

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
ACUPUNCTURE,)
)
Petitioner,)
)
vs.) Case No. 06-4117PL
)
ELHAM KHARABI, A.P.,)
)
Respondent.)
)
-----)
DEPARTMENT OF HEALTH, BOARD OF)
MASSAGE THERAPY,)
)
Petitioner,)
)
vs.) Case No. 06-4491PL
)
ELHAM KHARABI-MOGHADDAM, L.M.T.,)
)
Respondent.)
-----)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in these cases before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on May 21 and 22, 2007, in Miami, Florida.

APPEARANCES

For Petitioner: Allison M. Dudley
Assistant General Counsel
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: David M. Shenkman, Esquire
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STATEMENT OF THE ISSUES

The issues in these cases for determination are whether Respondent Elham Kharabi, A.P., L.M.T, committed the violations alleged in two Administrative Complaints issued by the Department of Health on March 14, 2005, in DOAH Case No. 06-4117PL, and on November 8, 2006, in DOAH Case No. 06-4491PL; and, if so, what disciplinary action should be taken against his license to practice acupuncture and his license to practice massage therapy in Florida.

PRELIMINARY STATEMENT

On or about March 14, 2005, the Department of Health filed a three-count Administrative Complaint, Case Number 2004-27932, before the Board of Acupuncture against Respondent Elham Kharabi, A.P., an individual licensed to practice acupuncture in Florida. In particular, it is alleged in the Administrative Complaint that Respondent committed violations of Sections 456.072(1)(u), 457.109(1)(j), and 457.109(1)(m), Florida Statutes (2004)(all references to Florida Statutes and the Florida Administrative Code are to the 2004 versions, unless otherwise indicated).

Respondent disputed the allegations of fact contained in the Administrative Complaint by Election of Rights form and an Answer, and requested a formal administrative hearing pursuant to Sections 120.569(2)(a) and 120.57(1), Florida Statutes (2006).

On October 20, 2006, the matter was filed with the Division of Administrative Hearings with a request that an administrative law judge be assigned to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2006). The matter was designated DOAH Case Number 06-4117PL and was assigned to the undersigned.

The final hearing was scheduled to be held on December 20 and 21, 2006, by Notice of Hearing entered November 30, 2006.

On January 26, 2007, the Department of Health filed an Administrative Complaint before the Board of Massage, Case Number 2004-27897, against Respondent's license to practice massage therapy in Florida. In particular, it is alleged in the Administrative Complaint that Respondent violated Section 480.046(1)(o), Florida Statutes, by having violated Section 480.0485, Florida Statutes.

Respondent disputed the allegations of fact contained in the Administrative Complaint by Election of Rights form and an Answer, and requested a formal administrative hearing.

On November 8, 2006, the matter was filed with the Division of Administrative Hearings with a request that an administrative

law judge be assigned to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2006). The matter was designated DOAH Case Number 06-4491PL and was assigned to the undersigned.

The two cases were consolidated by an Order of Consolidation entered November 27, 2006. The final hearing, previously scheduled for December 20 and 21, 2006, was rescheduled for February 8 and 9, 2007, by Order Granting Continuance entered November 30, 2006. The hearing was subsequently continued two more times.

On January 25, 2007, the parties filed a Joint Stipulation. Stipulated facts contained therein have been incorporated into this Recommended Order.

Two motions were filed shortly before the final hearing: Petitioner's Motion in Limine; and Petitioner's Motion for Official Recognition. Respondent filed Respondent's Motion in Opposition to Petitioner's Motion in Limine. Both Motions were considered at the commencement of the final hearing and the attendant rulings are contained in the transcript of that hearing.

During the final hearing, Petitioner presented the testimony of patient U.C., William Parente, Luis Yllanes, and Manuel Rodriguez-Garcia, M.D. Petitioner's Exhibit 1 was admitted. Respondent testified on his own behalf and presented

the testimony of Merrysue Haber, Ph.D. Respondent's Exhibits 1 through 4 were admitted. One Joint Exhibit was also admitted.

