following:

COUNT I

Section 480.046(1)(k), Florida Statutes, which states, as follows:

Grounds for disciplinary action by the board.--

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in section 456.072(2):

\* \* \*

(k) Violating a lawful order of the board or department previously entered in a disciplinary hearing, or failing to comply with a lawfully issued subpoena of the department,



by violating Rule 64B7-26.010(1), Florida Administrative Code, which states, as follows:

Sexual Activity Prohibited.

(1) Sexual activity by any person or persons in any massage establishment is absolutely prohibited.

\* \* \*

(4) As used in this rule, "sexual activity" means any direct or indirect physical contact by any person or between persons which is intended to erotically stimulate either person or both or which is likely to cause such stimulation and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. For purposes of this subsection, masturbation means the manipulation of any body tissue with the intent to cause sexual arousal. As used herein, sexual activity can involve the use of any device or object and is not dependent on whether penetration, orgasm, or ejaculation has occurred. Nothing herein shall be interpreted to prohibit a licensed massage therapist, duly qualified under Rule 64B7-31.001, from practicing colonic irrigation.

COUNT II

Section 480.046(1)(k), Florida Statutes, states, as follows:

Grounds for disciplinary action by the board.--

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in section 456.072(2):

\* \* \*

(k) Violating a lawful order of the board or department previously entered in a disciplinary hearing, or failing to comply with a lawfully issued subpoena of the department,

by violating Section 480.0485, Florida Statutes, which states, as follows:

Sexual misconduct in the practice of massage therapy.--The massage therapist-patient relationship is founded on mutual trust. Sexual misconduct in the practice of massage therapy means violation of the massage therapist-patient relationship through which the massage therapist uses that relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of massage therapy is prohibited,

and Rule 64B7-26.010(3), Florida Administrative Code, which states, as follows:

(3) No licensed massage therapist shall use the therapist-client relationship to engage in sexual activity with any client or to make arrangements to engage in sexual activity with any client.

(4) As used in this rule, "sexual activity" means any direct or indirect physical contact by any person or between persons which is intended to erotically stimulate either person or both or which is likely to cause such stimulation and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal

intercourse. For purposes of this subsection, masturbation means the manipulation of any body tissue with the intent to cause sexual arousal. As used herein, sexual activity can involve the use of any device or object and is not dependent on whether penetration, orgasm, or ejaculation has occurred. Nothing herein shall be interpreted to prohibit a licensed massage therapist, duly qualified under Rule 64B7-31.001, from practicing colonic irrigation.

COUNT III

Subsection 455.624(1)(u), Florida Statutes (1999), states, as follows:

Grounds for discipline; penalties; enforcement.--

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

\* \* \*

(u) Engaging or attempting to engage a patient or client in verbal or physical sexual activity. For the purposes of this section, a patient or client shall be presumed to be incapable of giving free, full, and informed consent to verbal or physical sexual activity.

19. Counts I and II each contain a scrivener's error when addressing the subparagraph of Subsection 480.046(1), Florida Statutes, which states the grounds for disciplinary action.

20. Subsection 480.046(1)(k), Florida Statutes (1999), provides the following ground for taking disciplinary action against a massage therapist:

(k) Violating any provision of this chapter, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing, or failing to comply with a lawfully issued subpoena of the department.

21. It appears that the drafter of the Administrative Complaint citing Subsection 480.046(1)(k), Florida Statutes, failed to include "(1999)" which would have been appropriate given the date of the alleged violations. This is harmless error and Respondent has not suffered as a result. This is a "notice pleading" forum. Respondent is clearly given adequate notice of the substantive violations he is charged with by the citation of Rule 64B7-26.010(1) and (3), Florida Administrative Code, and Section 480.0485, Florida Statutes, all of which address sexual misconduct.

22. While reasonable minds may question some of Respondent's conduct during the first three massage sessions, nothing violating the cited Florida Administrative Code Rules or Florida Statutes was proved by clear and convincing evidence.

23. During the fourth massage session, when Respondent climbed onto the massage table, straddled R.C., and placed his penis between her buttocks while thrusting himself against her, Respondent's conduct clearly and convincingly violated Rule 64B7-26.010(1) and (3), Florida Administrative Code, Section 480.0485, Florida Statutes, and Subsection 455.624(1)(u),

Florida Statutes (1999), as his conduct clearly and convincingly constitutes a "sexual activity" as defined in the rule, and was an attempt by Respondent to use the massage therapist-patient relationship to attempt to engage in sexual activity with R.C.

24. Subsection 480.046(2), Florida Statutes (1999), states, as follows:

(2) When the board finds any person guilty of any grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Refusal to license an applicant.

(b) Revocation or suspension of a license.

(c) Issuance of a reprimand or censure.

(d) Imposition of an administrative fine not to exceed \$1000 for each count or separate offense.

25. Subsection 455.624(2), Florida Statutes (1999), states, as follows:

(2) When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify, or to certify with restrictions, an application for a license.

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice.

(d) Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense.

(e) Issuance of a reprimand.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

(h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

In determining what action is appropriate, the board, or department when there is no board, must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the practitioner. All costs associated with compliance with orders issued under this subsection are the obligation of the practitioner.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Health, Board of Massage Therapy, finding that Mehdi Safdari violated Rule 64B7-26.010(1) and (3), Florida Administrative Code, Section 480.0485, Florida Statutes, and Subsection 455.624(1)(u), Florida Statutes (1999), as alleged in the Administrative Complaint issued on August 8, 2001; it is further

RECOMMENDED that the Department of Health, Board of Massage Therapy, suspend Mehdi Safdari's license to practice massage therapy for a period of three (3) years, during which time he must present himself for examination and/or treatment by a psychiatrist licensed to practice medicine in the State of Florida, who, upon conclusion of his examination and/or treatment, shall opine to the Board of Massage Therapy that Respondent is not a threat to his patients as a prerequisite to Respondent returning to the practice of massage therapy; impose an administrative fine against Respondent of \$3,000; and assess against Respondent the costs of investigating and prosecuting this case.

DONE AND ENTERED this 31st day of May, 2002, in  
Tallahassee, Leon County, Florida.

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JEFF B. CLARK  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of May, 2002.

COPIES FURNISHED:

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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.