

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 12-3883PL

YU YAO XU, L.M.T.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida, on April 11, 2013, before Administrative Law Judge Edward T. Bauer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lealand L. McCharen, Esquire
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For Respondent: June H. Zhou, Esquire
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STATEMENT OF THE ISSUE

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On October 17, 2012, Petitioner, Department of Health ("Department"), filed a three-count Administrative Complaint ("Complaint") against Respondent, Yu Yao Xu. In Count One of the Complaint, the Department alleges that Respondent violated section 456.072(1)(h), Florida Statutes, in that she obtained her license to practice massage therapy by "fraudulent misrepresentation[] or through an error of the department or the board." The Department further alleges, in Count Two, that Respondent submitted fraudulent documentation in connection with her application for licensure, contrary to section 456.072(1)(w). Finally, in Count Three, the Department asserts that Respondent's license is subject to revocation pursuant to section 480.041(1)(b), Florida Statutes, which provides that, in order to qualify for licensure as a massage therapist, an applicant must complete a course of study at an approved massage school or complete an appropriate internship program.

Respondent timely requested a formal hearing to contest the allegations, and, on December 3, 2012, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned to

Administrative Law Judge John G. Van Laningham. Thereafter, on April 8, 2013, the Department announced in writing that it no longer "intend[ed] to pursue allegations of fraud by Petitioner [sic] in the submission of her application for licensure as a massage therapist" On April 10, 2013, Judge Van Laningham transferred the instant matter to the undersigned for further proceedings.

As noted above, the final hearing in this matter was held on April 11, 2013, during which the Department presented the testimony of Melissa Wade and Anthony Jusevitch. The Department introduced four exhibits into evidence, numbered 1-4. Respondent testified on her own behalf, presented the testimony of Di Zheng, and introduced 13 exhibits, numbered 1-7, 15, 16, 18, 19, 20, and 21.

The final hearing transcript was filed with DOAH on April 29, 2013. Pursuant to Respondent's unopposed request, the deadline for the submission of proposed recommended orders was extended to May 16, 2013. Thereafter, the parties submitted proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.^{1/}

FINDINGS OF FACT

A. The Parties

1. The Department and the Board of Massage Therapy ("Board") have regulatory jurisdiction over licensed massage

therapists such as Respondent. The Department furnishes investigative services to the Board and is authorized to file and prosecute an administrative complaint, as it has done in this instance, when cause exists to suspect that a licensee has committed one or more disciplinable offenses.

2. On July 31, 2008, the Department issued Respondent license number MA 54053, which authorized her to practice massage therapy in the state of Florida. Respondent's address of record is 2615 South University Drive, Davie, Florida 33328.

B. The Events

3. Respondent was born in China and, at all times relevant to this proceeding, was a citizen of China. In 2001, Respondent immigrated to the United States and became a citizen of the state of California.

4. In or around December 2006, Respondent enrolled at Royal Irvin College ("Royal Irvin"), an institution located in Monterey Park, California, that offered massage therapy instruction. Some three months later, upon Respondent's successful completion of a course of study comprising 500 hours, Royal Irvin awarded her a degree.

5. Thereafter, Respondent obtained permits to practice massage therapy in three California municipalities and, on July 26, 2007, passed the National Certification Examination for Therapeutic Massage and Bodywork.

6. In early 2008, Respondent relocated to south Florida in pursuit of better-paying employment opportunities. Respondent's search ultimately brought her to "Oriental Massage," whose owner, Ah Ming, informed her that she needed to obtain a Florida license to be eligible for hire. As Royal Irvin was not a Board-approved massage school, Respondent needed to complete a course of study at an approved institution or, alternatively, an apprenticeship program.

7. At the suggestion of Mr. Ming, Respondent telephoned Glenda Johnson, the registrar of the Florida College of Natural Health ("FCNH")—a Board-approved massage school. During their initial conversation, Respondent explained her situation to Ms. Johnson, who, in turn, recommended that Respondent come to her office at FCNH's Pompano Beach campus.

8. Respondent's subsequent appointment with Ms. Johnson and her application for licensure are discussed shortly; first, though, a description of FCNH—and its responsibilities under Florida law—is in order.

9. FCNH, an incorporated nonpublic postsecondary educational entity, 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).^{2/} 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, Florida Statutes.

10. 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 relevant 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.

(emphasis added).

