

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MASSAGE THERAPY,

Petitioner,

vs.

Case No. 12-3610PL

YUPING JIANG, L.M.T.,

Respondent.

RECOMMENDED ORDER

On March 27, 2013, a final administrative hearing was held in this case in Naples, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Candace Rochester, Esquire
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For Respondent: Martin P. McDonnell, Esquire
Rutledge, Ecenia, and Purnell, P.A.
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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Health, Board of Massage Therapy, should discipline the Respondent,

Yuping Jiang, based on the manner in which she applied for and obtained her license.

PRELIMINARY STATEMENT

The Department of Health (Department) filed an Administrative Complaint against the Respondent alleging: in Count I, that she obtained her license through the Department's error or through fraudulent misrepresentation; in Count II, that she failed to provide information or timely updated information, or made misleading, untrue, deceptive, or fraudulent representations on her license application; and, in Count III, that she failed to complete the course of study required for licensure. The Respondent disputed the charges and requested an administrative hearing.

At the hearing, the Department had Petitioner's Exhibits 1 through 3 admitted in evidence. The Respondent testified and had her Exhibits 1 through 4 admitted in evidence. The Transcript of the final hearing was filed, and the parties filed proposed recommended orders that have been considered.

FINDINGS OF FACT

1. The Respondent, who was born in China, came to the United States in 2007 and enrolled in the Select Therapy Institute in California to study massage therapy. She completed a 650-hour course of study and graduated in February 2008. In April 2009, she sat for and passed the examination administered

by the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB).

2. In May 2010, the Respondent moved to Fort Lauderdale to work as a massage therapist. Her employer made an appointment for her at the Pompano campus of the Florida College of Natural Health (FCNH), which is approved by the Board of Massage Therapy (Board), to determine what was necessary for the Respondent to be licensed in Florida as a massage therapist.

3. When the Respondent and her employer arrived at FCNH's Pompano campus, the receptionist directed them to see Glenda Johnson, who was the school's registrar. The Respondent showed Johnson her Select Therapy Institute diploma and transcript and her NCBTMB certificate, which Johnson reviewed.

4. It is not FCNH's normal practice for the registrar to review transcripts to determine how much credit to accept from another school. This is normally done by the school's education department. However, Johnson appeared to have the authority to make the determination, and it was reasonable for the Respondent to believe that Johnson was authorized to do so.

5. Johnson then had the Respondent fill out and sign an application for licensure in Florida by examination based on her 650-hour course of study at, and diploma from, Select Therapy Institute and her NCBTMB certificate. Everything in the

application filled out and signed by the Respondent was true and correct at that time.

6. Johnson also had the Respondent fill out and sign an FCNH enrollment agreement. Johnson signed the agreement, as registrar, to enroll the Respondent at FCNH. The enrollment agreement included a statement that FCNH would evaluate collegiate and post-secondary training, military experience, or civilian occupations, and the Respondent would be given appropriate credit, if criteria to measure the value of such training and experience were met, as determined by FCNH.

7. Johnson then gave the Respondent a copy of the statutes and rules governing the practice of massage therapy in Florida and told the Respondent to study them. The Respondent spent about three hours in the registrar's office studying the statutes and rules. There was no instructor present. The Respondent did not ask anyone any questions about the statutes and rules, and she was not tested or graded on what she studied.

8. When the Respondent finished studying the statutes and rules, she asked Johnson what else was required of her and was told all she had to do was pay a total of about \$650, which covered both FCNH's tuition and the Board's \$205 license application fee. Although it did not seem that much was being required of her, she testified that she trusted Johnson, as the school's registrar. Cf. § 1005.04(1)(a) & (d), Fla. Stat.

(2012) (a nonpublic, secondary institution accredited by the Commission for Independent Education must disclose to prospective students the transferability of credit to and from other institutions and accurate information regarding the relationship of its programs to state licensure requirements).

9. Actually, even if credit for all other educational requirements for Florida licensure by examination were transferred from Select Therapy Institute, the Respondent was required to complete a ten-hour class in Florida statutes and rules. Fla. Admin. Code R. 64B7-32.003 (Apr. 25, 2007). (Notwithstanding some testimony to the contrary, other mandatory courses of study are not required by rule to be Florida-specific.) Id. Like all other educational requirements for licensure by examination, this class had to be taken in-person, with a faculty member present. Fla. Admin. Code R. 64B7-32.001 (Mar. 25, 1986).

