

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MASSAGE THERAPY,

Petitioner,

vs.

Case Nos. 14-2551  
14-2552PL

HONG TANG LONG LIFE THERAPY  
MASSAGE AND HONG TANG, L.M.T.,

Respondents.

\_\_\_\_\_ /

RECOMMENDED ORDER

On November 10, 2014, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Karine Gialella, Esquire  
Casie Barnette, Esquire  
Jennifer Fortenberry, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

For Respondents: Jack A. Goldberger, Esquire  
Atterbury, Goldberger & Weiss, P.A.  
Suite 1400  
250 Australian Avenue, South  
West Palm Beach, Florida 33401

Leonard Feuer, Esquire  
Leonard Feuer, P.A.  
Suite 1400  
250 Australian Avenue, South  
West Palm Beach, Florida 33401

## STATEMENT OF THE ISSUES

The issues in both cases is whether the respondents violated section 480.046(1)(o), Florida Statutes (2012), which prohibits a violation of any provision within chapter 480 or any rule adopted pursuant to chapter 480, and, if so, what penalty should be imposed. In DOAH Case 14-2552PL, the specific issue is whether Respondent Hong Tang (Respondent Tang) violated section 480.0485 by using the massage therapist-patient relationship to induce or attempt to induce patients to engage in sexual activity outside the scope of the practice of massage therapy. In DOAH Case 14-2551, the specific issue is whether Respondent Tang owned and practiced massage therapy at Respondent Hong Tang Long Life Therapy Massage (HTLLTM) and whether Respondent Tang violated Florida Administrative Code Rule 64B7-26.010(2) by engaging in, or attempting to engage in, sexual activity, indirectly or directly, within the massage establishment and outside the scope of her practice of massage therapy.

## PRELIMINARY STATEMENT

In DOAH Case 14-2552PL, the Administrative Complaint alleges that Respondent Tang is licensed to practice massage therapy in Florida. In July and August 2013, Respondent Tang allegedly owned Respondent HTLLTM where she practiced massage therapy.

On August 22, 2013, a deputy sheriff with the Palm Beach County Sheriff's Office allegedly visited Respondent HTLLTM where

he encountered Respondent Tang. The deputy allegedly asked the price for a massage, and Respondent Tang allegedly answered, \$50 for one half-hour. Respondent Tang then allegedly motioned with her hand cupped in an up and down motion, indicating that she would manually masturbate the deputy's penis for an additional \$30.

The Administrative Complaint alleges that Respondent Tang violated section 480.046(1)(o) "by using the massage therapist-patient relationship to induce or attempt to induce patients to engage in sexual activity outside the scope of the practice of massage therapy."

In DOAH Case 14-2551, the Administrative Complaint alleges that Respondent HTLLTM was licensed to operate as a massage establishment, holding license number MM 28993, and Respondent Tang owned and practiced massage therapy at Respondent HTLLTM. The Administrative Complaint also alleges the August 22 incident described above.

The Administrative Complaint alleges that Respondent HTLLTM violated section 480.046(1)(o) by violating rule 64B7-26.010 through the actions of its owner, Respondent Tang, "who engaged in, or attempted to engage in, sexual activity, either directly or indirectly, within the massage establishment and outside the scope of her practice of massage therapy."

Respondents requested a formal hearing.

At the hearing, Petitioner called five witnesses and offered into evidence three exhibits: Petitioner Exhibits 9, 10, and 14, which were admitted. Respondents called no witnesses and offered no exhibits.

The court reporter filed the transcript on November 26, 2014. The parties filed their proposed recommended orders on December 26, 2014.

#### FINDINGS OF FACT

1. Respondents hold Florida massage therapy licenses. At all material times, Respondent Tang, a 50-year-old female who was born in China and moved to the United States in 2008, owned and performed massage therapy at Respondent HTLLTM.

2. In May 2013, an advertisement appeared in backpage.com with the telephone number and address of Respondent HTLLTM, although the ad named neither respondent. The ad described massage services and prices and contained three photographs, but neither the text nor the photographs contained any sexual content or promise of sexual activity.

3. On August 22, 2013, at about 10:00 a.m., a deputy sheriff of the Palm Beach County Sheriff's Office telephoned Respondent HTLLTM and spoke with Respondent Tang about obtaining a massage. There is no indication of any sexual content in this brief conversation.

4. Shortly after concluding his conversation with Respondent Tang, the deputy sheriff, who was dressed in casual clothes, drove to Respondent HTLLTM, where he entered the front door, posing as a customer. No one else was present in the establishment except Respondent Tang, who invited the deputy into a massage room.

5. Nothing in the massage room indicated the availability of sexual activity. In the corner of the room was a basket. The parties disputed whether the basket contained sexual aids. It is unnecessary to determine the nature of the basket's contents because the deputy testified that he saw no sexual aids on entering the massage room and the contents of the basket were not visible unless someone stood beside the basket and looked down.