The two-volume Transcript of the final hearing was filed on June 5, 2007. By Notice of Filing Transcript entered June 7, 2007, the parties were informed that the Transcript had been filed and that their proposed recommended orders were to be filed on or by July 25, 2007 (the correct date for filing proposed recommended orders was June 25, 2007). Petitioner filed Petitioner's Proposed Recommended Order on June 25, 2007. Respondent filed Proposed Findings of Fact and Conclusions of Law on June 26, 2007. The post-hearing proposals of both parties have been fully considered in rendering this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Health (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for the investigation and prosecution of complaints involving the practice of acupuncture and massage therapy in Florida. § 20.43, and Chs. 456, 457 and 480, Fla. Stat.

2. Respondent, Elham Kharabi (identified as Elham Kharabi-Moghaddam by the Board of Massage Therapy), A.P., L.M.T, is and was at all times material to this matter, licensed by the Board

of Acupuncture as an acupuncturist, having been issued license number 1890 on November 7, 2003, and by the Board of Massage Therapy as a licensed massage therapist, having been issued license number 0013944 on January 29, 1993.

3. Respondent's mailing address of record at all times relevant to this matter is Post Office Box 451342, Miami, Florida 33245. Respondent's clinic is located at 2808 Bird Avenue, Miami, Florida 33133.

4. No evidence that Respondent has previously been the subject of a license disciplinary proceeding was offered.

B. Respondent's Treatment of Patient U.C.

5. At the times material to this matter, Respondent operated as "Miami's Clinical of Oriental Medicine" (hereinafter after referred to as the "Clinic"), located in Coconut Grove, Miami, Florida.

6. U.C., a single, 34-year-old mother, visited the Clinic in June 2004 (hereinafter referred to as "Patient U.C."). Patient U.C. visited the Clinic because she was suffering from depression and fatigue and thought that acupuncture might help her. On her first visit Patient U.C. spoke briefly with Respondent and was given a pamphlet. After this first meeting, Patient U.C. called Respondent and made an appointment for treatment.

7. Patient U.C.'s first formal appointment with Respondent was a free consultation which took place on June 29, 2004. During the consultation visit, Patient U.C. completed a Comprehensive Acupuncture Examination form, in which she described her "Major Complaints" as "depression, fatigue, inability to concentrate & focus, lethargy, moody, irritable, too sensitive & emotional." Respondent's Exhibit 3. Patient U.C. also indicated on the form that she had experienced the following "Nuerological" problems: "nervousness, depressed, easily angered, easily irritated, frequent crying, numbness/tingling in limbs, poor coordination, muscle weakness, and feel weak and shaky." She did not, however, mean that she was suffering from all of these problems at the time she completed the form. Rather, she simply listed every symptom she had ever experienced during her lifetime.

8. After Patient U.C. had completed the Comprehensive Acupuncture Examination form, Respondent conducted a patient interview with her, which he memorialized in a Patient Interview form. Respondent's Exhibit 4. Respondent determined a plan of treatment for Patient U.C., which he memorialized on the Patient Interview form. Respondent's plan of treatment consisted of: "Tui Na, LR3, LI4, SJ5, GB41, Yin Tang, R17." Based on Respondent's testimony describing these treatments, none required touching of Patient U.C.'s anus or vagina. Respondent

completely identified his plan of treatment and there was no testimony indicating that it was inadequate.

9. After the patient interview, Respondent advised Patient U.C. that he could treat her "Major Complaints" with Chinese medicine.

10. Respondent, with Patient U.C.'s agreement, performed a complete massage (while Patient U.C. and Respondent characterized the treatment differently, the procedure involved manipulation of Patient U.C.'s body and will be referred to throughout this Recommended Order as "massage" for ease of reference) and acupuncture on Patient U.C. after their initial discussions on June 29, 2004. Patient U.C. was unclothed, except for her underwear, during the massage. Having experienced a number of massages by male therapists in the past, Patient U.C. felt comfortable receiving the massage from Respondent.

