

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 12-3666PL

SHIYING PENG, L.M.T.,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 19 and 22, 2013, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Jennifer L. Friedberg, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: George F. Indest III, Esquire
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The Health Law Firm
1101 Douglas Avenue
Altamonte Springs, Florida 32714

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a massage therapist, obtained a license: (a) by means of fraudulent misrepresentations; (b) which she knew had been issued in error;

and/or (c) without having completed a course of study at an approved school, as Petitioner alleges. If so, it will be necessary to determine an appropriate penalty.

PRELIMINARY STATEMENT

On October 8, 2012, Petitioner Department of Health ("Department") issued an Administrative Complaint ("Complaint") against Respondent Shiyong Peng, L.M.T. ("Peng"). The Department alleged, in three separate counts, that Peng had obtained her license to practice massage therapy "through error of the Department of Health"; "by submitting a fraudulent transcript and fraudulent Certificates of Completion with her Application"; and "without completing a course of study at a Florida Board-approved massage school." Peng timely requested a formal hearing, and on November 14, 2012, the Department filed the pleadings with the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

The final hearing began on March 19, 2013, as scheduled, with both parties present. A recess was taken at the end of the day. The proceeding reconvened on March 22, 2013, and concluded on that date. The Department called three witnesses: Melissa Wade, a managerial employee of the company which owns and operates the Florida College of Natural Health ("FCNH"); Paris Zupancic, an administrator at FCNH; and Anthony R. Jusevitch,

the Executive Director of the Board of Massage Therapy.
Petitioner's Exhibits 1 through 3 were received in evidence.

Peng testified on her own behalf and presented one additional witness, her friend Saeid Amiri. Respondent's Exhibits R-1-Sub through R-25 were admitted. Respondent's Exhibits R-31 and R-32 were proffered for the record after the Department's objections to them had been sustained.

The three-volume final hearing transcript was filed on April 3, 2013, and Proposed Recommended Orders were due on May 3, 2013. The parties' respective submissions have been considered.

FINDINGS OF FACT

1. On February 26, 2008, the Department issued Peng license number MA 52684, which authorized her to practice massage therapy in the state of Florida.

2. The Department and the Board of Massage Therapy ("Board") have regulatory jurisdiction over licensed massage therapists such as Peng. The Department provides investigative services to the Board and is authorized to file and prosecute an administrative complaint, as it has done this instance, when cause exists to suspect that a licensee has committed a disciplinable offense.

3. The Florida College of Natural Health ("FCNH") is an incorporated nonpublic postsecondary educational entity. FCNH

holds a license by means of accreditation that authorizes its operation in Florida as an independent college. The Florida Commission for Independent Education ("CIE"), which regulates nonpublic postsecondary institutions, issued the necessary license to FCNH pursuant to section 1005.32, Florida Statutes (2012). In addition to being duly licensed by the state, FCNH is accredited by the Accrediting Commission of Career Schools and Colleges and by the Commission on Massage Therapy. Finally, FCNH is a "Board-approved massage school" within the meaning of that term as defined in section 480.033.^{1/}

4. At the times relevant to this proceeding, the minimum requirements for becoming and remaining a Board-approved massage school were set forth in Florida Administrative Code Rule 64B7-32.003 (Oct. 30, 2007), which provided in pertinent part as follows:

- (1) In order to receive and maintain Board of Massage Therapy approval, a massage school, and any satellite location of a previously approved school, must:
 - (a) Meet the requirements of and be licensed by the Department of Education pursuant to Chapter 1005, F.S., or the equivalent licensing authority of another state or county, or be within the public school system of the State of Florida; and
 - (b) Offer a course of study that includes, at a minimum, the 500 classroom hours listed below
 - (c) Apply directly to the Board of Massage Therapy and provide the following information:
 1. Sample transcript and diploma;

2. Copy of curriculum, catalog or other course descriptions;
3. Faculty credentials; and
4. Proof of licensure by the Department of Education.

5. As an institution holding a license by means of accreditation, FCNH must comply with the fair consumer practices prescribed in section 1005.04 and in the rules of the CIE.^{2/} Regarding these required practices, section 1005.04, Florida Statutes (2007), provided during the relevant time frame as follows:

- (1) Every institution that is under the jurisdiction of the commission or is exempt from the jurisdiction or purview of the commission pursuant to s. 1005.06(1)(c) or (f) and that either directly or indirectly solicits for enrollment any student shall:
 - (a) Disclose to each prospective student a statement of the purpose of such institution, its educational programs and curricula, a description of its physical facilities, its status regarding licensure, its fee schedule and policies regarding retaining student fees if a student withdraws, and a statement regarding the transferability of credits to and from other institutions. The institution shall make the required disclosures in writing at least 1 week prior to enrollment or collection of any tuition from the prospective student. The required disclosures may be made in the institution's current catalog;
 - (b) Use a reliable method to assess, before accepting a student into a program, the student's ability to complete successfully the course of study for which he or she has applied;
 - (c) Inform each student accurately about financial assistance and obligations for repayment of loans; describe any employment

placement services provided and the limitations thereof; and refrain from promising or implying guaranteed placement, market availability, or salary amounts;

(d) Provide to prospective and enrolled students accurate information regarding the relationship of its programs to state licensure requirements for practicing related occupations and professions in Florida;

(e) Ensure that all advertisements are accurate and not misleading;

(f) Publish and follow an equitable prorated refund policy for all students, and follow both the federal refund guidelines for students receiving federal financial assistance and the minimum refund guidelines set by commission rule;

(g) Follow the requirements of state and federal laws that require annual reporting with respect to crime statistics and physical plant safety and make those reports available to the public; and

(h) Publish and follow procedures for handling student complaints, disciplinary actions, and appeals.

