

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MASSAGE THERAPY,)
)
Petitioner,)
)
vs.) Case No. 10-10374PL
)
FABIAN CHANOS, L.M.T.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee, Florida, on January 31, 2011. Co-counsel for Petitioner, S. J. DiConcilio, and two of Petitioner's witnesses, the Executive Director of the Board of Massage Therapy, Anthony Jusevitch, and Medical Director of Professionals Resource Network (PRN), Dr. Judy Rivenbark, participated in Tallahassee. Co-counsel for Petitioner, Greg S. Marr; Respondent; and the court reporter participated by videoconference in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Greg S. Marr, Esquire
S. J. DiConcilio, Esquire
Assistant General Counsel
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For Respondent: Fabian Chanoz, pro se
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STATEMENT OF THE ISSUES

The issue is whether Respondent is guilty of being unable to practice massage with reasonable skill and safety due to illness, in violation of section 480.046(1)(g), Florida Statutes, or failing to comply with a monitoring or treatment contract or being terminated from a treatment program for impaired practitioners, in violation of section 456.072(1)(hh), Florida Statutes, and, thus, section 480.046(1)(o), Florida Statutes. If either charge is proved, an additional issue is the penalty that should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated April 16, 2008, Petitioner alleged that the Board of Massage Therapy referred Respondent to the PRN when he applied for a license. The referral was allegedly due to matters that he had identified in his application. On March 13, 2004, Respondent allegedly signed a "licensure-long" contract with PRN. On April 22, 2004, the

Board of Massage Therapy issued Respondent a license, suspended the license, and stayed the suspension as long as Respondent remained compliant with his PRN contract.

The Administrative Complaint alleges that the PRN contract requires periodic reports from Respondent's psychiatrist, but the last such report received by the Board of Massage Therapy was dated February 16, 2006. After PRN allegedly tried, without success, to contact Respondent, it sent him a letter, dated January 22, 2007, to his last known address. When Respondent allegedly failed to respond to the letter, PRN reported to the Board of Massage Therapy that Respondent was noncompliant with his contract and terminated the contract.

Count I of the Administrative Complaint alleges that Respondent is thus unable to practice massage therapy with reasonable skill and safety due to illness or the use of alcohol, drugs, narcotics, chemicals, or any other type of material as a result of any mental or physical condition, in violation of section 480.046(1)(g), Florida Statutes.

Count II of the Administrative Complaint alleges that the termination the PRN contract violates section 456.072(1)(hh), Florida Statutes, and, thus, section 480.046(1)(o), Florida Statutes.

At the hearing, Petitioner called two witnesses and offered into evidence six exhibits: Petitioner Exhibits 1-6.

Respondent called one witness and offered into evidence no exhibits. All exhibits were admitted. Petitioner Exhibit 3 is sealed because it contains confidential patient records.

The court reporter filed the transcript on February 17, 2011. Petitioner filed a Proposed Recommended Order on February 28, 2011.

FINDINGS OF FACT

1. By application dated September 23, 2003, Respondent applied for licensure as a massage therapist. The application lists Respondent's address as 2342 Treasure Isle Drive, Palm Beach Gardens. At all material times, this has been Respondent's official address of record with the Board of Massage Therapy, and Respondent's parents have resided at this address. For much of the time since licensure, Respondent has resided at his parents' home. For the time since licensure that Respondent did not reside at this address, his parents timely forwarded to Respondent all licensure-related mail when they received such mail.

2. Respondent's application mentions a mental illness, so the Board of Massage Therapy referred the file to its History Committee. After consideration of the materials in the file, the History Committee referred the file to PRN for an evaluation of Respondent and his fitness to practice.

3. Respondent's psychiatrist, Jorge H. Caycedo, who practices in Miami, sent a letter, dated January 9, 2004, to the Board of Massage Therapy. The letter states that Respondent has been in out-patient therapy with Dr. Caycedo, "on and off," since October 1997. Dr. Caycedo opined that Respondent suffers from "a Bipolar Disorder." At the time of the letter, Respondent was on a combination of medications that he had found "most helpful." The letter concludes:

[Respondent] is well aware of the nature of his mental problems and of the consequences of not taking his medications regularly, as prescribed.