11. On June 30, 2004, Patient U.C. returned to the Clinic to pay for her first visit and future planned visits.

12. On July 6, 2004, Patient U.C. presented to the Clinic for her second appointment. During this visit, she received the same treatment as she had during the first appointment. While at the Clinic, Respondent advised Patient U.C. that she needed treatment on a daily basis and encouraged her to come to the Clinic daily. Respondent told Patient U.C., who was concerned

about cost, that she could come in any time and that he would not charge her for her sessions. Patient U.C. declined Respondent's offer and indicated that she would only come for her scheduled paid-for weekly appointments.

13. On July 13, 2004, Patient U.C. went to the Clinic for her third visit, which had been paid for in advance. Patient U.C. complained to Respondent of pain in her jaw and the left side of her buttocks, radiating down her leg.

14. After rubbing or manipulating Patient U.C.'s jaw, Patient U.C. removed her clothing, except for her underwear, while Respondent left the room. When Respondent returned, he began treatment of Patient U.C.'s left buttock. Respondent massaged Patient U.C.'s left buttock, moving his oiled hands rapidly on her buttock while applying heavy pressure. Patient U.C., concerned that her underwear was hampering Respondent's efforts, offered to remove them. Respondent agreed and Patient U.C. removed her underwear.

15. Respondent recommenced his treatment, massaging Patient U.C.'s left buttock rapidly and forcefully. At some point, Patient U.C. felt Respondent remove his finger from her anus. Because Patient U.C. was lying on her stomach at the time and, therefore, was not able to see exactly what had happened, she was cautious in her testimony at hearing. The weight of her testimony, however, proved that, while Patient U.C. was unable

to say that she felt Respondent's finger enter her anus, she was able to feel him removing his finger from her anus.

16. After realizing that Respondent had inserted his finger into her anus and then removed it, Patient U.C. was confused and unsure of what to do. Patient U.C. described her feelings at hearing:

Q. What did you do when you felt that?

A. Nothing. I was shocked. It didn't make sense to me. How could I feel this thing coming out of my butt if I didn't feel it . . . being inserted? I was confused. It just didn't make sense and I thought you know it is probably an accident, a mistake because there is oil and he did massage vigorously and it was fast, but I did not do anything.

Transcript, Vol. I, Page 61, Lines 16-24.

17. After Respondent completed massaging Patient U.C., he placed acupuncture needles in her buttocks and left the room. Respondent returned a few minutes later and removed the needles.

18. After removing the needles, Respondent had Patient U.C. turn over on her back and he began massaging her right thigh. While massaging Patient U.C.'s thigh, he inserted his finger into her vagina and briefly moved it back and forth several times. Again, Patient U.C. did not respond to Respondent's inappropriate conduct, instead deciding to avoid having "to deal with it." Instead, she "just pretended that it

wasn't going on, that it didn't happen. I just pretended that it didn't happen." Transcript, Vol. I, Page 65.

19. When Patient U.C. did not respond to this second unwanted touching, Respondent removed his finger and returned to appropriate treatment, inserting acupuncture needles in Patient U.C. Following this treatment, Respondent removed the acupuncture needles and left the room. Patient U.C. got up from the treatment table, dressed, and left the clinic without confronting Respondent about putting his finger in her anus and her vagina. Patient U.C. did not confront Respondent because she just wanted to leave the Clinic and pretend that Respondent had not violated her.

C. Events Following Respondent's July 13, 2004, Treatment of Patient U.C.

20. Patient U.C. went home immediately after her July 13, 2004, visit to the Clinic and called William Parente, her boyfriend at the time. She was unable, however, to tell Mr. Parente what had happened because he was at lunch with other people. After talking briefly with Mr. Parente, Patient U.C. took a shower, ate, and went to work.

21. Later that day, Patient U.C. spoke to Mr. Parente and described the events that had taken place at the Clinic that day. According to Mr. Parente, Patient U.C. was very distraught and, from the sound of her voice, had been crying.

22. During the evening of July 13, 2004, Patient U.C. experienced pain in her anus. The pain had intensified by the next morning. Therefore, Patient U.C. went to the Health Clinic at the University of Miami, where she was a second-year law student. Personnel at the clinic advised patient U.C. to go to the Jackson Memorial Rape Treatment Center (Jackson).