11. 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.^{3/} Regarding these required practices, section 1005.04, Florida Statutes (2008), 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;

* * *

(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).

12. 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. . . . 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).

13. 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.^{4/} 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.

14. Returning to the events at hand, Respondent met with Ms. Johnson, FCNH's registrar, on March 17, 2008. Notably, Ms. Johnson possessed actual authority, on that date and at all

relevant times, to generate official transcripts and diplomas on behalf of FCNH.

15. The meeting, which took place on a weekday during normal business hours, was held in Ms. Johnson's office—located on the first floor of a multi-story building on FCNH's Pompano Beach campus. Upon Respondent's arrival (at the main entrance), a receptionist summoned Ms. Johnson, who, a short time later, appeared in the lobby and escorted Respondent to her office.

16. During the meeting that ensued, Respondent reiterated (with her limited English skills) her desire to obtain licensure in Florida as a massage therapist. To that end, Respondent presented Ms. Johnson with various documents, which included her diploma and transcript from Royal Irvin, copies of her existing professional licenses, and proof of her national certification.

17. As the meeting progressed, Ms. Johnson made copies of Respondent's records and asked her to sign an FCNH enrollment agreement, which Respondent did. The agreement, which is part of the instant record, indicates that Respondent was enrolling for the purpose of "(Transfer of Licensure) Therapeutic Massage Training." The agreement further reflects, and Respondent's credible testimony confirms, that, on the date of their meeting, Ms. Johnson collected \$520.00 in fees^{5/} from Respondent.

18. In addition to the enrollment agreement,^{6/} Ms. Johnson filled out, and Respondent signed, a three-page form titled,

"State of Florida Application for Massage Therapist Licensure."
In the application, Respondent truthfully disclosed, among other things, that she had completed 500 hours of study at Royal Irvin; that Royal Irvin was not approved by the Board; and that she had not attended an apprenticeship program.

19. Before the meeting ended, Respondent observed Ms. Johnson print and sign two documents: an FCNH Certificate of Completion, which reflected that Respondent had satisfied a two-hour course relating to the prevention of medical errors; and an FCNH Certificate of Completion indicating the completion of a "Therapeutic Massage Training Program (Transfer of Licensure)." When asked about the documents, Ms. Johnson informed Respondent, erroneously, that her prior coursework and existing credentials were sufficient for licensure. (Among other things, Ms. Johnson should have advised Respondent that Board-approved coursework in "HIV/AIDS" and the "prevention of medical errors"—neither of which Respondent completed until after^{7/} the Complaint was filed in this matter—was required^{8/} for licensure.) All Respondent needed to do, Ms. Johnson incorrectly explained, was read an FCNH-prepared booklet concerning the prevention of medical errors. Consistent with Ms. Johnson's instructions, Respondent took the booklet home and reviewed its contents.

20. In the weeks that followed, the Department received Respondent's application for licensure and various supporting

documents, which included: the FCNH certificates (discussed above); a "Transfer of Credit Form" signed by Ms. Johnson, which indicates that FCNH accepted Respondent's credits from Royal Irvin, and, further, that Respondent's coursework at Royal Irvin included a two-credit class involving the prevention of medical errors; an FCNH transcript (signed by Ms. Johnson and bearing the school's seal) showing that Respondent had completed a 500-hour program titled "Therapeutic Massage Training Program (Transfer of Licensure)"; Respondent's diploma and transcript from Royal Irvin; and a copy of Respondent's national certification as a massage therapist.

21. Collectively, the credit transfer form, the FCNH certificates, and the FCNH transcript "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), Florida Statutes. (These documents, which Respondent's FCNH diploma comprises, will be referred to hereafter, collectively, as the "Diploma.")

22. On May 30, 2008, the Department provided written notification to Respondent that, upon initial review, her application was incomplete because it failed to include copies of her California esthetician's license and massage permit from the city of Costa Mesa, California. Significantly, the

correspondence noted no other irregularities or omissions concerning Respondent's application or supporting documentation.

23. Consistent with the Department's request, Respondent furnished copies of her esthetician's license and massage permit from Costa Mesa. Thereafter, on July 31, 2008, the Department issued Respondent her license to practice massage therapy.

24. Although the Department seeks to characterize the issuance of Respondent's license as a "mistake" on its part, such a contention is refuted by the final hearing testimony of Anthony Jusevitch, the executive director of the Board. Mr. Jusevitch testified, credibly, that the Respondent's application materials contained no facial irregularities or flaws that would have justified a denial:

Q. Mr. Jusevitch, is this, then, the complete application file that was received by the board?

A. Yes.

Q. When you look at all of the documents in this application file, is there anything in the file that would have caused the Board of Massage Therapy to reject this application?