10. The Respondent paid Johnson in cash. Johnson said she would submit the Respondent's application, fee, and necessary supporting documentation to the Board. There was no evidence as to what happened to the balance of the cash paid to Johnson, but subsequent events suggest that Johnson probably pocketed it.

11. At some point after the Respondent left the Pompano campus, Johnson completed section III of the Florida license application, which is a transfer of credit form, and the

Respondent's FCNH transcript. The transfer of credit form indicated that FCNH was accepting: 150 credit hours from the Select Therapy Institute in the category Anatomy and Physiology (for a course titled Musculoskeletal); 225 credit hours in the category Basic Massage Therapy and Clinical Practicum (for a course titled Neuromuscular Massage); 10 credit hours in the category Theory and Practice of Hydrotherapy (without specifying the course taken); and 97 credit hours in the category Allied Modalities (for a course titled Sports Massage). The form indicated that the Respondent needed the following additional hours to qualify for examination: ten hours in the category Statutes/Rules and History of Massage; five hours in the category Theory and Practice of Hydrotherapy; two hours in the category Allied Modalities (for medical error prevention); and three hours in the category HIV/AIDS. Finally, the form showed the total credit hours for all schools: 150 credit hours in the category Anatomy and Physiology; 225 credit hours in the category Basic Massage Therapy and Clinical Practicum; ten credit hours in the category Statutes/Rules and History of Massage; 15 credit hours in the category Theory and Practice of Hydrotherapy; 97 credit hours in the category Allied Modalities; and three credit hours in the category HIV/AIDS.

12. At some point after the Respondent left the Pompano campus, Johnson also completed a FCNH transcript for the

Respondent indicating that the Respondent completed all the credit hours on the credit transfer form (a total of 500 credit hours, including 20 hours having been taken at FCNH), and assigning credits for those credit hours (a total of 25.84 credits, including 1.33 earned at FCNH). In fact, the Respondent did not take any classes at FCNH.

13. At some point after the Respondent left the Pompano campus, Johnson also completed FCNH certificates of completion for the Respondent indicating that the Respondent took and successfully completed FCNH's two-hour class titled Prevention of Medical Errors and 20 hours of FCNH's Therapeutic Massage Training Program (Transfer of License). In fact, the Respondent did not take FCNH's Prevention of Medical Errors class or any other classes at FCNH.

14. Johnson sent the Respondent's license application (with \$205 fee), Select Therapy Institute diploma and transcript, and NCBTMB certificate, together with the documents Johnson completed after the Respondent left the Pompano campus, to the Board. She did not provide copies to the Respondent. Based on those submissions, the Board issued the Respondent massage therapy license MA 59583. The two-year license was renewed for another two years in August 2011.

15. The Respondent's license application included both the representation that the answers and statements in or in support

of her application were true and correct and the acknowledgement that any false information on or in support of the application was cause for denial, suspension, or revocation of her license. Although true and correct when the Respondent filled it out and signed it, the Respondent's application was not true and correct as submitted to the Board on her behalf, with the false supporting documentation prepared by Johnson.

16. In December 2011, it came to the attention of Melissa Wade, FCNH's vice-president for Compliance and Institutional Effectiveness, that a number of people were claiming to have graduated from FCNH's Pompano campus based on documentation indicating that they did not complete FCNH's 768-hour course of study that was approved by the Board. Wade investigated and was unable to find any record of the individuals having been students at FCNH. Wade investigated further and discovered discrepancies in the documentation being submitted by those individuals. Wade investigated further and discovered that Johnson never registered these individuals as enrolled students. Johnson was terminated from her employment as registrar for the school.

17. Beginning in January or February 2012, Wade began notifying the Board about the individuals purporting to be FCNH graduates, but who never actually were registered as enrolled students and did not complete the school's Board-approved course of study. As more such individuals were identified, the Board

was notified. The Respondent was one of the individuals reported to the Board.

18. In August 2012, a Department investigator contacted the Respondent regarding a complaint that she provided fictitious transcripts and certificates to the Board as her basis for licensure. In September 2012, the Respondent explained that she simply submitted her information to Johnson, who told her what was required in order to receive a FCNH diploma and a Florida license. She admitted it did not seem that much was being required of her, but she stated that she trusted Johnson, as the school's registrar.