23. On July 14, 2004, at approximately 9:00 a.m., Patient U.C. presented to Jackson for treatment. Patient U.C.'s vagina and pelvic area were examined by a physician, who took a specimen. No lacerations or lesions were found. The specimen was forward to law enforcement. The physician also examined Patient U.C.'s anus. During this examination, Patient U.C. felt an uncomfortable burning pain in her anus. Because of the pain, she asked the physician to discontinue the examination. Although the examination of Patient U.C.'s anus was terminated, a specimen was also obtained from her anus and forwarded to the police.

24. After completion of the examination at Jackson, Patient U.C. was referred to the police and to the Journey Institute for counseling services. Patient U.C. immediately went to the Miami-Dade Police Department to make a report. She also sought assistance from the Journey Institute.

25. Two days after the incident, Patient U.C. also reported the incident to a friend, Luis Yllanes. When

Mr. Yllanes spoke to her, Patient U.C. was visibly upset. She trembled when Patient U.C. told Mr. Yllanes the specifics of what occurred in Respondent's office.

26. On July 19, 2004, Patient U.C. called her psychiatrist, Manuel Rodriguez-Garcia, M.D. Patient U.C. called to request a prescription for medications because she was depressed following the incident. Dr. Garcia prescribed Wellbutrin, an anti-depressant.

D. The Reliability of Patient U.C.'s Recollection.

27. Patient U.C. had been sexually abused over approximately a two-year period by her uncle when she was 16 to 17 years of age. She was also raped by a neighbor in the neighbor's house when she was a teenager. When she reported her uncle's abuse, her family, rather than being supportive, made her feel as if it was her fault.

28. In addition to the sexual abuse she suffered, Patient U.C. was physically and emotionally abused by her brother.

29. Beginning in 1998, Patient U.C. sought the medical assistance of Dr. Garcia, a board-certified psychiatrist. Dr. Garcia treated Patient U.C. from 1998 through March 22, 2005. (Having asserted her psychiatrist-patient privilege in relation to psychiatric records which substantially predate the allegations made in these cases, Dr. Garcia was limited to relating his treatment of Patient U.C. beginning May 30, 2003.)

30. As of May 30, 2003, Patient U.C. was diagnosed as suffering from attention deficit disorder (hereinafter referred to as "ADD") and depressive disorder with anxiety. Patient U.C. was not exhibiting any symptoms of psychosis. ADD is a congenital disorder that makes its sufferer distractible, with poor concentration. Dr. Garcia prescribed Ritalin to Patient U.C. to treat her ADD. He also prescribed Lexapro (an anti-depressant) and Ambien to help Patient U.C. sleep at night.

31. As of September 29, 2003, Patient U.C. continued to suffer from ADD and depressive disorder with anxiety. Patient U.C. told Dr. Garcia during the September 29, 2003, visit that "something is wrong with my brain." She was concerned because she had driven into the parking lot of one store when she had intended to go to another one. Dr. Garcia was not concerned about this incident or her comment. He found that Patient U.C. was not suffering from any dementia, delirium, confusion, disassociative states, or organic deficits and that she was oriented on life's decisions. Finding that Patient U.C. did not have anything "wrong with her brain," Dr. Garcia concluded that she was simply having difficulty concentrating, a symptom of her ADD. Finally, Dr. Garcia found that Patient U.C. was not exhibiting any signs of psychosis as of September 29, 2003.

32. Patient U.C. visited Dr. Garcia's office again on May 7, 2004. At Patient U.C.'s request, Dr. Garcia wrote her a

prescription for Adderall to replace her prescription for Ritalin.

33. Patient U.C. failed to go to her next scheduled appointment with Dr. Garcia on June 29, 2004. Patient U.C. had begun to believe that she was not getting better, despite the medications prescribed by Dr. Garcia. Consequently she had stopped taking those medications (Adderall, Ritalin, and Ambien) two or three months before the July 13, 2004, incident. Patient U.C. did not inform Dr. Garcia of her actions.

34. In addition to suffering from ADD and depressive disorder with anxiety, and the difficulty of raising a child as a single mother while attending law school, Patient U.C. was subjected to a serious of stressful events preceding the July 13, 2004, incident: her mother was diagnosed with a brain tumor, her father was seriously ill, her brother was indicted on criminal charges, and her sister had attempted suicide.