(2) In addition, institutions that are required to be licensed by the commission shall disclose to prospective students that additional information regarding the institution may be obtained by contacting the Commission for Independent Education, Department of Education, Tallahassee.

(emphasis added).

6. At the time of the events giving rise to this proceeding, the CIE's rule relating to fair consumer practices provided in relevant part as follows:

(1) This rule implements the provisions of Sections 1005.04 and 1005.34, F.S., and establishes the regulations and standards of the Commission relative to fair consumer practices and the operation of independent postsecondary education institutions in

Florida.

(2) This rule applies to those institutions as specified in Section 1005.04(1), F.S. All such institutions and locations shall demonstrate compliance with fair consumer practices.

* * *

(6) Each prospective student shall be provided a written copy, or shall have access to an electronic copy, of the institution's catalog prior to enrollment or the collection of any tuition, fees or other charges. The catalog shall contain the following required disclosures, and catalogs of licensed institutions must also contain the information required in subsections 6E-2.004(11) and (12), F.A.C.:

* * *

(f) Transferability of credits: The institution shall disclose information to the student regarding transferability of credits to other institutions and from other institutions. The institution shall disclose that transferability of credit is at the discretion of the accepting institution, and that it is the student's responsibility to confirm whether or not credits will be accepted by another institution of the student's choice. If a licensed institution has entered into written articulation agreements with other institutions, a list of those other institutions may be provided to students, along with any conditions or limitations on the amount or kinds of credit that will be accepted. Such written agreements with other institutions must be valid and in effect at the time the information is disclosed to the student. The agreements shall be kept on file at all times and available for inspection by Commission representatives or students. Any change or termination of the agreements shall be disclosed promptly to all affected students.

No representation shall be made by a licensed institution that its credits can be transferred to another specific institution, unless the institution has a current, valid articulation agreement on file. Units or credits applied toward the award of a credential may be derived from a combination of any or all of the following:

1. Units or credits earned at and transferred from other postsecondary institutions, when congruent and applicable to the receiving institution's program and when validated and confirmed by the receiving institution.
2. Successful completion of challenge examinations or standardized tests demonstrating learning at the credential level in specific subject matter areas.
3. Prior learning, as validated, evaluated, and confirmed by qualified instructors at the receiving institution.

* * *

(11) An institution is responsible for ensuring compliance with this rule by any person or company contracted with or employed by the institution to act on its behalf in matters of advertising, recruiting, or otherwise making representations which may be accessed by prospective students, whether verbally, electronically, or by other means of communication.

Fla. Admin. Code R. 6E-1.0032 (July 23, 2007) (emphasis added).

7. As a duly licensed, accredited, Board-approved massage school, FCNH was, at all relevant times, authorized to evaluate the transferability of credits to FCNH from other massage schools, so that credits earned elsewhere—including from schools that were not Board-approved—could be applied toward

the award of a diploma from FCNH. In making such an evaluation, FCNH was obligated to follow the standards for transfer of credit that the Board had established by rule.^{3/} Further, when exercising its discretion to accept transfer credits, FCNH was required to complete, sign, and attach to the student's transcript the Board's Transfer of Credit Form, by which the school's dean or registrar certified that the student's previously earned credits, to the extent specified, were acceptable in lieu of the student's taking courses at FCNH.

8. At all relevant times, FCNH's registrar was Glenda Johnson. As registrar, Ms. Johnson had actual authority to evaluate the transferability of credits and to execute the Transfer of Credit Form certifying to the Board that an applicant's previously earned credits were acceptable to FCNH.

9. In December 2011, an individual with the National Certification Board for Therapeutic Massage and Bodywork ("NCB") placed a telephone call to Melissa Wade, a managerial employee of FCNH, to report that the NCB had received a number of applications to sit for the National Certification Examination from FCNH graduates whose transcripts seemed irregular. (Peng's application was not among these; she had taken, and passed, the national examination in December 2007.) What these applicants had in common was that they had earned their massage therapy diplomas from Royal Irvin College in Monterey Park, California,

and they had fewer credit hours on their transcripts than FCNH's typical students. The NCB sent copies of the suspicious credentials to FCNH.

10. Ms. Wade reviewed the materials and detected purported anomalies in them. She was unable to find records in the school's files confirming that the putative graduates in question had been enrolled as students. Ms. Wade confronted Ms. Johnson with the problematic transcripts and certificates. Ms. Johnson admitted that she had created and signed them. Shortly thereafter, in December 2011, FCNH terminated Ms. Johnson's employment.

11. Ms. Wade later notified the Board that some of FCNH's diplomates might not have fulfilled the requirements for graduation. This caused the Department to launch an investigation, with which FCNH fully cooperated. The investigation uncovered some 200 graduates whose credentials FCNH could not confirm. One of them was Peng.

12. Peng was born in China, immigrated to the United States, and became a citizen of this country. In 2005 and 2006 Peng studied massage therapy at BodyConcepts Wellness Institute ("BodyConcepts") in East Rutherford, New Jersey. At BodyConcepts, Peng successfully completed a 610-hour curriculum in massage therapy. Her certificate was issued on February 10, 2006.

