

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF MASSAGE THERAPY,)
)
Petitioner,)
)
vs.) Case No. 04-1686
)
LONGWOOD MASSAGE &)
TANNING STUDIO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 6, 2004, in Orlando, Florida, before Susan B. Harrell,^{1/} a designated Administrative Law Judge of the 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: Thomas D. Sommerville, Esquire
Muller & Sommerville, P.A.
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STATEMENT OF THE ISSUES

Whether Respondent violated Subsections 480.046(1)(e), 480.046(1)(o), and 480.047(1)(c), Florida Statutes (2001),

and Florida Administrative Code Rules 64B7-26.010(1) and 64B7-26.010(2), and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On February 5, 2004, Petitioner, Department of Health (Department), issued a three-count Administrative Complaint against Respondent, Longwood Massage & Tanning Studio (Longwood), alleging that Longwood violated Subsections 480.046(1)(o) and 480.047(1)(c), Florida Statutes (2001), by employing unlicensed persons to practice massage at Longwood's establishment; violated Subsection 480.046(1)(e), Florida Statutes (2001), by aiding, assisting, procuring, or advising unlicensed persons to practice massage contrary to the provisions of Chapter 480, Florida Statutes (2001), or the rules of the Department or the Board of Massage Therapy; and violated Subsection 480.046(1)(o), Florida Statutes (2001), by violating Florida Administrative Code Rules 64B7-26.010(1) and 64B7-26.010(2), which prohibits sexual activity by any person in a massage establishment and prohibits the owner of a massage establishment from engaging in or permitting persons to engage in sexual activity in the massage establishment or from using the massage establishment to make arrangements for sexual activity in another place.

Longwood requested an administrative hearing, and the case was transmitted to the Division of Administrative Hearings on May 11, 2004.

The case was set for final hearing on July 20, 2004, and was continued to September 10, 2004, at the request of Respondent. The September 10, 2004, hearing was rescheduled due to inclement weather.

At the final hearing, Petitioner called the following witnesses: David Tunno, Ronald Tunno, Maria Graffius, Shannon McWhorter Tallon, Jennifer Wilcox, Dan Moran, Jason Bender, and William Christensen. Petitioner's Exhibits 1 and 3 through 6 were admitted in evidence. Respondent called Lea Pierre as its witness. Respondent did not submit any exhibits.

At the final hearing the parties agreed to file their proposed recommended orders within ten days of the filing of the transcript. The two-volume Transcript was filed on November 5, 2004. On November 10, 2004, the parties filed a Joint Stipulation for Extension of Time to file their proposed recommended orders. The parties timely filed their Proposed Recommended Orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. Longwood is, and at all times material to this proceeding, a licensed massage establishment in the State of

Florida, having been issued License No. MM 007785. The establishment is located at 420 East State Road 434, Suite E, Longwood, Florida.

2. David Tunno is the owner of Longwood. He applied for Longwood's massage establishment license and is responsible for ensuring that Longwood complies with the statutes and rules governing massage establishments in Florida.

3. David Tunno's father, Ron Tunno, visits Longwood to assist David Tunno in some of the massage establishment's business activities. Although Ron Tunno is not an employee of Longwood, he performs such duties as answering the telephones, signing receipts, placing advertising orders and providing advice to David Tunno regarding some business decisions.

4. Longwood employed Maria Graffius to provide massage therapy for approximately two years. At the time of her employment with Longwood, Ms. Graffius was a Florida-licensed massage therapist.

5. While Ms. Graffius was employed at Longwood, she engaged in sexual activities with some of Longwood's clients. She masturbated some of the clients and performed oral sex on some of the clients. In exchange for her sexual favors, clients would tip her with cash or food.

6. Ron Tunno told Ms. Graffius not to be shy with the clients. She took his remark to mean that she should have sex

with clients if they requested it. During the same conversation, Ron Tunno told her to flush down the toilet any condoms that she used at Longwood. Ms. Graffius supplied her own condoms and kept them in the glove compartment of her car.

7. Ms. Graffius was not certain whether David Tunno knew that she was engaging in sexual activities with Longwood's clients. David Tunno never told her to perform sexual acts on the clients.

8. Sharon Tallon, formerly known as Sharon McWhorter, answered a help-wanted advertisement from Longwood, stating "Friendly faces wanted for local massage studio." On May 21, 2002, Ms. Tallon called Longwood and spoke to Ron Tunno, who asked her to meet him for a private interview. Ron Tunno took Ms. Tallon and her friend to a small, hourly motel, where he asked Ms. Tallon to give him a massage. Ms. Tallon gave him a massage, and he told her that some of the customers may want her to perform sexual acts, such as oral sex or masturbation. She told him that she did not have a problem with that, and he asked her to perform oral sex on him so that he could tell if she was good at what she did. Ms. Tallon complied with his request.