35. Despite Patient U.C.'s medical problems, Patient U.C. was not suffering from Post-Traumatic Stress Disorder (hereinafter referred to as "PTSD") on or before July 13, 2004. Nor did Patient U.C. misperceive the events of July 13, 2004. Those events, as found, supra, were accurately recalled and testified to by Patient U.C.

36. The testimony of Merrysue Haber, Ph.D., suggesting that Patient U.C. suffered from PTSD, and that she may have

suffered a PTSD event or "flashback" on July 13, 2004 was not convincing. Dr. Haber's suggestion that Patient U.C. could have misperceived what had actually taken place on July 13, 2004, because of the sexual abuse she had suffered as a teenager, the stress that Patient U.C. was experiencing at the time, and the intensification of her psychological problems when Patient U.C. stopped taking her prescription medications is rejected.

37. Dr. Haber's testimony is rejected for a number of reasons. First, and most importantly, her testimony is rejected because her opinions were inconsistent with those of Dr. Garcia, who did not diagnose Patient U.C. as suffering from PTSD prior to July 13, 2004. During the period that Dr. Garcia treated Patient U.C., he never found her to be suffering from hallucinations or bipolar disorder, or to be exhibiting any signs of psychosis. At no time was there any interaction between Dr. Garcia and Patient U.C. that led him to "think that she could be psychotic, that she could have a delirium or a problem with perception." Transcript, Vol. II, Page 202, Lines 12 through 16.

38. Dr. Garcia had personally met with Patient U.C. and diagnosed her condition, while Dr. Haber has never spoken to Patient U.C. Having failed to find that Patient U.C. was suffering from PTSD prior to or on July 13, 2004, any suggestion

by Dr. Haber that Patient U.C. suffered from PTSD on the critical date is not credited.

39. In further support of these findings, it is noted that Dr. Haber relied, at least in part, on the medical records of Roger Rousseau, M.D., of the Journey Institute, the institution Patient U.C. had been referred to by Jackson personnel. Dr. Rousseau, while diagnosing Patient U.C. with "chronic" PTSD, did not see Patient U.C. until after the events of July 13, 2004. Dr. Haber's reliance on Dr. Rousseau's diagnosis is, therefore, misplaced.

40. Dr. Haber's testimony concerning the possible impact of Patient U.C.'s discontinuation of her medicines prior to July 13, 2004, is also rejected as inconsistent with Dr. Garcia's testimony. Based upon Dr. Garcia's credited testimony, it is found that Patient U.C.'s discontinuance of here medications would not have altered Patient U.C.'s perception of reality. At most, she would merely have experienced a resurgence of the symptoms of her ADD and depression, not psychosis. While Patient U.C. could have experienced an increased difficulty concentrating and her depression may have worsened, she would not have experienced withdrawal symptoms associated with discontinuing her medications and would not have exhibited new symptoms like hallucinations.

41. Finally, even if it had been proved that Patient U.C. was suffering from PTSD on July 13, 2004, the evidence proved that it is highly unlikely that she would have continued to insist that events which she supposedly misperceived on July 13, 2004, actually occurred. PTSD is a condition or disorder where a person may experience a variety of signs and symptoms, including vivid memories of a traumatic event, an inability to function, anxiety, depression, and hypersensitivity (ultra-sensitivity to stimuli that remind the person of the traumatic event). Persons suffering PTSD may suffer some or all of the foregoing symptoms.

42. Although not common, a person suffering PTSD can relive the traumatic event; experience a "flashback." Even when a person experiences a flashback or relives the traumatic event, the feeling of reliving the event does not last and the person realizes that the event did not actually recur. Dr. Garica gave the example of a combat soldier's reaction to an automobile back-firing. The soldier may flinch, but will quickly realize there is no real danger.

43. Patient U.C. never reported any flashback relating to her sexual abuse as a teenager to Dr. Garcia. Having given birth to a child, she has obviously had sexual relations; she has not had any difficulty being undressed while receiving a massage; and she was not concerned about suggesting to

Respondent that she take off her underwear when she realized her underwear was hampering his treatment of her on July 13, 2004.

