

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF MASSAGE THERAPY,)
)
Petitioner,)
)
vs.) Case No. 10-1149PL
)
MARCUS E. MCCAHLER, L. M. T.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On August 11, 2010, a duly-noticed hearing was held in Jacksonville, Florida, before Administrative Law Judge Lisa Shearer Nelson assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: S. J. DiConcilio, Esquire
Tari Rossitto-Van Winkle, Esquire
Department of Health
Prosecution Services Unit
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For Respondent: S. A. Siddiqui, Esquire
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STATEMENT OF THE ISSUE

The issues presented in this case are whether Respondent has violated the provisions of Chapters 456 and 480, Florida Statutes, and Florida Administrative Code Chapters 64B7-26, as

alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On October 5, 2008, the Department of Health (Petitioner or Department) filed a four-count Administrative Complaint against Respondent, Marcus McCastler (Respondent), charging him with several violations of Chapters 456 and 480, Florida Statutes, and administrative rules adopted pursuant thereto. Respondent disputed the allegations in the Administrative Complaint and on March 9, 2010, the case was referred to the Division of Administrative Hearings (Division) for assignment of an administrative law judge.

On March 23, 2010, a Notice of Hearing scheduled the case to be heard on May 13-14, 2010. However, the matter was continued until August 11, 2010, and commenced and proceeded to conclusion that day.

At hearing, Petitioner presented the testimony of A.M., W.M., Jennifer Mason, and Officer Grant Bowlus.^{1/} Petitioner's Exhibits 1 through 8 were admitted into evidence without objection. Respondent testified on his own behalf and presented the testimony of William Pittman. No exhibits were offered by Respondent.

The Transcript was filed with the Division on August 26, 2010. By agreement of the parties, proposed recommended orders were to be filed on or before September 17, 2010, and both

submissions were timely filed. Both parties' Proposed Recommended Orders have been carefully considered in the preparation of this Recommended Order. Unless otherwise indicated, all references are to the 2008 Florida Statutes.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of massage therapy pursuant to Section 20.43 and Chapters 456 and 480, Florida Statutes.

2. At all times material to the allegations in this case, Respondent was an applicant for or licensed as a massage therapist in the State of Florida, having been issued license number MA52091 on or about December 7, 2007.

Respondent's Application for Licensure

3. Respondent applied for a license as a massage therapist in July 2007. His application for licensure was signed and submitted to the Department on or about July 12, 2007.

4. The application includes the following question:

20. Have you ever been convicted of, or entered a plea of guilty, nolo contendere, or no contest to, a crime in any jurisdiction other than a minor traffic offense? You must include all misdemeanors and felonies, even if the court withheld adjudication so that you would not have a record of conviction. Driving under the influence or driving while impaired is not a minor traffic offense for purposes of this question.

5. Respondent answered "no" to question 20 quoted above.

6. At the end of the application is a place for a picture of the applicant and a section labeled "Affidavit of Applicant" which the applicant completes and signs. The affidavit states:

AFFIDAVIT OF APPLICANT: I, Marcus McCastler, affirm that I am the person referred to in the foregoing massage therapy licensure application, and that the attached photograph is a true likeness of myself.

I understand that it is my duty and responsibility as an applicant for licensure to supplement my application after it has been submitted if and when any material change in circumstances or conditions occur which might affect the Board's decision concerning my eligibility for examination or licensure. Such supplement is required by Chapter 456.013(1), F.S. Failure to do so may result in disciplinary action by the Board including denial of licensure.

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 and in support of this application are true and correct. Should I furnish any false information on or in support of this application, I understand that such action shall constitute cause for denial, suspension, or revocation of any license to practice in the state of Florida in the profession for which I am applying. I have read, understand, and agree to comply with the statutes and rules applicable to the practice of my profession in Florida.