6. Once they were in the massage room, the deputy and Respondent Tang negotiated a price for a massage, which was \$50 for one half-hour. The deputy asked if the massage was "full service." This is the first reference to sexual activity in any conversation between the deputy and Respondent Tang.

7. Respondent Tang responded with a hand motion, in which she formed a circle with her hand while moving it up and down, indicating by gesture that she would manually masturbate the deputy's penis. Respondent Tang did not verbally describe the service, but said that the additional cost would be \$30.

8. Signaling his intent to purchase a massage with masturbation of his penis, the deputy offered Respondent Tang \$80 in the form of four \$20 bills. After Respondent Tang accepted the payment, the deputy excused himself on some pretext, allowing other law enforcement officers to enter the establishment and execute a search warrant.

9. Manual masturbation of the deputy's penis would have been outside the scope of practice of massage.

CONCLUSIONS OF LAW

10. DOAH has jurisdiction. §§ 120.569, 120.57(1), and 480.046(4), Fla. Stat. (2012).

11. Section 480.0485 prohibits "sexual misconduct in the practice of massage therapy." The statute defines "sexual misconduct" as the use by the therapist of the massage therapist-patient relationship "to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient."

12. Florida Administrative Code Rule 64B7-26.010 provides in part:

(1) Sexual activity by any person or persons in any massage establishment is absolutely prohibited.

(2) No massage establishment owner shall engage in or permit any person or persons to engage in sexual activity in such owner's

massage establishment or use such establishment to make arrangements to engage in sexual activity in any other place.

\* \* \*

(4) As used in this rule, "sexual activity" means any direct or indirect physical contact by any person or between persons which is intended to erotically stimulate either person or both or which is likely to cause such stimulation . . . . For purposes of this subsection, masturbation means the manipulation of any body tissue with the intent to cause sexual arousal. As used herein, sexual activity can involve the use of any device or object . . . .

13. Section 480.046(1) (o) provides for disciplinary action, as specified in section 456.072(2), for a licensee's "[v]iolating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto."

14. Petitioner must prove the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

15. A respondent may not be found guilty of an offense with which she has not been charged. See, e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005) (administrative complaint charged physician with a failure to make medical records; proof of a failure to retain medical records cannot support a finding of guilt).

16. The charge against Respondent Tang involves sexual misconduct. Petitioner has proved by clear and convincing

evidence that Respondent Tang attempted to engage the deputy in sexual activity outside the scope of practice, but Petitioner never charged Respondent Tang with this offense.

17. Instead, Petitioner charged Respondent Tang only with inducing or attempting to induce the deputy to engage in sexual activity. The first definition of "induce" in the online Merriam Webster dictionary is "to move by persuasion or influence."<sup>1/</sup> According to the deputy's testimony, he initiated the issue of sexual activity. Up to the point that the deputy asked how much a full-service massage would be, Respondent Tang had not suggested sexual activity--either directly in her conversations with the deputy or indirectly in the backpage.com advertisement. Even assuming that the basket in the massage room contained sexual aids, it could not serve as an inducement to engage in sexual activity because the basket's contents were not readily visible. Respondent Tang's first allusion to sexual activity was to accept the deputy's offer to engage in sexual activity.

18. On these facts, the causative agent of sexual activity, if it had taken place, would have been the deputy, not Respondent Tang. See St. Johns River Water Mgmt. Dist. v. Fernberg Geological Servs., 784 So. 2d 500, 505 (Fla. 5th DCA 2001). An accepted counteroffer does not relieve the original offeror of the fact of having induced or attempted to have induced a



transaction. See, e.g., Ciampi v. Ogden Chrysler Plymouth, 262 Ill. App. 3d 94, 634 N.E. 2d 448 (1994).

19. The present case resembles the case of an undercover law enforcement officer "soliciting" an offer to engage in sex with a minor, and the perpetrator responding to the solicitation being found guilty of soliciting sex with a minor. These were the facts in State v. Murphy, 124 So. 3d 323 (Fla. 1st DCA 2013), in which the defendant was charged with using a computer service to solicit a parent to engage in sexual activity with the parent's child.

20. The defendant responded to an online advertisement on craigslist posted by a law enforcement officer posing as the child's father. The title of the ad was: "Need a discreet male for young female." The defendant responded with an email asking if the poster was still looking for a man. The law enforcement officer responded by indicating that the child had liked the picture that the defendant had sent, had had a bad sexual experience previously, and was looking for an older man. The email concluded with a request that the defendant tell more about himself.

21. The defendant replied by stating that he was a 22-year-old massage therapist, "really down to earth and chill." He loved "music and . . . the outdoors." He would show the child "a good time" and "not take advantage of her." He would show her

that "all guys aren't pieces of shit." He also promised to use protection.

22. The defendant was convicted of the charge. On appeal, the court affirmed, rejecting the defendant's argument that the "father," not the defendant, solicited the unlawful sexual contact; the defendant merely accepted the offer. The court aptly pointed out that the defendant had embarked on the task of "soliciting the father's consent and trying to close the deal." Id. at 328.