19. In October 2012, in an attempt to resolve the Department's issues regarding her license, the Respondent took and successfully completed Board-approved continuing education (CE) classes titled Living with HIV/AIDS (three CE hours), Massage Therapy Laws and Rules--Legal Update 2011 (ten CE hours), and Preventing Medical Errors (two CE hours).

20. Later in October 2012, the Department filed emergency suspension orders and administrative complaints against a number of licensees who submitted suspect FCNH documentation with their applications, including the Respondent.

21. During the time the Respondent practiced as a licensed massage therapist in Florida, there have been no complaints of any kind against her either by the Department or any consumer.

22. It was not proven by clear and convincing evidence that the Respondent had any intent to defraud the Department or the Board. However, even assuming that Johnson had at least apparent authority to transfer credit hours from Select Therapy Institute and assign FCNH credit, it is clear that the application submitted on the Respondent's behalf by Johnson was supported by documentation that falsely represented that the Respondent took 20 hours of classes at FCNH, including a ten-hour class on Florida statutes and rules and a two-hour class in Prevention of Medical Errors. At the same time, those false misrepresentations were made by FCNH, through its registrar, not by the Respondent.

CONCLUSIONS OF LAW

23. Since this is a license discipline case, the Department must prove its allegations by clear and convincing evidence.

Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

The Supreme Court has stated:

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)).

24. In Count I, the Department charged the Respondent with "[a]ttempting to obtain, obtaining, or renewing a license to practice a profession . . . by fraudulent misrepresentation, or through an error of the department or the board."

§ 456.072(1)(h), Fla. Stat. (2009). In Count II, the Department charged the Respondent with "[f]ailing to comply with the requirements for profiling and credentialing, including, but not limited to, failing to provide initial information, failing to timely provide updated information, or making misleading, untrue, deceptive, or fraudulent representations on a profile, credentialing, or initial or renewal licensure application."

§ 456.072(1)(w), Fla. Stat. (2009).

25. Fraud requires a false statement concerning a material fact (which could include nondisclosure when under a duty to disclose), made with knowledge of its falsity and with the intent to induce another's reliance, and consequent injury to the person acting in reliance on the false representation. See, e.g., Cohen v. Kravit Estate Buyers, Inc., 843 So. 2d 989, 991 (Fla. 4th DCA 2003). The evidence was not clear and convincing that the Respondent had the knowledge or intent necessary to be guilty of having made fraudulent misrepresentations in her license application.

26. Similarly, the evidence was not clear and convincing that the Respondent herself made misleading, untrue, or deceptive representations on her license application, notwithstanding Johnson's representations and statements in the application signed by the Respondent that the answers and statements in or in support of her application were true and correct and that any false information on or in support of the application was cause for denial, suspension, or revocation of the license.

27. The evidence also was not clear and convincing that the Respondent's license was issued through an error of the Department or the Board. The Board was presented with an application supported by what appeared to be a transcript and certificates of completion issued by FCNH, which indicated that the Respondent had completed a Board-approved course of study and was entitled to licensure by examination. See Fla. Admin. Code R. 64B7-32.002 (Feb. 21, 1996).

28. Even if the Respondent's license were issued through an error of the Department or Board, there would have to be some culpable conduct on the part of the Respondent for her to be disciplined for such an error. In this case, the evidence was not clear and convincing that the Respondent engaged in any conduct that would warrant discipline due to an error of the Department or Board. That evidence indicates that it was just as reasonable for the Respondent to rely on NCNH to determine

whether she was entitled to a transcript and certificates of completion of NCNH's Board-approved course of study as it was for the Department and Board to do so.

29. In Count III, the Department alleges that the Respondent violated section 480.046(1)(o), Florida Statutes (2009), which subjects a licensee to discipline for violating any provision of chapter 480 or 456, by violating section 480.041(1)(b), which sets out the qualifications for licensure, including the qualification of having completed a course of study at a Board-approved massage school. First, section 480.046(1)(o) sets out qualifications for an applicant for licensure; it does not, strictly speaking, make it a violation to obtain a license without being qualified. Second, if it did, it adds nothing to the violations alleged in Counts I and II, and Count III would be resolved as they were.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Massage Therapy enter a final order dismissing the Administrative Complaint against the Respondent.

DONE AND ENTERED this 11th day of June, 2013, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
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this 11th day of June, 2013.

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.