44. Based upon the foregoing, while it is obvious that Patient U.C. is not without problems, the evidence failed to prove that she was in any way unable to accurately understand and subsequently relate the events of July 13, 2004, as found in this Recommended Order.

E. Respondent's Acupuncture Medical Records.

45. Having denied that he placed his finger in Patient U.C.'s anus or vagina, Respondent obviously did not record any medical justification in his medical record for Patient U.C. for doing so.

CONCLUSIONS OF LAW

A. Jurisdiction.

46. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1) and 456.073(5) Florida Statutes (2006).

B. The Burden and Standard of Proof.

47. The Department seeks to impose penalties against Respondent's licenses to practice acupuncture and massage therapy the Administrative Complaints that include suspension or revocation of his licenses and/or the imposition of an administrative fine. Therefore, the Department has the burden

of proving the specific allegations of fact that support its charge that Respondent violated Sections 456.072(1)(u), 457.109(1)(j), 457.109(1)(m), and 480.046(1)(o), Florida Statutes, by clear and convincing evidence.

48. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [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 evidence 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 the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaint in DOAH Case No. 06-4117 (Board of Acupuncture).

49. In its Administrative Complaint in DOAH Case No. 06-4117, before the Board of Acupuncture, the Department has

alleged that Respondent: (a) engaged or attempted to engage in sexual misconduct as defined and prohibited in Section 456.063(1), Florida Statutes, in violation of Section 456.072(1)(u), Florida Statutes (Count One); (b) exercised influence within a patient-acupuncturist relationship for purposes of engaging a patient in sexual activity in violation of Section 457.109(1)(j), Florida Statutes (Count Two); (c) violated Section 457.109(1)(m) Florida Statutes, by failing to keep written medical records which are consistent with the practitioner's style of acupuncture justifying the course of treatment of the patient (Count Three).

50. Section 456.072(1), Florida Statutes, sets out grounds for discipline of all health professionals, including the following disciplinable act:

(u) Engaging or attempting to engage in sexual misconduct as defined and prohibited in s. 456.063(1).

51. Section 456.063(1), Florida Statutes, defines "sexual misconduct" as follows:

Sexual misconduct in the practice of a health care profession means a violation of the professional relationship through which the health care practitioner uses such a relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of

such health care profession. Sexual misconduct in the practice of a health care profession is prohibited.

52. Section 457.109(1), Florida Statutes, sets out grounds for the discipline which specifically apply to acupuncturists, including the following:

(j) exercising influence within a patient-acupuncturist relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her acupuncturist.

. . . .

(m) failing to keep written medical records justifying the course of treatment of the patient.

D. The Charges of the Administrative Complaint in DOAH Case No. 06-4491PL (Board of Massage Therapy).

53. In its Administrative Complaint in DOAH Case No. 06-4491PL before the Board of Massage Therapy, the Department alleged that Respondent violated Section 480.046(1)(o), Florida Statutes, by violating Section 480.0485, Florida Statutes, which prohibits the use of the massage therapist-patient relationship to induce or attempt to induce a patient to engage in sexual activity outside the scope of massage therapy.

54. Section 480.046(1)(o), Florida Statutes, sets out the following relevant ground for disciplinary action by the Board

of Massage Therapy: "Violating any provision of this chapter 456, or any rules adopted pursuant thereto."

55. Section 480.0485, Florida Statutes, defines and prohibits sexual misconduct in the practice of massage therapy as:

The massage therapist-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.

E. Factual Basis for the Department's Charges in Both Cases.

56. In both cases, the Department has alleged the same general factual basis for the alleged violations, other than in Count Three of the Administrative Complaint in DOAH Case No. 06-4117PL. Generally, the Department has alleged that Respondent committed the alleged statutory violations by committing sexual misconduct when he inserted his finger into Patient U.C.'s anus and when he inserted his finger into Patient U.C.'s vagina.

57. The factual allegations in support of the allegation that Respondent had violated Section 457.109(1)(m), Florida Statutes, by failing to keep written medical records which are

consistent with the practitioner's style of acupuncture justifying the course of treatment of the patient (Count Three of the Administrative Complaint in DOAH Case No. 07-4117PL), are that Respondent failed to keep any written record that justified his insertion of his finger into Patient U.C.'s anus or her vagina.