A. I didn't see anything that would have cause[d] us to reject this application when I review it; no.

* * *

A. No, there was nothing irregular about the application. . . .

Final Hearing Transcript, pp. 83; 86.

25. 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 (which the NCB administers) from FCNH graduates whose transcripts seemed irregular. What these applicants had in common was that they had earned their massage therapy diplomas from Royal Irvin, and that the same member of FCNH's administration—i.e., Ms. Johnson—had accepted their transfer credits. The NCB sent copies of the suspicious credentials to FCNH.

26. Ms. Wade reviewed the materials and detected some 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, but she denied—untruthfully, at least with respect to her dealings with Respondent—ever having taken money for doing so.

(Ms. Johnson provided the rather dubious explanation that she had been merely trying to "help" people.) Shortly thereafter, in December 2011, FCNH terminated Ms. Johnson's employment.

27. Thereafter, Ms. Wade notified the Department 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 cooperated. The investigation uncovered approximately 200 to 250 graduates, including Respondent, whose credentials FCNH could not confirm.

CONCLUSIONS OF LAW

A. Jurisdiction

28. DOAH has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

29. This is a disciplinary proceeding in which the Department seeks to discipline Respondent's license to practice massage therapy. Accordingly, the Department must prove the allegations contained in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

30. 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:

[C]lear 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).

C. Statutory Construction/Notice

31. 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); 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.").

32. Due process prohibits an agency from taking disciplinary action against a licensee based on matters not

specifically alleged in the charging instrument. 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"); 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"); § 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").

33. With the foregoing principles in mind, the undersigned turns to the three statutory offenses charged in the Complaint, each of which is discussed separately below.

D. Count One

34. In Count One of the Complaint, the Department alleges that Respondent is in violation of section 456.072(1)(h), a provision that, in relevant part, subjects a licensee to discipline for obtaining a license "by fraudulent misrepresentation[] or through an error of the department or the board."

35. During the final hearing, the Department stipulated, consistent with its pre-hearing filing of April 8, 2013, that it had abandoned any allegation that Respondent had obtained her license by fraudulent misrepresentation. See Final Hearing Transcript, p. 8, lines 18-25. Accordingly, the remaining issue with respect to Count One is whether Respondent obtained her license through an error of the Department or the Board.

36. In its Proposed Recommended Order, the Department contends that the issuance of a license to Respondent "was based on an error by the Department who had been deceived by the fictitious documents submitted in support of Respondent's application for licensure." See Petitioner's PRO, p. 14. Accordingly, the Department appears to take the position that Respondent herself has committed a disciplinable offense by virtue of a (purported) unilateral error committed by a member of the Department's staff. For the reasons that follow, the Department's argument is rejected.

37. First, the Department's theory of unilateral error is antithetical to the general procedure for licensing as set forth in section 120.60(1), Florida Statutes, which provides:

(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 section 120.60 prohibits an agency from denying a license for failure to correct an error or omission unless the agency timely notified the applicant of the particular deficiency within 30 days after receiving the application, to allow the agency:

[L]ater to revoke a license pursuant to section 456.072(1)(h) based solely on a purported deficiency 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.

Dep't of Health, Bd. of Massage Therapy v. Diamond, Case No. 12-3825PL, 2013 Fla. Div. Adm. Hear. LEXIS 204, *25-26 (Fla. DOAH Apr. 9, 2013) (Van Laningham, J.).

38. In addition, the imposition of discipline pursuant to section 456.072(1) requires a culpable "act" on that part of the licensee. Id. at *26; § 456.072(1), Fla. Stat. ("The following acts shall constitute grounds for [discipline]") (emphasis added). Owing to the fact that a unilateral agency error does not contemplate any wrongful act on the licensee's part, such an event does not provide a valid basis upon which to impose discipline. For a disciplinable act to occur, the applicant

"must somehow use or take advantage of an agency error to obtain her license." Diamond, 2013 Fla. Div. Adm. Hear. LEXIS 204 at *26. Based upon the findings of fact contained herein, the Department has failed to make such a showing. See Dep't of Health, Bd. of Massage Therapy v. Jiang, Case No. 12-3610PL, slip op. at 12 (Fla. DOAH June 11, 2013) (Johnston, J.) ("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.").