23. Respondent Tang engaged in no such inducing behavior. At most, she reduced the scope of the sexual activity by exhibiting a willingness only to masturbate the deputy's penis rather than provide the full-service sex about which he had asked.

24. The charge against Respondent HTLLTM involves sexual activity, as distinguished from sexual misconduct. Sexual activity is physical contact intended to cause erotic stimulation. The rule addresses direct and indirect physical contact, but indirect contact presumably means that the contact is mediated through clothing or a device; the modifier, "indirect," does not eliminate the requirement of some form of physical contact.

25. As noted above, no physical contact of any nature took place between the deputy and Respondent Tang, so the liability of

Respondent HTLLTM depends on whether the rule also imposes liability on the massage establishment for some form of attempted physical contact by Respondent Tang. As Petitioner noted in its proposed recommended order, disciplinary provisions must be construed strictly, and any ambiguities must be construed in favor of the licensee. See, e.g., McClung v. Criminal Justice Standards & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984).

26. The Administrative Complaint and Petitioner's Unilateral Pre-Hearing Stipulation filed on August 18, 2014, mention only rule 64B7-26.010(1), (2), and (4) as grounds for disciplining Respondent HTLLTM. Rule 64B7-26.010(1) prohibits sexual activity by any person in a massage establishment, and rule 64B7-26.010(4) defines "sexual activity." Obviously, the definitional provision, in itself, does not impose liability on a massage establishment. The clear effect of rule 64B7-26.010(1) is to prohibit a person from performing sexual activity in a massage establishment; the prohibition applies to the person, not the establishment. The reference to "massage establishment" in this provision identifies the location of the prohibited sexual activity and does not attempt to establish some form of vicarious liability of the establishment for the prohibited act of person. Consistent with the authority in McClung, supra, it is impossible

to read rule 64B7-26.010(1) as imposing a duty on the establishment.

27. Rule 64B7-26.010(2) arguably imposes a duty on the massage establishment by its reference to the "massage establishment owner." But this provision prohibits the owner from engaging in or permitting any person to engage in sexual activity--meaning actual physical contact--in the owner's massage establishment. Although Petitioner proved that Respondent Tang owned Respondent HTLLTM, it did not prove physical contact between Respondent Tang and the deputy. Rule 64B7-26.010(2) also prohibits "arrangements to engage in sexual activity," so as to capture attempts that did not result in actual physical contact, but this prohibition applies only to arrangements for sexual activity offsite.

28. The sole subsection omitted from the Administrative Complaint and Unilateral Pre-Hearing Stipulation is rule 64B7-26.010(3), which prohibits a "licensed massage therapist" from using the therapist-client relationship "to engage in sexual activity with any client or to make arrangements to engage in sexual activity with any client." The reference to making arrangements to engage in sexual activity is not limited to offsite locations, so this rule would capture attempts to engage in actual physical contact at the establishment, such as what occurred in this case. But rule 64B7-26.010(3) is not available

as a basis for proving the liability of Respondent HTLLTM because the rule applies to the therapist, not the establishment, and, probably for this reason, Petitioner never pleaded this rule provision as a basis for disciplining Respondent HTLLTM.

RECOMMENDATION

It is

RECOMMENDED that the Board of Massage Therapy enter a final order finding Respondent Hong Tang and Respondent Hong Tang Long Life Therapy Massage not guilty of the allegations contained in the administrative complaints.

DONE AND ENTERED this 31st day of December, 2014, in Tallahassee, Leon County, Florida.



---

ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of December, 2014.

ENDNOTE

<sup>1/</sup> Merriam Webster online dictionary at <http://www.merriam-webster.com/dictionary/induce>.

COPIES FURNISHED:

Leonard Feuer, Esquire  
Leonard Feuer, P.A.  
Suite 1400  
250 Australian Avenue, South  
West Palm Beach, Florida 33401  
(eServed)

Jack Alan Goldberger, Esquire  
Atterbury, Goldberger & Weiss, P.A.  
Suite 1400  
250 Australian Avenue, South  
West Palm Beach, Florida 33401  
(eServed)

Mitchell J. Beers, Esquire  
Mitchell J. Beers and Associates, P.A.  
Prosperity Gardens, Suite 204  
11380 Prosperity Farms Road  
Palm Beach Gardens, Florida 33410

Casie Marye Barnette, Esquire  
Department of Health  
Bin C-65  
4052 Bald Cypress Way  
Tallahassee, Florida 32399  
(eServed)

Christy Robinson, Executive Director  
Board of Massage Therapy  
Department of Health  
Bin C-06  
4052 Bald Cypress Way  
Tallahassee, Florida 32399  
(eServed)

Jennifer Tschetter, General Counsel  
Department of Health  
Bin A-02  
4052 Bald Cypress Way  
Tallahassee, Florida 32399-1701  
(eServed)

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.