

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MASSAGE THERAPY,)
)
Petitioner,)
)
vs.) Case No. 03-4789PL
)
VLADISLAV SIMAKOV,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On June 22, 2004, an administrative hearing in this case was held in Bradenton, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brian J. Stabley, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: J. Brent Jones, Esquire
Grossman, Roth and Partridge
1800 Second Street, Suite 777
Sarasota, Florida 34236

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated October 22, 2003, the Department of Health, Board of Massage Therapy (Petitioner), alleged that Vladislav Simakov (Respondent) violated Sections 456.072, 480.046(1)(o), and 480.0485, Florida Statutes (2003), related to the practice of massage therapy. The Respondent disputed the allegations and requested an administrative hearing. The Petitioner forwarded the matter to the Division of Administrative Hearings, which scheduled and conducted the hearing.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 1 through 3 admitted into evidence. The Respondent presented the testimony of two witnesses and testified on his own behalf.

The one-volume Transcript of the hearing was filed on July 6, 2004. Both parties filed proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent is a massage therapist holding State of Florida license number MA25243. The Respondent, a male, has been a licensed massage therapist since September 22, 1997.

2. At all times material to this case, the Respondent has worked as a massage therapist at Bayshore Rehabilitation, 6088 14th Street West in Bradenton, Florida.

3. K.S. is a 29-year-old female, living in Myakka City, Florida.

4. As a birthday gift, relatives gave K.S. a gift certificate for a massage at Bayshore Rehabilitation.

5. On March 11, 2003, K.S. called Bayshore Rehabilitation and made an appointment to receive a 55-minute massage beginning at 5:00 p.m. on that day.

6. Prior to March 11, 2003, K.S. had never been to Bradenton Rehabilitation, and had not previously received a massage from a licensed massage therapist.

7. Upon arriving at Bayshore Rehabilitation, K.S. gave the gift certificate to a blonde woman, who greeted K.S. when she entered the facility. The blonde woman did not identify herself to K.S.

8. The blonde woman was Svetlana Ladyzhensky. Ms. Ladyzhensky and her husband Lenny Ladyzhensky are the owners of Bradenton Rehabilitation.

9. Ms. Ladyzhensky led K.S. to Treatment Room No. 3. Ms. Ladyzhensky did not ask K.S. to provide any health-related information.

10. Ms. Ladyzhensky informed K.S. that the massage therapist was blind and asked if that presented any problem. K.S. was not concerned by the information.

11. After telling K.S. how to prepare for the massage, Ms. Ladyzhensky left the room. Based on directions from Ms. Ladyzhensky, K.S. undressed but for her underwear, got onto the massage table on her stomach, and covered herself with a sheet.

12. Shortly thereafter, the Respondent entered the room, greeted K.S., and conversed briefly with her. She told him she had not had a massage before.

13. The Respondent turned on a music player and began to massage K.S.'s shoulders and back, using some type of massage oil.

14. After moving the sheet, the Respondent began to massage K.S.'s lower back. K.S. testified that the Respondent told her she could take down her underwear, that she pulled them partway down her buttocks, and that he continued the massage.

15. K.S. testified that after the Respondent massaged her lower back, he then "grabbed" her underwear and pulled them down to her knees. K.S. testified that the Respondent massaged her buttocks, moved his hands towards her genitals, and brushed his fingers against her vaginal lips for five to ten seconds. K.S. testified that due to the Respondent's blindness, she assumed

the touching of her vaginal lips was an error. She testified that the contact made her uncomfortable, that she "asked him if he massaged feet or hands or anything else," and that the Respondent replied, "Oh yes, just trying to give you what you want."

16. The Respondent testified at the hearing and denied that he grabbed and pulled down the underwear, or that any inappropriate contact occurred during the massage.

17. After massaging K.S.'s lower back, the Respondent massaged her legs and feet, and then directed her to turn over onto her back.

18. K.S. testified that at the time she turned over onto her back, she saw that a clock in the room read 5:40 p.m.

19. After turning over, K.S. covered herself from neck to ankle with the sheet. The Respondent lowered the sheet and massaged her neck and shoulders.

20. K.S. testified that the Respondent then lowered the sheet to expose her breasts, and that within 30 to 45 seconds he grabbed her breasts, one in each hand, and began to squeeze them. K.S. testified that she grabbed his hands and pushed him away, firmly saying, "No." K.S. testified that the Respondent "immediately came back and grabbed my nipples and twisted them extremely hard" and that she responded by again pushing his hands away and saying, "No."

21. K.S. testified that the Respondent grabbed the sheet and said, "What, you no like?" and that she replied, "No." K.S. testified that the Respondent then pulled the sheet off her and said, "Yes, you like, you want more?" and that she replied, "No, I don't."

22. K.S. testified that the Respondent then briefly massaged her lower right calf "extremely hard" and quickly left the treatment room, ending the massage.