F. Ultimate Conclusions.

58. Ultimately, these cases turned almost exclusively on the credibility of Patient U.C. and Respondent. Largely for the reasons explained in paragraphs 51 through and including 67 of Petitioner's Proposed Recommended Order, which are found to be accurate, the credibility issue has been resolved in favor of Patient U.C.

59. Having accepted and credited Patient U.C.'s version of what transpired on July 13, 2004, it is found that the Department has proved clearly and convincingly that Respondent on that day inserted his finger into Patient U.C.'s anus and her vagina, and that he moved his finger back and forth while in Patient U.C.'s vagina. He did so while Patient U.C. was under his care as an acupuncturist and a massage therapist. Finally, he did so without Patient U.C.'s consent and without medical reason or justification.

60. It has, therefore, been proved clearly and convincingly that Respondent committed the violations alleged in the Administrative Complaints in both cases:

a. Respondent engaged or attempted to engage in sexual misconduct as defined and prohibited in Section 456.063(1), Florida Statutes, with Patient U.C. in violation of Section 456.072(1)(u), Florida Statutes, as alleged in Count One of the Administrative Complaint in DOAH Case No. 07-4117PL;

b. Respondent exercised influence within a patient-acupuncturist relationship for purposes of engaging Patient U.C. in sexual activity in violation of Section 457.109(1)(j), Florida Statutes, as alleged in Count Two of the Administrative Complaint in DOAH Case No. 07-4117PL;

c. Respondent used his massage therapist-patient relationship to induce or attempt to induce Patient U.C. to engage in sexual activity outside the scope of practice of massage therapy or the scope of generally accepted massage therapy examination or treatment of Patient U.C. in violation of Section 480.0485, Florida Statutes, thus violating Section 480.046(1)(o), Florida Statutes, as alleged in the Administrative Complaint in DOAH Case No. 07-4491PL.

61. Finally, it is concluded that the Department failed to prove that Respondent violated Section 457.109(1)(m) Florida Statutes, by failing to keep written medical records which are

consistent with the practitioner's style of acupuncture justifying the course of treatment of the patient as alleged in Count Three of the Administrative Complaint in DOAH Case No. 06-4117PL.

62. It is clear from the "Plan of Treatment" for Patient U.C. completed by Respondent on the Patient Interview form (Respondent's Exhibit 4), and his testimony, that he never intended for the insertion of his finger into patient U.C.'s anus or vagina to be part of his treatment of Patient U.C. Respondent did not, therefore, fail to keep written medical records consistent with his style of acupuncture and justifying his actual course of treatment of the Patient U.C.

G. The Appropriate Penalty.

63. In determining the appropriate punitive action to recommend to the Board of Acupuncture and the Board of Massage Therapy in these cases, it is necessary to consult the "disciplinary guidelines," of both Boards which impose restrictions and limitations on the exercise of the disciplinary authority of the respective Board. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

64. The Board of Acupuncture's guidelines are set out in Florida Administrative Code Rule 64B1-9.001(1)(j), which provides, in part, the following guideline for "[e]xercising

influence within a patient-acupuncturist relationship for purposes of engaging a patient in sexual activity, or engaging or attempting to engage a patient in verbal or physical sexual activity":

. . . . The usual recommended penalty shall be an administrative fine of up to \$1000.00 and a six (6) month suspension immediately followed by a two (2) year probation with such terms and conditions as set forth by the Board.

65. Florida Administrative Code Rule 64BI-9.001(2) provides that the Board of Acupuncture may take disciplinary action other than imposing the penalties contained in the guidelines, based on consideration of the following factors:

- (a) The danger to the public;
- (b) The number of repetitions of offenses, other than an adjudicated offense for which the licensee is presently being penalized;
- (c) The length of time since date of violation;
- (d) The number of complaints filed against the licensee;
- (e) The length of time the licensee has practiced acupuncture;
- (f) The actual damage, physical or otherwise, to a patient;
- (g) The deterrent effect of the penalty imposed;
- (h) The effect of the penalty upon the licensee's livelihood;
- (i) Any efforts for rehabilitation;
- (j) The actual knowledge of the licensee pertaining to the violation;
- (k) Attempts by the licensee to correct or stop a violation or refusal of a licensee to correct or stop a violation;

(l) Any action relating to discipline or denial of a certificate or license in another state including, findings of guilt or innocence, standards applied, penalties imposed and penalties served;

(m) Any other mitigating circumstances.