In my opinion, he is in condition to practice as a massage therapist provided that he follows the treatment recommended to him.

4. On February 17, 2004, Dr. Aldo Morales, a psychiatrist, examined Respondent at the request of PRN. In his letter of the same date, Dr. Morales detailed Respondent's psychiatric history, which includes four hospitalizations for manic and depressive episodes--mostly the latter--and command auditory hallucinations. Dr. Morales noted that Respondent's family history includes a sibling with bipolar disorder and that Respondent's personal history included daily use of marijuana for six years, but his use of marijuana, as well as alcohol, had ended 11 years earlier. Dr. Morales' letter reports that a ten-

panel drug screen, which included a test for marijuana, was negative.

5. Dr. Morales found nothing adversely remarkable in the mental status exam and entered, as Axis I diagnostic impressions, "Bipolar Disorder, most recent episode depressed (3 1/2 years ago), with a prior history of psychosis" and "Cannabis dependence, in full sustained remission" Dr. Morales assessed Respondent's global assessment of function as 70.

Based on his examination, Dr. Morales concluded:

It is my opinion that [Respondent] can practice his profession with reasonable skill and safety as long as he remains under psychiatric supervision, adheres to his medication regimen, and remains clean and sober.

6. On March 13, 2004, PRN entered into an Advocacy Contract with Respondent. Immediately under "Advocacy Contract," at the top of the first page of the contract, is the following: "***Licensure-Long***." In the contract, Respondent agrees to submit to random urine or blood screens; abstain from all but prescribed medications, drugs, alcohol, and other mood-altering substances; obtain quarterly updates for PRN from Dr. Caycedo; attend a weekly PRN-monitored professional support group; and return messages from PRN within 24 hours. Other requirements included notification of PRN anytime that Respondent, a French citizen, left the United States and anytime

that he returned to the United States, as well as a visit to Respondent's treating psychiatrist within one week of returning to the United States with a report from the psychiatrist to PRN. At the bottom of the contract, immediately above Respondent's signature, which is dated March 13, 2004, is the statement:

[PRN] agrees to assume an advocacy role with Professional Licensing Board . . . for [Respondent] provided the following terms are agreed to and met. The duration of this contract will be **licensure-long**. . . .

7. At the meeting of the Board of Massage Therapy on April 22, 2004, pursuant to the contract between PRN and Respondent, a PRN representative made a brief presentation highlighting the above-described facts. In this presentation, the PRN representative assured the Board that the monitoring would apply "license long." The Board agreed to issue a suspended license to Respondent, but to stay the suspension as long as Respondent remained compliant with the PRN contract. Immediately after the vote, a Board member addressed Respondent:

You understand what we did? You have your license as long as you stay in compliance. There's a suspension on your license but that suspension is stayed[. A]s long as you stay in compliance with that contract[,]
you['re] fine.

8. The Board of Massage Therapy then issued an Order Granting Conditional License dated May 20, 2004. The Order states the application is:

CONDITIONALLY APPROVED with the following conditions of licensure:

1. [Respondent] shall remain in compliance with any recommended . . . PRN . . . contract.

2. The license shall be issued suspended, with suspension stayed for so long as [Respondent] remains in compliance with the PRN contract.

3. Should [Respondent] fail to maintain compliance with the PRN contract, the stay of suspension shall be lifted until [Respondent] appears before the Board and demonstrates renewed compliance.

4. The conditions are imposed on [Respondent's] violation of section[s] 480.046(1)(g); 456 072(1)(y) Florida Statutes by being unable to practice Massage Therapy with reasonable skill and safety by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of materials, or as a result of any mental or physical condition.

9. The Order concludes with a Notice of Right to Hearing that clearly provides Respondent with a chance to contest disputed issues of fact before an Administrative Law Judge or undisputed issues of fact by other means. Respondent did not avail himself of either of these options.