7. Respondent signed and dated his application immediately following the declaration quoted above.

8. The answer to question number 20 on his application was false.

9. On August 28, 2002, in Case No. 2001-CT-30030 (Fourth Judicial Circuit, Duval County, Florida), Respondent pleaded nolo contendere to the second-degree misdemeanor of driving on a suspended or revoked license, in violation of Section 322.34(2), Florida Statutes. Adjudication was withheld and court costs were paid.

10. On April 6, 2004, in Case No. 2003-CT-031996-AXXX (Fourth Judicial Circuit, Duval County, Florida), Respondent pleaded nolo contendere to driving with no valid driver's license, in violation of Section 322.03, Florida Statutes. Adjudication was withheld and court costs paid.

11. On December 15, 2004, in Case No. 2004-MM-041686 (Fourth Judicial Circuit, Duval County, Florida), Respondent pleaded nolo contendere to possession of less than 20 grams of cannabis, a first-degree misdemeanor, in violation of Section 893.13(6), Florida Statutes. Adjudication of guilt was withheld and court costs paid.

12. On December 18, 2006, Respondent pleaded nolo contendere to the misdemeanor of permitting an unauthorized minor to drive, in violation of Section 322.35, Florida Statutes. In Case No. 2006-CT-004817 (First Judicial Circuit, Escambia County, Florida), Respondent was adjudicated guilty, fined \$200.00, and ordered to pay court costs.

13. On February 14, 2007, Respondent pleaded nolo contendere to possession of less than 20 grams of cannabis, a first-degree misdemeanor. In Case No. 07-00255-MM-MA (Fourth Judicial Circuit, Clay County, Florida), adjudication was withheld and Respondent was ordered to pay \$205 in costs.

14. On July 3, 2008, Respondent was arrested and charged with simple battery, in violation of Section 784.03(1)(b), Florida Statutes, a first-degree misdemeanor. On July 4, 2008, Respondent pleaded nolo contendere to the lesser included offense of fighting. In Case No. 2008-MO-18280 (Fourth Judicial Circuit, Duval County, Florida), the Court withheld adjudication and imposed a fine of \$250.00.

15. All of the offenses listed above with the exception of the offense described in paragraph 14 occurred before Respondent signed the application for a license as a massage therapist.

16. Respondent claims that he answered question 20 no "reluctantly" on advice of a lawyer at his school. Respondent's claim is not credible.

The July 6, 2008 Incident

17. In July 2008, Respondent was employed as a massage therapist by Summit Regency, d/b/a Massage Envy, in Jacksonville, Florida.

18. On or about July 6, 2008, Respondent gave a massage to A.M., a female client of Massage Envy. A.M. has been a licensed

R.N. since 1979 and works as a public health nurse at the Duval County Health Department.

19. A.M. had received massages before and Respondent had given her a massage on a previous occasion. On this particular day, she came to Massage Envy with her husband, W.M., who was also getting a massage. Both were using a prepaid plan whereby they received a set number of massages over a defined period of time. A.M.'s massage was scheduled for and took place at approximately 2:00 p.m.

20. Upon entering the room, A.M. was provided with a sheet/drape and Respondent left the room while A.M. undressed, got on the table face down and covered herself with the drape.

21. A.M. testified that, while she was face down on the table and during the massage, Respondent removed the drape, leaving her completely exposed. She testified that about 20 minutes into the massage, Respondent inserted his bare finger into her rectum and pushed his finger to the side of the rectum without her consent and without telling A.M. what he was doing or why.

22. According to A.M., she did not say anything and did not attempt to get down from the table because she was in shock and frightened, and mortified at what Respondent had done. She did not ask him to return the drape until he instructed her to turn over. At that point, he handed her the drape and she turned over

onto her back. He massaged her arms and then the massage was over.

23. Respondent, on the other hand, denied removing the drape from A.M.'s body during the massage and adamantly denied inserting his finger into her rectum.

24. A.M. and her husband left Massage Envy after their massages and returned home. A.M. did not tell her husband about the incident until they arrived home, at which time she told him that Respondent had "stuck his finger up her butt."

