

STATE OF FLORIDA  
BOARD OF MASSAGE THERAPY

FILED DATE - **AUG 22 2013**  
Department of Health

By: [Signature]  
Deputy Agency Clerk

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2012-13362  
DOAH CASE NO.: 12-3666PL

SHIYING PENG, LMT,

Respondent.

FILED  
2013 AUG 23 AM 11:48  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

FINAL ORDER

THIS CAUSE came before the BOARD OF MASSAGE THERAPY (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on July 26, 2013, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order (a copy of which is attached hereto as Exhibit A) in the above-styled cause. Petitioner was represented by Candace Rochester, Assistant General Counsel. Respondent was present and was represented by George F. Indest III, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON EXCEPTIONS

1. Petitioner's first exception to the Findings of Fact addresses paragraph 8 in the Recommended Order (hereinafter "RO"). The facts in paragraph 8 are supported by competent substantial evidence. The exception is rejected.

2. Petitioner's second exception to the Findings of Fact addresses paragraph 16 in the RO. The findings in paragraph 16 are supported by competent substantial evidence. The exception is rejected.

3. Petitioner's third exception to the Findings of Fact addresses paragraph 20 of the RO. The findings in paragraph 20 are supported by competent substantial evidence. The exception is rejected.

4. Petitioner's fourth exception to the Findings of Fact addresses paragraph 21 of the RO. When there is conflicting evidence in the record, it is the responsibility of the Administrative Law Judge to resolve the conflict. The exception is rejected.

5. Petitioner's fifth exception to the Findings of Fact addresses paragraph 25 of the RO. There is competent substantial evidence in the record to support the finding in paragraph 25. Rulings on evidence are not within the substantive jurisdiction of the Board. The exception is rejected.

6. Petitioner's sixth exception to the Findings of Fact addresses paragraph 27 of the RO. The facts in paragraph 27 are a reasonable inference drawn from the evidence in the record. The exception is rejected.

7. Petitioner's seventh exception to the Findings of Fact addresses paragraph 28 of the RO. The record contains conflicting evidence concerning the facts in paragraph 28, and there was no

citation to any rule to support Petitioner's position. The exception is rejected.

8. Petitioner's eighth exception to the Findings of Fact addresses paragraph 29 of the RO. The exception is not relevant to the basis for the Administrative Law Judge's conclusions. The exception is rejected.

9. Petitioner's ninth exception to the Findings of Fact addresses paragraph 30 of the RO. The standard applied by the Administrative Law Judge was not "knew or *should have known*." The standard for establishing fraud is "knew or *showed reckless or careless disregard*." Petitioner did not meet the legal standard applied by the Administrative Law Judge. The exception is rejected.

10. Petitioner's 10<sup>th</sup> exception to the Findings of Fact addresses paragraph 31 of the RO. There is no citation to a rule that supports Petitioner's position, and there was no testimony in the record concerning the course materials. In addition, the record contains documentary evidence that Respondent was enrolled at FCNH. The exception is rejected.

11. Petitioner's 11<sup>th</sup> exception to the Findings of Fact addresses paragraph 32 of the RO. There is competent substantial evidence to support the findings in paragraph 32. The exception is rejected.

12. Petitioner's 12<sup>th</sup> exception to the Findings of Fact addresses paragraph 33 of the RO. Whether a document is void *ab*

*initio* is a legal conclusion that is not supported in the record. The exception is rejected.

13. Petitioner's first exception to Conclusions of Law addresses paragraph 40 and 41 of the RO. The Administrative Law Judge's conclusions are a reasonable interpretation of statute. The exception is rejected.

14. Petitioner's second exception to Conclusions of Law addresses paragraphs 42 and 43 of the RO. The conclusions of the Administrative Law Judge are a reasonable interpretation of statute. The exception is rejected.

15. Petitioner's third exception to Conclusions of Law addresses paragraphs 44 and 45 of the RO. The conclusions of the Administrative Law Judge are a reasonable interpretation of statute. The exception is rejected.