39. Even assuming, arguendo, that a unilateral mistake by the Department or Board can properly subject a licensee to revocation, there is an absence of clear and convincing evidence that the Department "erred" in granting Respondent's application for licensure. As discussed previously, Respondent's application package included 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, which likewise bore the registrar's official signature. Collectively, these documents constituted evidence of Respondent's successful completion of an approved course of study,^{9/} a fact that likely accounts for the credible, unequivocal testimony of Mr. Jusevitch that no basis existed to deny Respondent's application for licensure. See Jiang, slip op. at 12 (concluding that evidence

failed to establish a violation of section 456.072(1)(h) where 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 Respondent had completed a Board-approved course of study and was entitled to licensure by examination.").

40. For these reasons detailed above, Respondent is not guilty of violating section 456.072(1)(h).

E. Count Two

41. The Department further asserts, in Count Two of the Complaint, that Respondent is in violation of section 456.072(1)(w), which subjects a licensee to discipline for:

Failing 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.

Although section 456.072(1)(w) encompasses a variety of misconduct, it is notable that, in paragraph 25 of the Complaint, the Department narrowed its theory of guilt to the allegation that Respondent "submit[ed] a fraudulent transcript and fraudulent certificates of completion with her application."

42. Prior to the final hearing, the Department filed a pleading titled, "Notice of Intent Not to Pursue Allegations of Fraud" ("Notice"), which reads:

COMES NOW the Petitioner, by and through undersigned counsel, and files this notice that Petitioner does not intend to pursue allegations of fraud by [Respondent] in the submission of her application for licensure as a massage therapist that is at issue herein

Surprisingly, the Department contends that although the foregoing Notice operated to abandon any allegation that Respondent committed fraud, she is nevertheless subject to discipline under the theory that her application for licensure was accompanied by fraudulent documents: specifically, the FCNH transcript and certificates prepared by Ms. Johnson. It appears, in other words, that the Department seeks to punish Respondent, whom the Department no longer alleges is guilty of fraud, for the misdeeds of FCNH's registrar.

43. There are several problems with the Department's position, the first of which is that the content of the Notice would have caused any reasonable litigant to conclude, as Respondent did, that all allegations of fraud had been abandoned. To permit the Department to proceed onward in the face of the Notice would, at least in the undersigned's judgment, undermine the fairness and integrity of this proceeding. Further, the Department's current theory (i.e., that Respondent is responsible

for the fraudulent conduct of Ms. Johnson) was not pleaded in the Complaint, which alleged only that Respondent had committed fraud—a claim later abandoned in the Notice. Finally, the actions of Ms. Johnson, standing alone, do not provide a basis upon which to convict Respondent, as section 456.072(1)(w) requires evidence of personal misconduct by the licensee. See Pic N' Save v. Dep't of Bus. & Prof'l Reg., 601 So.2d 245, 250 (Fla. 1st DCA 1992) ("[O]ne's license to engage in an occupation is not to be taken away except for misconduct personal to the licensee"); Dep't of Health, Bd. of Massage Therapy v. Diamond, Case No. 12-3825PL, 2013 Fla. Div. Adm. Hear. LEXIS 204, *29-30 (Fla. DOAH Apr. 9, 2013) ("The Department failed to prove that Diamond knowingly, and with the intent to deceive the Department, made any false statement of material fact in, or in connection with, her application. Therefore, Diamond is not guilty of [violating section 456.072(1)(w)]."). Respondent is not guilty of Count Two.

F. Count Three

44. Finally, the Department charges Respondent under section 480.046(1)(o), which subjects a licensee to discipline for, among other things, violating any provision of chapter 480. Specifically, the Department alleges that Respondent has not "completed a course of study at a board-approved massage school" and has therefore 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.

45. As an initial matter, the undersigned is dubious of the Department's attempt to punish Respondent for "violating" section 480.041(1), a provision that:

[D]oes 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, the undersigned is skeptical that any person can be punished for "violating" section 480.041(1).

Diamond, 2013 Fla. Div. Adm. Hear. LEXIS 204 at *30-31; Dep't of Health, Bd. of Massage Therapy v. Jiang, Case No. 12-3610PL, slip op. at 13 (Fla. DOAH June 11, 2013) (Johnston, J.) ("[S]ection 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."). Even assuming, however, that a licensee can be properly disciplined for having "violated" section 480.041(1)(b), the Department has failed to prove, for the reasons detailed below, that Respondent did not complete a course of study at a Board-approved massage school.