25. W.M. advised her to report the matter to the police and to call the owner of Massage Envy, which she did. With respect to the owner of Massage Envy, she reported what she believed Respondent had done, and asked for her money back. Her money was refunded to her, and she was provided a copy of the complaint paperwork to file a complaint with the Department of Health.

26. A.M. also reported the incident to the Jacksonville Police Department at approximately 7:00 p.m. that evening, but did not wish to file charges against Respondent. She said she simply wanted to "report it so that it would be on record." She also went to her family physician the next day because her hemorrhoids were bleeding, which she attributed to the incident with Respondent.

27. Respondent was not charged with any crime as a result of events taking place July 6, 2008. However, he was terminated from his employment based on A.M.'s complaint.

28. After careful review of all of the evidence presented at hearing, there is not clear and convincing evidence that Respondent removed the drape inappropriately during the exam or that he intentionally inserted his finger into A.M.'s rectum.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2010).

30. The Department is seeking to take disciplinary action against Respondent's license as a massage therapist. Because disciplinary proceedings are considered to be penal proceedings, the Department has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence.

Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

31. Moreover, disciplinary provisions must be strictly construed in favor of the licensee. Elmariah v. Department of Professional Regulation, 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Department of Professional Regulation, 534 So. 782, 784 (Fla. 1st DCA 1988).

32. Count I of the Administrative Complaint is based upon paragraphs one through ten and concerns the allegations related to the July 6, 2008, incident. It charges Respondent with violating Sections 456.063(1); 456.072(1)(v); 480.046(1)(o); and 480.0485, Florida Statutes, and Florida Administrative Code Rules 64B7-26.010(1) and (3). The statutory provisions identified above state the following:

456.063 Sexual misconduct; disqualification for license, certificate, or registration.--

(1) Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such 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.

456.072 Grounds for discipline; penalties; enforcement.--

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

* * *

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

480.046 Grounds for disciplinary action by the board.--

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

* * *

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

480.0485 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.

33. Florida Administrative Code Rules 64B7-26.010(1) and (3) provide as follows:

64B7-26.010 Sexual Activity Prohibited.

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

* * *

(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.

34. Clear and convincing evidence is a very heavy burden to meet. While evidence was presented to support the allegations in the Administrative Complaint, the evidence presented was not "of such a 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." In re Henson, supra. Under these circumstances, the Department did not meet its burden with respect to Count I.

35. Count II of the Administrative Complaint is also based upon the facts alleged in paragraphs one through ten, in addition to paragraph 19, concerning the incident on July 6, 2008. Count II charges Respondent with violating Section 480.046(1)(o), Florida Statutes, which was quoted in paragraph 32 above, as well as Section 480.046(1)(h), Florida Statutes, and Florida Administrative Code Rule 64B7-30.001(5).

36. Section 480.046(1)(h) authorizes disciplinary action for "[g]ross or repeated malpractice or the failure to practice massage with that level of care, skill, and treatment which is recognized by a reasonably prudent massage therapist as being acceptable under similar conditions and circumstances."

37. Florida Administrative Code Rule 64B7-30.001(5) provides:

64B7-30.001 Misconduct and Negligence in the Practice of Massage Therapy.

The following acts shall constitute the

failure to practice massage therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar massage therapist as being acceptable under similar conditions and circumstances:

* * *

(5) Failure to appropriately drape a client. Appropriate draping of a client shall include draping of the buttocks and genitalia of all clients, and breasts of female clients, unless the client gives specific informed consent to be undraped.

38. For the same reason expressed with respect to Count I, the allegations in Count II have not been proven by clear and convincing evidence.

39. Count III of the Administrative Complaint concerns Respondent's actions with respect to obtaining his license to practice massage therapy, as alleged in paragraphs 1,2, 11-17 and 19. The statutory violations charged are Sections 456.072(1)(h) and (m), and 480.046(1)(o), Florida Statutes (2007).

