

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF MASSAGE THERAPY,)
)
Petitioner,)
)
vs.) Case No. 11-0937PL
)
ANGEL LUIS DEJESUS, LMT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 28, 2011, a duly-noticed hearing was held in Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Greg S. Marr, Esquire
Florida Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Angel Luis DeJesus, pro se
Franklin Correctional Institution
1760 Highway 67 North
Carrabelle, Florida 32322

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated section 480.046(1)(c), Florida Statutes (2007), as alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On April 21, 2009, the Department of Health (Petitioner or Department) filed an Administrative Complaint charging Respondent, Angel DeJesus (Respondent or Mr. DeJesus), with violating section 480.046(1)(c), based upon his conviction for sexual battery. On June 2, 2009, Respondent executed an Election of Rights form and requested a section 120.57(1) hearing. On February 22, 2011, the case was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

On March 7, 2011, a Notice of Hearing was issued, scheduling the case for hearing on April 28, 2011, and the case proceeded as scheduled. Respondent, who is incarcerated, participated in the proceedings by telephone.

At hearing, Petitioner presented the testimony of Paula Mask, and Petitioner's Exhibits 1 through 4 were admitted into evidence. Petitioner was afforded the opportunity to file the depositions of Sergeant Bankert (Petitioner's Exhibit 5) and Jennifer Mason (Petitioner's Exhibit 6) no later than 30 days after the hearing. Respondent did not present any witnesses or exhibits at hearing.

The Transcript of the proceedings was filed with the Division on May 9, 2011. Petitioner's Exhibit 5 was filed May 4, 2011, and Petitioner's Exhibit 6 was filed May 20, 2011. On May 27, 2011, a Scheduling Order issued directing the parties to

file their proposed recommended orders no later than June 10, 2011. Petitioner filed its Proposed Recommended Order on June 9, 2011. To date, there has been no written submission by Respondent.

FINDINGS OF FACT

1. The Department is the state agency charged with the regulation of 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 the Administrative Complaint, Respondent was licensed as a massage therapist in the State of Florida, having been issued license number MA49928.

3. On September 19, 2007, Deputy Darin Bankert was a sworn law enforcement officer working as a violent crimes investigator with the Manatee County Sheriff's Office. He was called to the scene of an alleged sexual battery.

4. The reported crime involved a sexual attack of a massage therapist client during a massage. Respondent was the subject of the investigation, which was initiated by the victim.

5. On October 22, 2007, Respondent was charged with sexual battery in violation of section 794.011(5), Florida Statutes, a second-degree felony. The information in Case Number 2007 CF 003650 issued in the Circuit Court, Twelfth Judicial Circuit, in and for Manatee County, states:

ANGEL DEJESUS on the date of 9/19/2007,

. . . in the County and State aforesaid, did commit a sexual battery upon [victim], a person twelve years of age or older, to-wit: ANGEL DEJESUS with his sexual organ, penetrated or had union with the vagina and/or the anus of [victim] and in the process thereof used physical force and violence not likely to cause serious personal injury to the said [victim] contrary to Section 794.011(5), Florida Statutes, in such case made, and provided and against the peace and dignity of the State of Florida.

6. On September 19, 2008, as a result of a jury trial, Respondent was found guilty of sexual battery as alleged in the indictment. On September 25, 2008, the trial court adjudicated him guilty and sentenced him to fifteen years in prison, with credit for 372 days for time served before sentencing. The court designated Respondent as a sexual offender with all of the reporting requirements associated with that status, and prohibited any contact with the victim.

7. Sexual battery on a massage therapy client is a crime directly related to the practice of massage therapy. Sexual battery, whether or not involving a massage therapy client, is directly related to the practice and the ability to practice massage therapy.

8. Trust between a massage therapist and a client is an integral component of the therapist-client relationship. Sexual battery demonstrates a lack of honesty, self-control and judgment. Given the vulnerable position of a client during any massage, anything that undermines that trust impairs the

therapist's ability to fulfill his or her responsibilities as a therapist.

CONCLUSIONS OF LAW

9. 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.

10. 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. Dep't of Banking and Fin. 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).

11. The Administrative Complaint charges Respondent with a single count of violating section 480.046(1)(c), which provides in pertinent part:

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

* * *

(c) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of massage or to the ability to practice massage. Any plea of nolo contendere shall be considered a conviction for purposes of this chapter.

12. In this case there is no question that Respondent was convicted of sexual battery. However, the only evidence tying the conviction directly to Respondent treating a massage client is hearsay. The victim did not testify and the officer who investigated the crime only related what he was told when he took over the investigation.

13. This direct evidence is unnecessary. When a person goes in for a massage, there is a level of trust required given the vulnerable position of the client and access that is afforded the therapist. Any action that undermines the trust required of a massage therapist is directly related to the therapist's ability to practice the profession. Committing sexual battery, whether or not on a massage client, clearly undermines that trust. The Department has proven the violation of section 480.046(1)(c) by clear and convincing evidence.

14. The Board of Massage Therapy has adopted disciplinary guidelines in accordance with section 456.079, Florida Statutes, to provide notice of a meaning range of penalties to be imposed

for violations of chapters 456 and 480 and the applicable rules. The undersigned has reviewed the provisions of Florida Administrative Code Rule 64B7-30.002 in determining the appropriate penalty to be determined.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Respondent has violated section 480.046(1)(c), Florida Statutes, and revoking his license to practice massage therapy.

DONE AND ENTERED this 28th day of June, 2011, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of June, 2011.

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.