

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 14-3041PL

HONG YANG, LMT,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was held in the above-styled case on August 29, 2014, by video teleconference with sites in Tampa and Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lealand Lane McCharen, Esquire
Cecilie Dale Sykes, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Alex Yu, Esquire
Law Office of Alex Yu, P.A.
15255 Amberly Drive
Tampa, Florida 33647

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed sexual misconduct in the practice of massage, and if so, what disciplinary action should be taken against Respondent's license.

PRELIMINARY STATEMENT

On April 1, 2014, the Department of Health (Department or Petitioner) issued an administrative complaint on behalf of the Board of Massage Therapy against Respondent Hong Yang (Respondent), a licensed massage therapist. The complaint set forth factual allegations and charges that Respondent committed sexual misconduct in the practice of massage, and also, that she had been practicing massage without displaying her license.

Respondent disputed the facts and requested an administrative hearing. On June 30, 2014, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge to conduct the requested hearing.

At the parties' joint request, the final hearing was set for August 29, 2014, by video teleconference with sites in Tampa and Tallahassee, Florida, and proceeded as scheduled.

On August 15, 2014, Petitioner moved for leave to file an amended administrative complaint, to correct some dates and to drop the charge of practicing massage therapy without properly displaying the massage therapy license. The motion was granted.

Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation in which they stipulated to several facts that would not require evidence at hearing. The stipulated facts have been incorporated in the Findings of Fact below.

At hearing, Petitioner presented the testimony of Kevin Lapham, a Department investigator and inspector. Petitioner's composite Exhibit 1, a certified copy of Respondent's licensure file (redacted to obliterate personal identifying information), was admitted without objection.

Respondent testified on her own behalf, and did not offer any exhibits. A certified interpreter/translator was present and assisted Respondent with her testimony.

The one-volume Transcript of the final hearing was filed on September 5, 2014. The deadline to file proposed recommended orders (PROs) was September 15, 2014. Petitioner timely filed a PRO; Respondent did not file a PRO. Petitioner's PRO has been considered, along with the hearing record, in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of massage therapy in the state of Florida, pursuant to chapters 20, 456, and 480, Florida Statutes (2013).^{1/}

2. At all times material to this proceeding, Respondent was licensed as a massage therapist in Florida, having been issued license number MA 69679 on or about July 26, 2012. In the short period of time since Respondent has been licensed, no prior disciplinary action has been taken against her license.

3. On December 11, 2013, Respondent was working at Lulu's Massage in West Palm Beach, Florida.

4. That same day, Department of Health investigator/inspector Kevin Lapham conducted an inspection of Lulu's Massage, to determine licensure status of individuals working there and to determine compliance with licensure requirements.

5. Mr. Lapham entered one of the massage rooms at Lulu's Massage, without knocking first.

6. Mr. Lapham observed the following upon entering the room: A completely nude male customer was lying on his back on a massage table. Respondent was standing next to the male, with her hand on his groin and her face near his groin. Respondent was uncovered from her waist to her ankles, with her shorts and underwear pooled around her ankles.

7. When Mr. Lapham entered the room, Respondent reacted by putting her body over the nude male customer's crotch.

8. At hearing, Mr. Lapham positively identified Respondent, without question or hesitation, as the exposed woman he saw with the nude male customer, as described above, at Lulu's Massage on December 11, 2013.

9. Mr. Lapham's testimony was credible, clear, and convincing.

10. Respondent admitted to the intrusion of the Department inspector into the massage room where she was with a male

customer on December 11, 2013. Respondent also admitted that when Mr. Lapham entered the room, both her shorts and her underwear were not in place covering her, because they had been pulled down her legs.

11. Respondent blamed her male customer for pulling down her shorts and her underwear so that they were around her ankles, and claims that she objected to his behavior. Respondent's claim was not credible. Respondent did not step away from the table out of his reach, leave the room, or even pull up her underwear and shorts. Instead, Respondent testified that in reaction to him pulling down her shorts and her underwear, she "tried to comfort him, asking him don't move." While Respondent was comforting her nude male customer, the Department inspector entered the room.

12. Respondent denied that she touched the nude male customer on his groin, but offered no reasonable explanation for Mr. Lapham's contrary testimony.

13. Respondent was arrested by the Juno Police Department on December 11, 2013, and charged with committing, engaging in, or offering to commit prostitution.