13. In 2007, Peng moved to California. There, Peng attended Royal Irvin College in Monterey Park, where she completed a 250-hour course for which she was issued a Massage Technician II certificate on November 7, 2007. Soon after graduating from Royal Irvin College, as mentioned above, Peng took and passed the National Certification Examination for Therapeutic Massage and Bodywork.

14. Thereafter, Peng relocated to Florida intending to work as a massage therapist. Before she could begin working, however, Peng needed to obtain a Florida license. Because neither Royal Irvin College nor BodyConcepts was a Board-approved massage school, Peng needed to complete either a course of study at an approved school or, alternatively, an apprenticeship program. Opting for the former, Peng researched Board-approved schools on the Board's website and identified FCNH as a potential school.

15. On or about January 22, 2008, Peng went to the Pompano campus of FCNH. Upon her arrival at FCNH, Peng signed her name at the reception desk and waited to be seen. After some time, an FCNH employee, identified by Peng as Glenda Johnson, emerged from the offices behind the reception area. Ms. Johnson brought Peng back to her office. Once inside the office, Peng inquired as to whether she could transfer her out-of-state credits to FCNH in order to obtain a Florida license. After reviewing

Peng's transcripts from Royal Irvin College and BodyConcepts, Ms. Johnson advised Peng that her credits could be transferred to FCNH. Ms. Johnson informed Peng that she would have to take two Florida-specific classes, namely Prevention of Medical Errors and Florida Laws and Rules.

16. Peng decided to enroll in FCNH, and Ms. Johnson prepared the necessary documents. As part of the enrollment process, Peng executed an Enrollment Agreement, a release, a Drug Free School Statement, and a privacy rights disclosure statement. Among other things, the Enrollment Agreement provided that "[t]he school will evaluate collegiate and post secondary training, military experience, or civilian occupations, and students will be given appropriate credit if criteria to measure the value of such training and/or experience are met, as determined by the school." For her part, Ms. Johnson completed several forms in her capacity as registrar. These documents included portions of the Enrollment Agreement, the Transfer of Credit Form, and FCNH's internal Calculation Form for a Graduate From Another Massage Therapy School.

17. Ms. Johnson produced a Department of Health application for a massage therapy license. Peng filled out the parts of the application requesting personal information such as name, Social Security number, date of birth, and phone number,

and Ms. Johnson completed the rest. Peng then signed the three-page application, which is dated January 22, 2008.

18. The application which Peng executed states, truthfully, that she obtained a massage therapy certificate in November of 2007 from Royal Irvin College, and that the school is not Board approved. The application states, inaccurately, that Peng completed 610 hours of study at Royal Irvin College, when in fact she earned only 250 hours of credit there. The 610-hour massage therapy program which Peng completed was offered not at Royal Irvin College, but at BodyConcepts, a fact which for reasons unknown was omitted in response to the pertinent question on the application. This was obviously a mistake, however, and not—as the Department now contends—a "false statement" intended to deceive, for Peng's application package included the diplomas and transcripts from both Royal Irvin College and BodyConcepts. These credentials clearly state Peng's educational attainments and the number of hours completed at each institution. The evidence does not establish that Peng knowingly made a false statement of material fact in the application or otherwise intended to perpetrate a fraud on the Department.

19. Ms. Johnson took Peng's FCNH enrollment forms and collected \$520.00 in cash as the fee for handling the transfer of Peng's credits and her enrollment in the required courses.

The total reflects a \$250.00 fee for transferring credits to FCNH and a \$270.00 fee for tuition. Peng paid the fees to Ms. Johnson in cash because she did not have a checking account or credit card at that time. Ms. Johnson signed a receipt for the \$520.00 payment and handed it to Peng.

20. After Peng had completed the paperwork in Ms. Johnson's office, an unidentified female FCNH employee escorted Peng to a classroom on the campus. This woman provided Peng with materials for the Prevention of Medical Errors and Florida Laws and Rules courses she was to take.

21. While at FCNH, Peng apparently received some classroom instruction. She remained in class at FCNH into the night of January 22, 2008, and departed campus after completion of an exam. The next day, Peng returned to FCNH, where she spent all day in a classroom, departing the campus via taxi in the evening. During these two days of study, Peng made handwritten notes on nearly every page of the written materials she was provided. She used a translating device to translate difficult English words into her native Mandarin Chinese.

22. After completion of the courses at FCNH, Peng submitted her application for licensure. By letter dated February 4, 2008, the Department notified Peng that her application was incomplete due to some missing documents. Specifically, the letter requested additional information

regarding her legal name change as well as proof of attendance at a Board-approved school. Peng sent the Department a copy of her divorce decree, satisfying the first part of the request.

23. Because FCNH had not provided Peng any certificates of completion, however, she returned to FCNH on February 22, 2008, seeking proof of attendance. There, Peng again met with Ms. Johnson. Ms. Johnson assured Peng that she had completed all of the requirements. Peng asked Ms. Johnson to send the Department proof of such completion, as requested in the letter dated February 4, 2008. Ms. Johnson gave copies of two Certificates of Completion to Peng and promised her that they would be sent to the Department.