23. The Respondent testified that he performed a standard massage with K.S., and left the room after it was completed. The Respondent denied that any contact with K.S.'s breasts or nipples occurred during the massage, and denied that the conversation reported by K.S. took place.

24. After the Respondent left the room, K.S. dressed and exited the treatment room. Ms. Ladyzhensky was waiting by the treatment room door to escort K.S. from the facility. K.S. was not crying or in distress when she came out of the treatment room.

25. Ms. Ladyzhensky asked K.S. about the massage. K.S. remarked that it was "OK" and asked if she could get a drink from a nearby water fountain. Ms. Ladyzhensky said, "Of course." K.S. drank some water and left the building.

26. K.S. went from Bayshore Rehabilitation to the home of the relatives who had given her the gift certificate.

27. Within a few minutes, the relatives arrived at Bayshore Rehabilitation to report the allegations, and to seek a refund of the cost of the gift certificate. The cost was refunded.

28. Shortly thereafter, K.S. also returned to discuss the allegations with Lenny Ladyzhensky. During the conversation with Mr. Ladyzhensky, K.S. saw a law enforcement vehicle pass by the building, and she went outside, flagged the officer down, and reported the allegations.

29. Both Lenny and Svetlana Ladyzhensky testified during the hearing. Both testified that the walls in the facility are thin and un-insulated, that the doors are hollow, and that it is possible to hear noise between and outside the treatment rooms.

30. During part of the time that K.S. and the Respondent were in Treatment Room No. 3, Mr. Ladyzhensky was in an adjoining treatment room, and heard conversation and some laughter from the room. He heard nothing that caused any concern on his part.

31. During the time that K.S. and the Respondent were in the treatment room, Ms. Ladyzhensky was moving around the facility and heard muffled conversation and laughter coming from Treatment Room No. 3. She heard nothing that caused her any alarm.

32. K.S. did not scream or call for help during the alleged assault. She made no attempt to leave the room while the alleged events occurred, even though the door was unlocked and accessible. K.S. testified that she was afraid of being physically harmed by the Respondent so she did not scream or attempt to leave the room. K.S.'s testimony regarding the alleged assault lacks credibility.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57, Fla. Stat. (2003).

34. The Petitioner is the state agency charged with the regulation of licensed massage therapists in the State of Florida. See Chapters 456 and 480, Fla. Stat. (2003), and Fla. Admin. Code R. 64B7-24 through 64B7-33.

35. Section 480.0485, Florida Statutes (2003), provides 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.

36. Subsection 480.046(1)(o), Florida Statutes (2003), provides that disciplinary action may be imposed against a licensee for violation of Chapter 456, Florida Statutes, or any rules adopted pursuant thereto.

37. Florida Administrative Code Rule 64B7-26.010 provides as follows:

64B7-26.010 Sexual Activity Prohibited.

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

(2) No massage establishment owner shall engage in or permit any person or persons to engage in sexual activity in such owner's massage establishment or use such establishment to make arrangements to engage in sexual activity in any other place.

(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, F.A.C, from practicing colonic irrigation.

38. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is that which is credible, precise, explicit, and 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

39. K.S. testified that while she was lying on her stomach, the Respondent "grabbed" her underwear, pulled them down to her knees, and brushed his fingers against her genitals for five to ten seconds. She testified that later in the massage, the Respondent violently assaulted her breasts.

40. It strains credulity to believe that, given the serious nature of the alleged assault, a person would have responded to the attack in the same way as did K.S.

41. Escape would have been relatively easy. The door was accessible and unlocked, and the Respondent is blind, yet K.S. made no attempt to leave the room at any time prior to conclusion of the massage.

42. Possible assistance was nearby, as other people were present in the facility during the time of the massage, yet K.S. made no effort to scream or call for help during the alleged assault. No one heard anything unusual during the time that the Respondent and K.S. were in the treatment room. When K.S. exited the treatment room and spoke to one of the facility's owners, K.S. did not appear to be upset or unhappy with the massage.

43. While K.S. appeared to testify sincerely at the hearing as to the allegations, the testimony lacks sufficient credibility to support a firm belief of conviction, without hesitancy, as to the truth of the allegations, and therefore the burden of proof has not been met.

RECOMMENDATION

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

RECOMMENDED that the Department of Health, Board of Massage Therapy, enter a final order dismissing the Administrative Complaint filed against the Respondent.

DONE AND ENTERED this 28th day of July, 2004, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2004.

COPIES FURNISHED:

Brian J. Stabley, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

J. Brent Jones, Esquire
Grossman, Roth and Partridge
1800 Second Street, Suite 777
Sarasota, Florida 34236

Renee Alsobrook, Acting General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

William H. Buckhalt, Executive Director
Board of Massage Therapy
Department of Health
4052 Bald Cypress Way, Bin C06
Tallahassee, Florida 32399-1701

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.