40. Section 456.072, Florida Statutes (2007), provides in pertinent part:

456.072 Grounds for discipline; penalties; enforcement.--

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

* * *

(h) Attempting to obtain, obtaining, or renewing a license to practice a profession by bribery, by fraudulent misrepresentation, or through an error of the department or the board.

* * *

(m) Making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession.

41. Section 480.046(1)(o), Florida Statutes (2007), makes it a basis for discipline to violate any of the provisions of Chapter 480, Chapter 456, or any rules adopted pursuant thereto.

42. The Department has established the violations charged. Respondent submitted an application for licensure that stated he had never been convicted of, or entered a plea of guilty, nolo contendere, or no contest to, a crime in any jurisdiction other than a minor traffic offense. He knew at the time he submitted the application that he had in fact been charged with, and pleaded nolo contendere to, a variety of offenses, including driving on a suspended license, driving without a license, possession of cannabis and allowing an unauthorized minor to drive. Respondent claims that he answered the question on the application "no" reluctantly, on the advice of a lawyer of his school. His claim is not credible. Moreover, his record evidences a pattern of behavior that raises serious questions about his fitness to hold a professional license. To date, Respondent has entered six different pleas to criminal charges, five of which predate his application. As a whole, it paints a picture of a young man who has little respect for the law, and no interest in conforming his behavior to its parameters. Violations of Sections 456.072(1)(h) and (m), and 480.046(1)(o),

Florida Statutes, have been demonstrated by clear and convincing evidence.

43. Finally, Count IV of the Administrative Complaint charges Respondent with violating Section 480.047(1)(f), Florida Statutes (2007), by giving false or forged evidence to the Department in obtaining a license. The Department has also demonstrated this violation, in that Respondent supplied a false answer to question 20 on his application for licensure. By doing so, he also violated Section 480.046(1)(o), Florida Statutes (2007), charged in Count IV of the Administrative Complaint.

44. The Board of Massage Therapy has adopted disciplinary guidelines pursuant to Section 456.077, Florida Statutes, to provide notice to licensees and to the public of the appropriate penalty ranges for violations of Chapters 456 and 480, and any rules adopted to implement these chapters. The recommended penalty for a violation of Section 456.072(1)(h), Florida Statutes, is revocation. Fla. Admin. Code R. 64B7-30.002(1)(b). For a violation of Section 480.046(1)(f) or Section 480.072(1)(m), where the offense is for fraud or making a false or fraudulent misrepresentation, the penalty for a first offense is a \$10,000 fine, with any subsequent offense subject to the same fine and revocation.

45. The Board has also identified aggravating and mitigating factors to be considered in determining the

appropriate penalty to be imposed. Among those factors are the danger to the public; the length of time since the violation; the length of time the licensee has practiced; any effort at rehabilitation by the licensee, the actual knowledge of the licensee pertaining to the violation and any other mitigating or aggravating circumstances. Fla. Admin. Code R. 64B7-30.002(3).

46. In this case, consideration is given to the fact that Respondent had not one criminal offense, but several that should have been disclosed on his application. He knew that his answer to the question on the application was false, but chose to deny any criminal history when he had pleaded to five crimes in multiple counties over a period of five years immediately preceding his application. Moreover, the final plea took place a mere five months prior to his application for licensure. There is no evidence that Respondent has made any effort at rehabilitation, either with respect to his criminal past or his violation of disciplinary provisions related to his license. It appears, given Respondent's pattern of behavior, that only the most severe penalty will get his attention.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That the Board of Massage Therapy enter a Final Order

finding that Counts I and II of the Administrative Complaint were not proven by clear and convincing evidence; that Respondent committed the acts charged in Counts III and IV of the Administrative Complaint and by doing so, violated Sections 456.072(1)(h) and (m); 480.046(1)(o); and 480.047(1)(f), Florida Statutes (2007); and revoking his license to practice massage therapy.

DONE AND ENTERED this 18th day of October, 2010, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 2010.

ENDNOTE

^{1/} The victim, A.M., and her husband, W.M., are referred to by their initials. § 456.057(10)(a), Fla. Stat.

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.