66. The Board of Massage Therapy's guidelines are set out in Florida Administrative Code Rule 64B7-30.002(1)(k)1., which provides that the penalty range for a violation of Section 480.046(1)(o), Florida Statutes, due to a violation of Section 480.0485, Florida Statutes, is: "\$1,000.00 fine or revocation."

67. Florida Administrative Code Rule 64B7-30.002(3) provides that, in determining the appropriate penalty, the Board of Massage Therapy may deviate from its penalty guidelines based upon a consideration of the following aggravating or mitigating factors:

(a) The danger to the public;

(b) The length of time since the violation;

(c) The number of times the licensee has been previously disciplined by the Board;

(d) The length of time licensee has practiced;

(e) The actual damage, physical or otherwise, caused by the violation;

(f) The deterrent effect of the penalty imposed;

(g) The effect of the penalty upon the licensee's livelihood;

(h) Any effort of rehabilitation by the licensee;

(i) The actual knowledge of the licensee pertaining to the violation;

(j) Attempts by licensee to correct or stop violation or refusal by licensee to correct or stop violation;

(k) Related violations against licensee in another state including findings of guilt or innocence, penalties imposed and penalties served;

(l) Actual negligence of the licensee pertaining to any violation;

(m) Penalties imposed for related offenses under subsections (1) and (2) above;

(n) Any other mitigating or aggravating circumstances.

68. Petitioner requests that the Board of Acupuncture enter an order imposing the following penalties: a reprimand; a fine of \$1000; suspension of his license for six months; and probation for a period of two years with terms to be decided by the Board of Acupuncture.

69. Petitioner requests that the Board of Massage Therapy enter an order imposing the following penalties: a reprimand; a fine of \$1000; suspension of his license for six months; and probation for a period of two years, with terms to be established by the Board of Massage Therapy.

70. In considering the aggravators and mitigators in this matter it is noted that this is Respondent's first and only offense with either Board; he realized during the commission of his offense that his advances were not welcomed by Patient U.C. and stopped his inappropriate conduct; Respondent is unlikely to be of further danger to the public; and any fine imposed on him, or suspension of his license, will have a substantial impact on

his livelihood. It is also noted, however, that Respondent caused substantial emotional harm to Patient U.C.

71. Having carefully considered the facts of this matter in light of the provisions of Florida Administrative Code Rules 64B1-9.001 and 64B7-30.002, it is concluded that, while a longer suspension of Respondent's licenses could be justified due to the harm caused to Patient U.C., the penalties recommended by Petitioner are within the guidelines of the Boards and are reasonable.

RECOMMENDATION

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

RECOMMENDED:

1. That a final order be entered by the Board of Acupuncture finding that Elham Kharabi, A.P., has violated Section 456.072(1)(u), Florida Statutes, by violating Section 456.063(1), Florida Statutes, and Section 457.109(1)(j), Florida Statutes (2004), as alleged in Counts One and Two of the Administrative Complaint; dismissing the allegations of Count Three of the Administrative Complaint; issuing a written reprimand; imposing a fine of \$1,000.00; suspending Respondent's acupuncture license for six months; and placing Respondent's license on probation for two years with terms to be set by the Board of Acupuncture; and

2. That a final order be entered by the Board of Massage Therapy finding that Elham Kharabi-Moghaddam, L.M.T., has violated Section 480.046(1)(o), Florida Statutes, by having violated Section 480.0485, Florida Statutes; issuing a written reprimand; imposing a fine of \$1,000.00; suspending Respondent's massage therapy license for six months; and placing Respondent's license on probation for a period of two years, with terms to be set by the Board of Massage Therapy.

DONE AND ENTERED this 23rd day of July, 2007, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of July, 2007.

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 these cases.