46. At the time Respondent submitted her initial application, Florida Administrative Code Rule 64B7-32.002 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.

(emphasis added).

47. As discussed previously, Respondent's application included a Diploma that comprised the FCNH transcript, credit transfer form, and certificates—all of which were issued by the school registrar, who possessed the actual authority to generate documents of that type on behalf of FCNH. After reviewing Respondent's application, the Department determined (correctly, as Mr. Jusevitch's testimony establishes) that the Diploma constituted proof of Respondent's completion of a course of study

in massage therapy that met the minimum standards. The Diploma, which FCNH has not rescinded, continues to be exactly what it was in July 2008: evidence of successful completion of a course of study at a Board-approved massage school. The Department contends, nevertheless, that because the registrar should not have issued the Diploma, a fact of which Respondent was unaware until the filing of the Complaint, Respondent's rights under that credential—which include her licensure as a massage therapist—should be terminated.

48. Persuaded by the reasoning expressed in Department of Health, Board of Massage Therapy v. Diamond, Case No. 12-3825PL, 2013 Fla. Div. Adm. Hear. LEXIS 204 (Fla. DOAH Apr. 9, 2013), a case that involved facts nearly identical to those at hand, the undersigned rejects the Department's implicit attempt to nullify Respondent's Diploma. As Judge Van Laningham explained in Diamond:

[T]he questions which the Department has raised implicating the Diploma's validity, namely whether FCNH should have issued Diamond a Diploma and—to the point—whether the Diploma is operative as a legal instrument under which Diamond 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.

* * *

Diamond'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 Diamond 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.

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. The upshot is that, in arguing that Diamond 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.

* * *

[W]hether 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 Diamond 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 Diamond in her capacity as FCNH's registrar and agent. Obviously such equitable defenses were useless to Diamond 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.

2013 Fla. Div. Adm. Hear. LEXIS at *36-37, 40 (internal citations omitted); see also Jaber v. Wayne State Univ. Bd. of Governors, 2010 U.S. Dist. LEXIS 88144, *10 (E.D. Mich. Aug. 26, 2010) ("[T]he Board of Governors nonetheless has the exclusive power to revoke degrees. The Board was not involved in Jaber's revocation process. Accordingly, [the] revocation of Jaber's Doctorate degree is void"); Waliga v. Bd. of Trustees, 488 N.E.2d 850, 852 (Ohio 1986) (holding that a college or university acting through its board of trustees is authorized to revoke a degree upon good cause, provided the degree-holder is afforded a fair hearing to protect his interest).

49. Because FCNH has not revoked the Diploma, the Diploma continues to certify that Respondent completed a course of study in massage therapy at a Board-approved school. For these reasons, Count Three fails.

RECOMMENDATION

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

DONE AND ENTERED this 14th day of June, 2013, in Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2013.

ENDNOTES

^{1/} Unless otherwise noted, all statutory and rule references are to the current versions.

^{2/} The undersigned takes official recognition of the public record of the Florida Department of Education concerning FCNH's licensure status, which is available online at <http://app1.fldoe.org/cie/SearchSchools/detail.aspx?schoolid=2217> (last visited June 12, 2013).

^{3/} See § 1005.32(5), Fla. Stat.

^{4/} See Fla. Admin. Code R. 64B7-32.004 (Feb. 27, 2006).

^{5/} According to the enrollment agreement, a tuition fee of \$270.00 was assessed, as well as a transfer fee in the amount of \$250.00.

^{6/} Attached to the enrollment agreement were various forms, including a "Drug Free School Statement"; a FCNH notice of student privacy rights; and a document titled, "Calculation Form for a Graduate From Another Massage Therapy School." See Petitioner's Exhibit 2.

^{7/} See Respondent's Exhibit 19.

^{8/} See Fla. Admin. Code R. 64B7-25.001(1)(d) & (1)(f) (Mar. 31, 2008); see also § 456.013(7), Fla. Stat. (2008) ("The boards, or the department when there is no board, shall require the completion of a 2-hour course relating to prevention of medical errors as part of the licensure and renewal process. . . . The course shall be approved by the board or department, as appropriate").

^{9/} See Fla. Admin. Code R. 64B7-32.002 (Feb. 21, 1996).

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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.