10. The Board of Massage Therapy issued Respondent license number MA 41103. The licenses issued by the Board of Massage Therapy expire on August 31 in odd-numbered years. Using the address noted above, the Board contacted Respondent each time that his license was approaching the end of its term, and

Respondent renewed his license by August 31 in 2005, 2007, and 2009. At all times, Respondent's license number remained MA 41103.

11. Following licensure, Dr. Caycedo provided PRN with periodic updates of Respondent's status, although the frequency of these updates was less than quarterly. These letters are dated June 10, 2004; October 8, 2004; February 8, 2005; February 21, 2005; June 1, 2005; December 1, 2005; and February 16, 2006. The February 8 letter reports that Respondent said on this visit that he had been hearing voices, although they had been friendly and not issuing commands, and he had been "more depressed." The other letters reported that Respondent was in good mental condition and stable, although the last letter reports that Respondent had complained of difficulty concentrating and feeling "racy." This letter states that Respondent's next office appointment would be in two months.

12. Respondent testified that he visited Dr. Caycedo and attended group meetings for the first two years after receiving his license. Respondent's main defense is that the condition of suspension attaching to his license expired when the first license term expired because his renewed license was "new" and not conditioned on his ongoing compliance with the PRN contract.

13. However, Respondent did not take advantage of the opportunity to clarify his claimed misunderstanding when he

could have done so easily. By letter dated January 23, 2007, Dr. Raymond M. Pomm, then Medical Director of PRN, warned Respondent that PRN was preparing to refer Respondent's case to Petitioner due to Respondent's failure to comply with his contract and gave Respondent until February 1 to contact PRN staff for "direction." If Respondent had truly misunderstood whether the condition had continued to attach to his license, he would have taken this opportunity to resolve the issue.

14. Respondent received the January 23 letter. It was sent to the address listed above, and Respondent's father signed for it on January 25, 2007. Respondent's admission at the hearing that it was "possible" that he received this letter acknowledges the obvious--he received it, and he received it when it was delivered at his parents' home. At the time, Respondent was living at this address. Also, later in 2007, when Respondent's license came up for renewal, the notice went to the same address, and Respondent did what was required to renew his license.

15. Respondent ignored the February 1 deadline. On February 26, 2007, Dr. Pomm wrote Respondent to advise him that PRN had referred his case to Petitioner for noncompliance with his PRN contract. Again, Respondent received the letter, but took no action. On the same date, Dr. Pomm wrote Petitioner and stated that Respondent was not in compliance with his PRN

contract, and Dr. Pomm "cannot say that he is safe to practice with reasonable skill and safety . . ."

16. Respondent continued to practice massage therapy in Florida until September 2008. At this time, Respondent returned to Paris, France, where he lived and worked until about December 1, 2010, when he returned to Florida. Respondent testified that he filed the paperwork to renew his license by August 31, 2009, while he was residing in Paris. Although the record omits any copy of this renewal, unlike the 2005 and 2007 renewals, Mr. Anthony Jusevitch testified that the Board renewed Respondent's license on August 31, 2009.

17. Respondent testified that he visited Dr. Caycedo upon Respondent's return to Florida, but the record contains no indication of when or the findings of Dr. Caycedo, except Respondent's two-edged assurance that Dr. Caycedo thought that it was a "miracle" that Respondent was well. At the hearing, Dr. Rivenbark testified on cross that she has no reason today to opine that Respondent could not practice massage therapy with skill and safety, although, on redirect, she clarified her testimony by adding that, based on Respondent's diagnosis, there is "great potential" that he may be unsafe to practice.