24. Ms. Johnson forwarded the documents to the Department, and soon afterward Peng's application was deemed complete. The Department notified Peng by letter dated February 26, 2008, that she had been issued a license to practice as a massage therapist.

25. At the time Peng obtained her license, Florida law required as a condition of licensure that an applicant take a three-hour course on HIV/AIDS. See § 456.034, Fla. Stat. (2007).^{4/} Peng credibly testified that Ms. Johnson, when evaluating her transcript, had asked whether Peng had taken an HIV/AIDS course. Peng told Ms. Johnson that she had taken the course at both Royal Irvin College and at BodyConcepts.

Ms. Johnson informed Peng that so long as she had taken the course within the past year, the credits would transfer to FCNH and she would not have to take the course again.^{5/}

26. Among the documents that were sent to the Department in connection with Peng's application was the Transfer of Credit Form. This form states that FCNH has evaluated and agreed to accept 485 hours of Peng's previously awarded credits. The form is signed by Ms. Johnson, as evaluator and registrar, who certified "that the transcript credit for the . . . courses [applicant previously attended for credit] is acceptable credit from . . . Royal Irvin College." Ms. Johnson prepared this document on her own without input or review by Peng. The evidence provides no explanation for why Ms. Johnson did not identify BodyConcepts on the credit-transfer form itself. She evidently included the credits earned from that school in her calculation, however, because the majority of Peng's previously earned credits were from BodyConcepts.

27. Ms. Johnson also signed and submitted to the Department an FCNH transcript showing that Peng had completed a 500-hour program titled "Therapeutic Massage Training Program (Transfer of Licensure)." Ms. Johnson did not show this document to Peng. Even if she had, however, the transcript would not have seemed irregular to Peng because it appears on its face to be an official FCNH credential, listing the courses

that FCNH had accepted for transfer credit as well as those that Peng had completed at FCNH on January 22 and 23, 2008. Peng was not shown to have had any prior familiarity with FCNH documents; she had no reason to believe that the FCNH transcript purported to award her any credits other than those she rightfully earned at FCNH or one of the other schools she had attended.

28. Finally, as mentioned above, Ms. Johnson prepared, signed, and submitted to the Department two Certificates of Completion reflecting Peng's completion of: "15 Hours of Therapeutic Massage Training Program (Transfer of Licensure)" and "2 Hours Prevention of Medical Errors." Because Peng had taken courses at FCNH on January 22 and 23, 2008, her receipt of these certificates did not signify anything unusual. As far as Peng knew, she had taken the courses Ms. Johnson informed her she needed to take and, accordingly, had earned the certificates presented to her.

29. Collectively, the credit-transfer form, the transcript, and the certificates "signify satisfactory completion of the requirements of an educational or career program of study or training or course of study" and constitute a "diploma" within the meaning of that term as defined in section 1005.02(8). The several documents comprising Peng's FCNH diploma will be referred to hereafter, collectively, as the "Diploma."

30. The evidence does not support a finding that Peng misrepresented her educational attainments when she met with Ms. Johnson. The evidence does not support a finding that Peng knew or should have known that Ms. Johnson's evaluation of her credits was anything but routine and in accordance with FCNH's academic policies. The evidence does not support a finding that Peng knew or should have known that FCNH, as the transferee school accepting her Royal Irvin College and BodyConcepts courses, would award her academic credit or credentials which she had not legitimately earned. Peng had no reason to suspect the FCNH Enrollment Agreement she signed would not be properly entered into the school's records. Nor did Peng have any reason to suspect that the courses she completed would not be properly credited to her academic record.

31. To sum up Peng's transaction with FCNH, she went to the Board-approved, state-licensed massage school on January 22, 2008, where she met with the registrar, Ms. Johnson, a member of the school's administration who she had no reason to believe would deceive her. It was reasonable under the circumstances for Peng to rely upon Ms. Johnson, and she was entitled under the law to receive accurate information from the registrar regarding, among other things, the transferability of credits to FCNH, and the relationship between FCNH's academic program and the state's licensure requirements for massage therapists. It

was also reasonable for Peng to assume that the course materials and courses she took were part of her apparently legitimate enrollment in FCNH.

32. Moreover, Ms. Johnson, who at all times was acting within the course and scope of her employment as the school's registrar, had actual authority to evaluate transfer credits on behalf of FCNH. The evidence does not establish that Peng was or should have been aware of any limitations on Ms. Johnson's authority, nor does the evidence show that Peng gave Ms. Johnson false information. From Peng's perspective, Ms. Johnson had apparent authority, at least, to accept Peng's credits from Royal Irvin College and BodyConcepts, and to prepare, execute, and issue such transcripts and certificates as would be appropriate to the situation.

33. Peng has not surrendered her Diploma or otherwise acceded to the allegation that the credentials FCNH conferred upon her are invalid. Although Ms. Wade testified at hearing that Ms. Johnson should not have awarded Peng an FCNH Diploma based on Peng's Royal Irvin College and BodyConcepts credits, FCNH has not initiated a legal proceeding to revoke or withdraw Peng's Diploma. At present, therefore, there is no legally binding or enforceable determination that the Diploma is void or that Peng is without rights and privileges thereunder.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

35. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Peng by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

36. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of

such 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) (citation omitted).

37. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.");

see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929 (Fla. 1st DCA 2011) (statutes imposing a penalty must never be extended by construction).

38. Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. See § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action"); see also Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) ("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992) ("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

39. In Count I of the Complaint, the Department charged Peng under section 456.072(1)(h), Florida Statutes (2007), which states that the act of "obtaining . . . a license . . . by bribery, by fraudulent misrepresentation, or through an error of the department" constitutes grounds for discipline. The

Department alleged that Peng committed a disciplinable offense "by obtaining her license to practice massage therapy . . . through error of the Department of Health or by fraudulent misrepresentation by submitting a fraudulent transcript and fraudulent Certificates of Completion with her Application."

40. The Department takes the position that Peng's license can be revoked based on the Department's unilateral mistake, even if Peng did not personally commit a culpable act. Thus, the Department contends that because its staff missed several so-called "red flags" that "should have caused them to ask additional questions regarding [Peng's] application," Peng herself committed a disciplinable offense. This argument is rejected.

41. To begin, the Department's "unilateral error" theory is inconsistent with the general procedure for licensing as set forth in section 120.60, which provides in pertinent part as follows:

(1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period.

Given that the law unambiguously prohibits an agency from "deny[ing] a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant" of the particular deficiency within 30 days after receiving the application, to allow the agency later to revoke a license pursuant to section 456.072(1)(h) based solely on a purported deficiency or "red flag" in the licensee's application of which the agency failed to give timely notice under section 120.60 not only would erode the protection that the latter statute affords specific licensees, but also would undermine the integrity of licenses in general.

42. Further, section 456.072(1) clearly does require a culpable "act" on the part of the licensee as a condition for imposing discipline. Id. ("The following acts shall constitute grounds for" discipline) (emphasis added). The disciplinable acts specified in section 456.072(1)(h) are the use of a bribe, fraudulent misrepresentation, or "error of the department" to obtain a license. Because a unilateral agency error does not involve any wrongful act on the licensee's part, such an event cannot constitute a basis for discipline. For a disciplinable act to occur, the applicant must somehow use or take advantage of an agency error to obtain her license.

43. To take advantage of an agency error, the applicant must know about it. Thus, to commit the disciplinable act of

obtaining a license through an error of the agency, the applicant must knowingly use the agency's error to her advantage. Properly understood, then, section 456.072(1)(h) imposes an affirmative duty on an applicant to inform the licensing agency if she learns that the agency is about to issue, or has issued, her a license in error.

44. Finally, Peng's application was supported by proof of graduation from a Board-approved massage school in the form of an official transcript signed by FCNH's registrar and two Certificates of Completion also bearing the official signature of the school's registrar. These documents constituted evidence of Peng's successful completion of an approved course of study. See Fla. Admin. Code R. 64B7-32.002 (Feb. 21, 1996). The Department's recognition of Peng as a graduate of a Board-approved massage school would have been a mistake only if Peng did not possess the legally cognizable rights and privileges appertaining to her FCNH Diploma, but she did—and does.

45. The Department failed to prove that Peng knowingly took advantage of an agency error in obtaining her license, or even that the Department made a mistake. Therefore, Peng is not subject to discipline on the basis of agency error.

46. Regarding the allegation that Peng obtained her license by submitting fraudulent credentials, it is useful to recall that, in the context of a civil suit, the essential

elements of a fraud claim are: (1) a false statement concerning a material fact, including a nondisclosure when under a duty to disclose; (2) made with knowledge that the representation (or omission) is false and with the intention of inducing another's reliance thereon; and (3) consequent injury to the other party 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). In an administrative proceeding such as this, where an applicant is alleged to have used fraudulent means in an attempt to obtain a license, it is not necessary for the agency to prove actual injury, but the rest of the common law definition of fraudulent conduct is relevant and applicable in evaluating the charge.

47. "[F]raudulent intent usually must be proved by circumstantial evidence and such circumstances may, by their number and joint consideration, be sufficient to constitute proof." Nally v. Olsson, 134 So. 2d 265, 267 (Fla. 2d DCA 1961). Therefore, as proof of fraud, "one may show 'a series of distinct acts, each of which may be a badge of fraud and when taken together as a whole, constitute fraud.'" Dep't of Rev. v. Rudd, 545 So. 2d 369, 372 (Fla. 1st DCA 1989) (quoting Allen v. Tatham, 56 So. 2d 337, 339 (Fla. 1952)). Further, "[s]cienter, or guilty knowledge, [which] is an element of intentional misconduct [such as fraud], . . . can be established by showing

actual knowledge, or that the defendant was reckless or careless as to the truth of the matter asserted." Ocean Bank of Miami v. INV-UNI Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992).

48. In this case, the Department failed to prove that Peng knowingly, and with the intent to deceive the Department, made any false statement of material fact in, or in connection with, her application. Therefore, Peng is not guilty of obtaining a license by fraudulent misrepresentation.

49. In Count II of the Complaint, the Department charged Peng under section 456.072(1)(w), Florida Statutes (2007), which states that the act of "making misleading, untrue, deceptive, or fraudulent representations on a[n] . . . initial . . . licensure application" constitutes grounds for discipline. The Department alleged that Peng committed a disciplinable offense "by submitting a fraudulent transcript and fraudulent Certificates of Completion with her Application."