9. Apparently Ms. Tallon met Ron Tunno's standards because he hired her to work at Longwood. She went to work at Longwood on the same day as her private interview. Ms. Tallon did not have a license to practice massage therapy.

10. When Ms. Tallon got to Longwood, Ron Tunno introduced her to David Tunno and showed her around the establishment. Ron Tunno showed her how to prepare a room for the client. He advised Ms. Tallon that she must supply her own condoms and that she must flush used condoms down the toilet.

11. Ms. Tallon worked at Longwood for two days, during which time she performed oral sex on four clients. She was paid \$220 in cash by Longwood for her services. She also gave one massage which did not involve sexual activity.

12. Not only did Ms. Tallon engage in sexual acts with clients, but she also engaged in sexual acts with David Tunno and Ron Tunno while working at Longwood. Ms. Tallon gave David Tunno a massage, he requested that she perform oral sex on him, and she complied. On her second day of employment at Longwood, Ms. Tallon had intercourse with Ron Tallon at Longwood.

13. Ms. Tallon contacted the Longwood Police Department and advised them of her activities at Longwood. She was advised that she would be given immunity for her acts, and she assisted the police by making a controlled telephone call to Ron Tunno and by wearing a wire transmitter while talking to Ron Tunno at Longwood.

14. On February 21, 2003, the Seminole County Sheriff's Office, having obtained a search warrant, raided Longwood. In one of the massage rooms, the sheriff's officers found Jennifer

Wilcox and a client. The evidence did not establish that Ms. Wilcox was actually giving a massage or that she had given a massage to the client. Ms. Wilcox was not a licensed massage therapist at the time. Ms. Wilcox was enrolled in school, training to be a massage therapist. She claimed that she was at Longwood to study and not to give massages. The sheriff's officers did not find any study materials on the premises. In another massage room, the sheriff's officers found Ms. Graffius with a client.

15. In one of the rooms, the sheriff's officers found a small round pillow with a zippered opening in the back. Inside the pillow were two condoms. The officers also observed a substance on some of the towels and a sheet. The substance resembled semen, but no evidence was presented to establish that the substance was semen.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2004).

17. The Department has alleged in the Administrative Complaint that Respondent violated Subsections 480.046(1)(e) and (o), Florida Statutes (2001), which provide:

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

* * *

(e) Aiding, assisting, procuring, or advising any unlicensed person to practice massage contrary to the provisions of this chapter or to a rule of the department or the board.

* * *

(o) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

18. The Department alleged that Respondent violated Subsection 480.046(1)(o), Florida Statutes (2001), by violating Florida Administrative Code Rules 64B7-26.010(1) and (2), which provide:

(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 place.

19. The Department also alleged that Respondent violated Subsection 480.047(1)(c), Florida Statutes (2001), which provides:

(1) It is unlawful for any person to:

* * *

(c) permit an employed person to practice massage unless duly licensed as provided herein.

20. The Department has the burden to establish the allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (1996).

21. The Department has established by clear and convincing evidence that Respondent violated Subsection 480.047(1)(c), Florida Statutes (2001), by hiring Shannon Tallon, a person unlicensed to practice massage, to give massages at Longwood and by allowing Ms. Tallon to perform massages at Longwood.

22. The Department has established by clear and convincing evidence that Respondent violated Subsection 480.046(1)(e), Florida Statutes (2001), by aiding, assisting, or procuring Ms. Tallon to practice massage while unlicensed and to perform sexual acts with clients.

23. The Department has established by clear and convincing evidence that there was sexual activity between some of Longwood's therapists and clients and, thus, has established a violation of Subsection 480.046(1)(o), Florida Statutes (2001), by a violation of Florida Administrative Code Rule 64B7-26.010(1).

24. The Department has established by clear and convincing evidence that Respondent violated Subsection 480.046(1)(o), Florida Statutes (2001), by violating Florida Administrative Code Rule 64B7-26.010(2). It is clear that David Tunno, who had

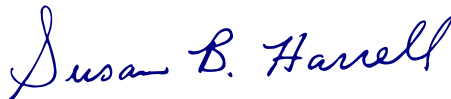
a sexual relationship with Ms. Tallon at Longwood, was aware that Ms. Tallon was engaging in sexual activity at Longwood.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Longwood Massage & Tanning Studio violated Subsections 480.046(1)(e), 480.046(1)(o), and 480.047(1)(c), Florida Statutes (2001), and Florida Administrative Code Rules 64B7-26.010(1) and (2), and revoking Longwood Massage & Tanning Studio's massage establishment license.

DONE AND ENTERED this 30th day of December, 2004, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of December, 2004.

ENDNOTE

^{1/} At the time of the final hearing Administrative Law Judge Susan B. Harrell was named Susan B. Kirkland.

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.