16. Petitioner's fourth exception to Conclusions of Law addresses paragraph 52 of the RO. The exception does not state an appropriate basis for an exception, and the conclusions of the Administrative Law Judge are a reasonable interpretation of statute. The exception is rejected.

17. Petitioner's fifth exception to Conclusions of Law addresses paragraphs 53 and 55 of the RO. The Administrative Law Judge concluded that a rescission of Respondent's credentials was necessary to find that Respondent was no longer entitled to a license. Petitioner supplied no case law contrary to that cited by the Administrative Law Judge. There was no evidence regarding the

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sufficiency of the documents to establish entitlement to licensure. The Administrative Law Judge made a factual finding that Respondent completed the necessary courses. The determination of the jurisdiction of the Division of Administrative Hearing is not within the authority of the Board of Massage Therapy. The exception is rejected.

18. Petitioner's sixth exception to Conclusions of Law erroneously summarizes the basis of the Administrative Law Judge's analysis. The RO concludes that the *proof* of meeting the licensure qualifications has not been withdrawn by the entity which issued that proof and the Board does not have the authority to invalidate the proof of qualifications. The exception is rejected.

19. Petitioner's seventh exception to Conclusions of Law addresses paragraph 58 of the RO. This is an exception to a findings of fact, not to conclusions of law. For reasons stated above, the exception is rejected.

20. Petitioner's eighth exception to Conclusions of Law addresses paragraph 59 of the RO. The exception asserts that the Administrative Law Judge failed to appreciate the requirements of Section 480.041. The RO has a lengthy discussion of the requirements of Section 480.041. The exception is rejected.

21. Petitioner's ninth exception to Conclusions of Law addresses paragraph 60 of the RO. The portion of paragraph 60 to which Petitioner takes exception is incorporated into the theory of the Administrative Law Judge that only the institution granting the

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qualifications has the authority to invalidate them. The exception is rejected.

22. Petitioner's 10<sup>th</sup> exception to Conclusions of Law addresses paragraph 64 of the RO. The exception asserts that the Administrative Law Judge erred in not considering Petitioner's allegation that Respondent did not complete the courses necessary for licensure. The transcript contains an extensive preliminary discussion regarding this issue. Speculation about what the Administrative Law Judge considered or didn't consider is not the basis for an exception.

23. Petitioner's 11<sup>th</sup> exception to Conclusions of Law addresses paragraph 68 of the RO. The credentials of Respondent have not been rescinded by the issuing institution and the Board does not have the authority to invalidate them. The exception is rejected.

24. Petitioner's 12<sup>th</sup> exception to Conclusions of Law addresses paragraph 69 of the RO. The credentials of Respondent have not been rescinded by the issuing institution and the Board does not have the authority to invalidate them. The exception is rejected.

#### FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

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CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 464, Florida Statutes.

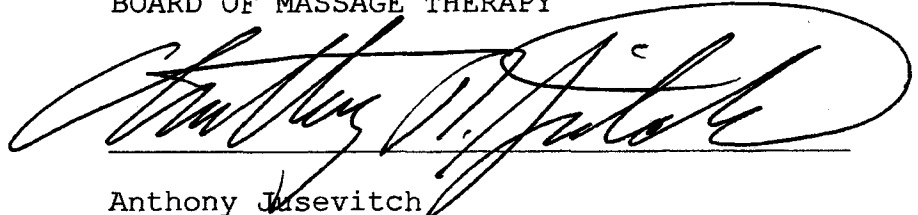
2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Administrative Complaint is dismissed.

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 21 day of August, 2013.

BOARD OF MASSAGE THERAPY



Anthony Jusevitch  
Executive Director  
for Karen Goff Ford, Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to **George F. Indest III**, Esquire, 1101 Douglas Avenue, Altamonte Springs FL 32714; to **John G. Van Laningham**, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Candace Rochester, Assistant General Counsel, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3265 this 22<sup>nd</sup> day of August, 2013.

Angel Sanders

**Deputy Agency Clerk**