50. The Department asserts that the credentials which FCNH issued to Peng are "inauthentic, illegitimate, and, therefore, fraudulent," despite the fact that the school's own registrar issued the documents in her official capacity, and despite the fact that, to anyone unfamiliar with FCNH's internal policies and practices, such as Peng, the credentials are facially regular in appearance. The Department's position assumes that fraudulence is some sort of intrinsic quality of the documents

for which Peng is culpable, regardless of whether she personally engaged in fraudulent conduct. The undersigned rejects the idea that a licensee can be disciplined merely for having reasonably relied upon an allegedly "fraudulent" document obtained in good faith by the licensee under circumstances demonstrating that the licensee considered the document to be what it purports to be. The Department failed to prove that Peng knowingly, and with the intent to deceive the Department, made any false statement of material fact in, or in connection with, her application. Therefore, Peng is not guilty of making fraudulent representations in her application.

51. In Count III of the Complaint, the Department charged Peng under section 480.046(1)(o), Florida Statutes (2007), which subjects a licensee to discipline for the act of violating any provision of chapter 480 or chapter 456. The Department alleged that because Peng has not "completed a course of study at a board-approved massage school," she has "violated" a provision of chapter 480, namely section 480.041(1)(b), which makes completion of such a course of study (or, alternatively, an apprenticeship program) a qualification for licensure as a massage therapist.

52. As a preliminary matter, the undersigned notes that section 480.041(1) does not by its terms require compliant behavior, either by prescribing minimum standards of conduct or

forbidding conduct deemed wrongful. Rather, this statute merely describes the qualifications that a person must possess to be licensed as a massage therapist. A person who lacks one or more of the statutory requirements is unqualified, but being unqualified is not the same as being a lawbreaker. Because section 480.041(1) is not violable as that term is ordinarily understood, it is questionable whether any person can be punished for "violating" section 480.041(1).

53. Assuming for argument's sake, however, that a licensee can be disciplined for having "violated" section 480.041(1)(b), the Department failed to prove that Peng did not complete a course of study at a Board-approved massage school, for the reasons set forth below.

54. At the time Peng submitted her initial application, Florida Administrative Code Rule 64B7-32.002 (Feb. 21, 1996) provided as follows:

In order to be acknowledged as a graduate of a Board approved massage school as referred to in subsection 480.033(9), F.S., the Board's administrative office must receive an official transcript documenting the applicant's training. Such transcript must document to the satisfaction of the Board that the applicant has successfully completed a course of study in massage which met the minimum standards for training and curriculum as delineated in this rule chapter. A transcript indicating passing grades in all courses, and including dates of attendance, and stating the date of successful completion of the entire course

of study, is evidence of successful completion. If the transcript does not specifically state that the student successfully completed the entire course of study, the transcript must be accompanied by a diploma or certificate of completion indicating the dates of attendance and completion.

55. Peng's application included a Diploma issued by FCNH, a Board-approved massage school. After reviewing Peng's application, the Department determined that the Diploma sufficed to prove Peng's successful completion of a course of study in massage meeting the minimum standards. The Diploma never changed; it continues to be exactly what it was in February of 2008: evidence of successful completion of a course of study at a Board-approved massage school.^{6/} To get around this reality, the Department argues that the Diploma is "fraudulent" and that Peng did not take the courses required for completion of an approved course of study in massage therapy. Although the Department argues that it is "not asking for the rescission of [Peng's] credentials," in effect it is seeking such relief. To deem Peng unqualified for having failed to complete an approved course of study, the Department urges that Peng's rights under the FCNH Diploma be ignored, if not extinguished, and it believes such rights should be disregarded owing to Peng's alleged deceitfulness.

56. If Peng had knowingly deceived the Department, e.g., by making a fraudulent misrepresentation in her application, then Peng would be subject to discipline for such misconduct, which of itself is a sufficient basis—independent of any educational credential—for taking punitive measures. As discussed above, however, the Department failed to prove that Peng made fraudulent misrepresentations to the Department. Consequently, there was no fraud in the transaction between Peng and the Department.

57. Asserting that Peng did not take courses at FCNH, which she should have known were required for licensure, the Department tacitly contends that Peng fraudulently obtained her FCNH Diploma. In this regard, the Department accepts as credible Ms. Wade's ex post facto testimony that FCNH should not have accepted Peng's credits from Royal Irvin College and BodyConcepts and, based on such transfer credits, awarded Peng a Diploma.

58. There are multiple problems with the Department's theory. First, Peng has shown that she received some instruction at FCNH. Second, as a duly licensed postsecondary institution, FCNH (a) had the discretion to accept or decline to accept Peng's Royal Irvin College and BodyConcepts credits and (b) had the duty to disclose to Peng all relevant information regarding transferability of credits. See § 1005.04, Fla. Stat.

(2007); Fla. Admin. Code R. 6E-1.0032(6)(f). As FCNH's registrar, Ms. Johnson had actual (and certainly apparent) authority to evaluate and accept Peng's Royal Irvin College and BodyConcepts credits and apply them toward the award of an FCNH credential. Ms. Johnson performed a seemingly legitimate evaluation of Peng's credentials and informed her that she needed additional Florida-specific courses. Peng paid the tuition for those courses and was told she was enrolled in them. She then received the materials for and studied those subjects at FCNH.