18. Dr. Rivenbark's opinion is about the same as Dr. Pomm's opinion--each expert lacks a basis to say that Respondent may practice with reasonable skill and safety. Of

course, such evidence is short of establishing that Respondent is unable to practice with reasonable skill and safety. The only evidence to support a present finding to this effect would be an inference from Respondent's initial diagnoses, as well as his auditory hallucinations and recurring depression, although these occurred five years ago. The most current information appears to be Dr. Caycedo's findings upon Respondent's return to Florida a couple of months ago, but, given its hearsay nature, this testimony is not especially reliable, nor is it at all descriptive of what, if anything, Dr. Caycedo meant. The evidence in this record is therefore short of what is necessary to establish that Respondent may not practice with reasonable skill or safety, but this finding in no way implies that the condition originally attached to his license--ongoing compliance with the PRN contract--is no longer necessary.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

20. Section 480.046(1)(g), Florida Statutes, provides:

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

* * *

(g) Being unable to practice massage with reasonable skill and safety by reason of illness or use of alcohol, drugs, narcotics,

chemicals, or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph, the department shall have, upon probable cause, authority to compel a massage therapist to submit to a mental or physical examination by physicians designated by the department. Failure of a massage therapist to submit to such examination when so directed, unless the failure was due to circumstances beyond her or his control, shall constitute an admission of the allegations against her or him, consequent upon which a default and final order may be entered without the taking of testimony or presentation of evidence. A massage therapist affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that she or he can resume the competent practice of massage with reasonable skill and safety to clients.

* * *

21. Section 456.072(1)(hh), Florida Statutes, provides:

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

* * *

(hh) Being terminated from a treatment program for impaired practitioners, which is overseen by an impaired practitioner consultant as described in s. 456.076, for failure to comply, without good cause, with the terms of the monitoring or treatment contract entered into by the licensee, or for not successfully completing any drug treatment or alcohol treatment program.

22. Section 456.072(2) provides:

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 or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.

(d) Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of \$10,000 per count or offense.

(e) Issuance of a reprimand or letter of concern.

(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.

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergo remedial education.

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.

23. Petitioner must prove the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

24. Petitioner has proved that Respondent failed to comply with his PRN contract and thus was terminated from the program, which is a disciplinary offense under section 456.072(1)(hh). Respondent's claim that the condition that attached to his license disappeared, without further action, upon the first renewal of his license is rejected as unsupported by the record. The PRN contract clearly notifies Respondent that the condition attaches as long as he holds a license. If Respondent genuinely were confused, which is doubtful, he could have contacted PRN or Petitioner early in the process and resolved the confusion.

25. Respondent's claim that his mental condition never justified attaching the condition to his license is barred by the fact that Respondent waived his right to challenge this condition when, in 2004, he failed to take advantage of a clear point of entry to do so. Lamar Advertising Co. v. DOT, 523 So. 2d 712 (Fla. 1st DCA 1988).

26. Additionally, Respondent reported auditory hallucinations and greater depression to Dr. Caycedo nearly one year after receiving his license, and he reported that, in December 2010, Dr. Caycedo thought that it was miraculous that Respondent had returned from France in good shape. This evidence would compel the rejection of Respondent's second argument, even if Respondent had not waived his right to raise it.

27. Florida Administrative Code Rule 64B7-30.002(1)(aa) addresses a violation of section 456.072(1)(gg). This is an obsolete reference to current section 456.072(1)(hh), which was renumbered in 2006. Ch. 06-207, § 2, at 5, Laws of Fla. This rule provides:

First offense: Suspension until compliant up to suspension until compliant with program followed by up to 5 years probation with conditions.

Second or subsequent offense: Suspension until compliant with program and up to five years probation with conditions, or revocation, and up to \$2,000.00 fine.

28. This is a first offense of noncompliance with the PRN contract. The penalty is suspension until Respondent achieves compliance. In this case, probation does not add much of a meaningful restriction because Respondent's license will always be conditioned on his compliance with the PRN contract.

RECOMMENDATION

It is

RECOMMENDED that the Board of Massage Therapy enter a final order suspending Respondent's license until he achieves compliance with his PRN contract.

DONE AND ENTERED this 1st day of March, 2011, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 1st day of March, 2011.

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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.