14. Respondent testified that the police did not provide her with an interpreter that afternoon, and she did not understand why she was arrested. However, no evidence was offered to prove that the matter was later cleared up, once

Respondent had representation and/or an interpreter to assist her in connection with the criminal charges. No evidence was offered to prove the status or disposition of those charges. While no adverse inferences are drawn from the fact of criminal charges, Respondent's attempt to explain away those charges is not credited.

15. Respondent's testimony characterizing her actions on December 11, 2013, as lawful and legitimate massage therapy was not credible. Instead, Respondent's partial verification of the facts observed by Mr. Lapham adds more weight to his clear and convincing testimony.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

17. Petitioner initiated this disciplinary proceeding pursuant to its authority to prosecute complaints charging violations of the licensing laws governing licensed massage therapists. § 456.073, Fla. Stat.

18. In this penal proceeding, Petitioner has the burden of pleading with particularity in the administrative complaint the facts and law on which it relies to take disciplinary action against Respondent. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d

1371, 1372 (Fla. 1st DCA 1996); Willner v. Dep't of Prof'l Reg., Bd. of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990). The amended administrative complaint meets these standards.

19. In addition, Petitioner has the burden to prove the complaint's allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). As stated by the Florida Supreme Court:

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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), (quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). Accord Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

20. Respondent is charged with engaging in sexual misconduct in the practice of massage, in violation of sections 480.0485 and 456.063(1), Florida Statutes, for which Respondent is subject to discipline pursuant to sections 480.046(1)(p) and 456.072(1)(v), Florida Statutes.

21. Section 480.0485 provides as follows:

The massage therapist-patient relationship is founded on mutual trust. Sexual misconduct in the practice of massage therapy means violation of the massage therapist-patient relationship through which the massage therapist uses that 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. Sexual misconduct in the practice of massage therapy is prohibited.

A similar, but less specific, provision prohibiting "sexual misconduct" in the practice of a health care profession is set forth in section 456.063(1).

22. Section 480.033(3), Florida Statutes, defines "massage":

"Massage" means the manipulation of the soft tissues of the human body with the hand, foot, arm, or elbow, whether or not such manipulation is aided by hydrotherapy, including colonic irrigation, or thermal therapy; any electrical or mechanical device; or the application to the human body of a chemical or herbal preparation.

23. When Respondent was discovered tending to a completely nude male customer, with her hand on his groin and her face near his groin, Respondent was engaged in sexual activity with her patient, outside the scope of legitimate, lawful massage practice. Respondent does not argue otherwise, and instead denied that she was engaged in these activities. As found above, that denial was not credible.

24. Respondent's admission that she was nude below the waist, with her shorts and her underwear pulled down below her ankles, is an admission that Respondent was engaged in sexual activity outside the scope of legitimate lawful massage practice. Respondent does not argue that it is within the scope of legitimate lawful massage practice for a massage therapist to provide services while nude from the waist down. Instead, Respondent attempted to blame her exposed state on her nude male customer. As found above, that explanation was not credible.

25. Petitioner proved by clear and convincing evidence that Respondent was engaged in sexual misconduct in the practice of her health care profession, massage therapy, in violation of sections 480.0485 and 456.063(1). Respondent is subject to discipline for violating these statutes, pursuant to sections 480.046(1)(p) and 456.072(1)(v).

26. The disciplinary guidelines rule adopted by Respondent's licensing board, the Board of Massage Therapy, offers guidance for considering the appropriate penalty. This rule provides that in the normal case, the discipline for a violation of the sexual misconduct prohibition in either section 480.0485 or section 456.063(1) should be license revocation plus a fine of \$2,500.00. Fla. Admin. Code R. 64B7-30.002.

27. Rule 64B7-30.002(3) sets forth possible aggravating and mitigating circumstances that might warrant deviation from the

normal penalty. In this case, no particularly weighty factors were proven either way. Respondent has no prior discipline, but she has only been licensed since 2012. The offense is a very serious breach of the profession, but that is taken into account in the disciplinary guideline. The normal penalty should apply.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Massage Therapy enter a final order imposing a fine of \$2,500.00 against Respondent, Hong Yang, and revoking her license to practice massage therapy.

DONE AND ENTERED this 3rd day of October, 2014, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of October, 2014.

ENDNOTE

^{1/} All references to Florida Statutes are to the 2013 codification, the law in effect when the actions at issue occurred.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.