59. Peng's reliance on Ms. Johnson's decision regarding the transferability of credits was reasonable under the circumstances; believing, as she was told, that her out-of-state credits were acceptable to FCNH in lieu of taking additional courses (with the exception of the two she did take), Peng had no reason to be concerned about not attending additional classes at FCNH.^{7/}

60. Third, regardless of whether Peng knew or should have known which courses were required for licensure, she was entitled to receive accurate information from FCNH regarding the relationship of the school's massage therapy program to state licensure requirements. See § 1005.04(1)(d), Fla. Stat. Peng's reliance on Ms. Johnson's advice that no additional coursework at FCNH (besides the instruction she received) would be

necessary to qualify for a Florida massage therapy license was therefore reasonable under the circumstances. That is, Peng reasonably believed that the courses she had completed at Royal Irvin College and BodyConcepts, which FCNH accepted toward the award of its credentials, and the study of Florida-specific topics at FCNH, were all that she needed in order to complete the program at FCNH.

61. Finally, the questions which the Department has raised implicating the Diploma's validity, namely whether FCNH should have issued Peng a Diploma and whether the Diploma is operative as a legal instrument under which Peng has certain rights and privileges, are not amenable to adjudication in this administrative proceeding. Neither the Department nor the Board has the authority to revoke or rescind the Diploma, rendering it a nullity, any more than either agency could revoke a degree from, say, Harvard University or Tallahassee Community College. Diplomas, degrees, and other educational credentials confer rights and privileges in which their holders have a property interest. The power to revoke or withdraw such a valuable credential, once conferred, belongs to the issuing institution, not a third-party state agency, and such action, to be enforceable, must be undertaken in accordance with a legal process ensuring that the rights and interests of the degree holder are protected.

62. As the Supreme Court of Ohio explained:

We consider it self-evident that a college or university acting through its board of trustees does have the inherent authority to revoke an improperly awarded degree where (1) good cause such as fraud, deceit, or error is shown, and (2) the degree-holder is afforded a fair hearing at which he can present evidence and protect his interest. Academic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards. To hold that a university may never withdraw a degree, effectively requires the university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified. Such a holding would undermine public confidence in the integrity of degrees, call academic standards into question, and harm those who rely on the certification which the degree represents.

Waliga v. Board of Trustees, 488 N.E.2d 850, 852 (Ohio 1986).

The authority to revoke degrees for cause, in short, is a "necessary corollary" to the power to confer degrees, Hand v. Matchett, 957 F.2d 791, 794-95 (10th Cir. 1992)—necessary because "upon the grant of a degree, the university certifies to the world that the recipient has fulfilled the university's requirements, and this certification continues until the degree is revoked." Crook v. Baker, 813 F.2d 88, 93 (6th Cir. 1987).

63. As the court made clear in Waliga, however, the issuing institution cannot revoke a degree—in which the holder possesses a property right—except according to constitutionally

adequate procedures providing due process. 488 N.E.2d at 853. This does not mean that the school necessarily must go to court to revoke a degree previously conferred. See Crook, 813 F.2d at 94. An administrative proceeding—to which the issuing institution and the degree holder are parties—may suffice. See Faulkner v. Univ. of Tenn., 1994 Tenn. App. LEXIS 651 (Tenn. Ct. App. Nov. 16, 1994). But it does mean that the former student must be afforded adequate notice, a fair opportunity to be heard, and an impartial forum. As one judge observed:

Educational institutions are uniquely situated to make determinations regarding academic qualifications or the lack thereof. Establishing degree requirements and granting degrees are within the province of universities, not courts; so the rescission of degrees of former students is within the province of universities, not courts. Courts, when their jurisdiction is quickened, must assure that degrees are not rescinded by universities until the former student has had all of the process due him—adequate notice, a fair opportunity to defend, and an impartial forum.

Faulkner v. The Univ. of Tenn., 627 So. 2d 362, 367 (Ala. 1992) (Houston, J., dissenting).^{8/}

64. Peng's FCNH Diploma certifies to the world that she has completed a course of study at a Board-approved massage school. Because of this certification, which the Diploma represents, the Department's allegation that Peng has not completed such a course of study is true only if the Diploma is a nullity, a worthless

piece of paper signifying nothing. The Diploma is not a nullity, however, unless and until it is revoked.

65. FCNH has persuaded the Department that the Diploma is invalid. But the Department, which did not confer the Diploma, is powerless to revoke this academic credential. Only FCNH has the authority to revoke the Diploma, provided it does so in accordance with due process of law, and it has not yet taken such action, as far as the evidence in this case shows. In arguing that Peng is academically unqualified for licensure as a massage therapist, the Department is attempting to steal a base, taking for granted that the Diploma is void or, alternatively, voidable in this proceeding. Because the Diploma is neither void nor voidable in this forum, the Department's argument is rejected.

66. This case points up the impropriety of using an administrative disciplinary proceeding in place of the fair hearing to which a degree holder is entitled when the issuing institution seeks to revoke his or her degree. The evidence presented at the final hearing suggests that, in the transaction between FCNH and Peng, FCNH might have gotten its hands dirty. Its registrar, Ms. Johnson, who was acting in the course and scope of her employment when she met with Peng, seems to have misled the former student—assuming, as FCNH now maintains, that Peng's Royal Irvin College and BodyConcepts credits were not, in fact, a sufficient basis upon which to confer credentials

representing the completion of a course of study conforming to state licensure requirements. Assuming further that, like the Department, FCNH were unable to prove that Peng acted in concert with Ms. Johnson, FCNH could conceivably be found liable to Peng for the wrongful acts of its agent. E.g., Phillips Petroleum Co. v. Royster, 256 So. 2d 559, 560-61 (Fla. 1st DCA 1972). In a judicial proceeding by FCNH to rescind the Diploma, Peng could assert such claims. In this administrative case, however, Peng was precluded by jurisdictional limitations from making claims against nonparty FCNH, even as FCNH's Ms. Wade testified on the Department's behalf, advancing FCNH's position that the Diploma should be given no force and effect.^{9/}

67. Indeed, whether the Diploma should be revoked—a question which, as explained, cannot be decided here—is perhaps less clear than the Department and FCNH would have it. This is because Peng might have equitable defenses to rescission, such as waiver and estoppel, which could preclude FCNH from relying on so-called irregularities to deny the validity of the credentials that Ms. Johnson issued Peng in her capacity as FCNH's registrar and agent. See, e.g., Russell v. Eckert, 195 So. 2d 617, 622 (Fla. 2d DCA 1967). Obviously such equitable defenses were useless to Peng here, which is why this proceeding is no substitute for the fair hearing to which she is entitled in the event FCNH seeks to revoke her Diploma.

68. Because FCNH has not revoked the Diploma, the Diploma continues to certify that Peng completed a course of study in massage therapy at a Board-approved school.

69. The Department has raised two additional issues that require a brief mention. One concerns instructional methodology. The Department argues that for a "course of study" to meet with the Board's approval, it must be delivered in a lecture format. Because Peng's instruction in the Florida-specific courses at FCNH was apparently in a self-study format, the Department contends that Peng did not complete an "approved" course of study. This contention is rejected for two reasons. First, Peng was not specifically charged in the Complaint with a violation stemming from an alleged deficiency in instructional methodology. Second, the Department did not reference a statute or rule mandating that, to be approved, massage therapy courses must be given in a lecture format.

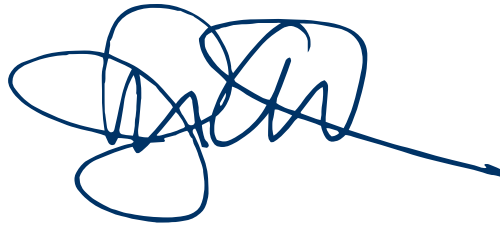
70. The other issue concerns the mistake in Peng's application, pursuant to which the 610 hours of credit she received at BodyConcepts were erroneously attributed to Royal Irvin College, while the 250-hour course of study Peng completed at Royal Irvin College went unmentioned, as did the school, BodyConcepts. As found above, and for the reasons stated, this was clearly a mistake and not a material misrepresentation. Further, Peng was not specifically charged in the Complaint with

a violation relating to this mistake. Therefore, no disciplinary action is warranted as a result of the minor irregularity in Peng's application.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order finding Peng not guilty of the offenses charged in the Complaint.

DONE AND ENTERED this 6th day of June, 2013, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of June, 2013.

ENDNOTES

1/ Section 480.033(9) provides:

"Board-approved massage school" means a facility which meets minimum standards for training and curriculum as determined by rule of the board and which is licensed by the Department of Education pursuant to chapter 1005 or the equivalent licensing authority of another state or is within the public school system of this state.

2/ See § 1005.32(5), Fla. Stat.

3/ See Fla. Admin. Code R. 64B7-32.004 (Feb. 27, 2006).

4/ This statute was repealed effective July 1, 2012. Fla. Laws ch. 2012-115.

5/ The Board rule in effect at that time, which has since been repealed, did not require that the HIV/AIDS course be taken in Florida or be offered by a Board-approved school. See Fla. Admin. Code R. 64B7-25.0012 (Jan. 26, 2000).

6/ If the Department believed that Peng's official transcript from FCNH and the other certificates comprising her Diploma failed to conform to the requirements of rule 64B7-32.002, then it should have denied her application on that basis, which would have given Peng the right, in 2008, to request a hearing to determine the sufficiency of the Diploma. In any event, it should be noted that the Department is not asserting in this case that Peng's FCNH Diploma is insufficient evidence of successful completion of an approved course of study pursuant to rule 64B7-32.002; the Department argues instead that the Diploma was fraudulently obtained and thus is a nullity, which is a different theory.

7/ If the Board determines that FCNH failed to comply with the standards for transfer of credit set forth in rule 64B7-32.004, then the Board can withdraw its approval of FCNH pursuant to rule 64B7-32.003(3). In addition, or alternatively, if so inclined, the Department or the Board may make a complaint about FCNH to the CIE, which is authorized to investigate suspected misconduct on the part of licensed nonpublic postsecondary schools, and to impose discipline on violators. See § 1005.38, Fla. Stat. The Department has not alleged, in any event, that

Peng should be disciplined because the transfer standards were not met.

^{8/} The dissenting justice concluded, contrary to the court's majority, that the plaintiff had failed to exhaust his administrative remedies. The entire court agreed, however, that the plaintiff's degree could not be revoked except through a proceeding affording him due process of law.

^{9/} Peng was similarly precluded from asserting in this administrative proceeding other legal claims she might have against FCNH, such as breach of contract. See, e.g., Sharik v. Southeastern Univ. of the Health Sciences, Inc., 780 So. 2d 136 (Fla. 3d DCA 2000), reh'g en banc denied, 780 So. 2d 142 (Fla. 3d DCA 2001).

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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.