

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 15-1103

QUEEN SPA, INC.,

Respondent.

_____/

DEPARTMENT OF HEALTH,
BOARD OF MASSAGE THERAPY,

Petitioner,

vs.

Case No. 15-1565PL

JIANPING LIU, L.M.T.,

Respondent.

_____/

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) heard this case by video teleconference on August 5, 2015, at sites in Fort Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: Louise Wilhite-St. Laurent, Esquire
Shoshana Jean Silver, Esquire
Lucas Lawrence May, Esquire
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Prosecution Services Unit
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For Respondent: Vana Renejuste, Esquire
Renejuste Law and Associates
3049 Cleveland Avenue, Suite 140
Fort Myers, Florida 33901

STATEMENT OF THE ISSUES

A. Did Respondent, Jianping Liu, L.M.T. (Ms. Liu), induce patients N.D. and J.H. to engage in sexual activity or engage in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment?

B. Did Ms. Liu massage patient N.D. at a location not licensed as a massage establishment and without exemption?

C. Did sexual misconduct occur in Respondent, Queen Spa, Inc.'s (Queen Spa), massage establishment?

D. Did Queen Spa's backpage.com and anyitem.org advertisements induce or attempt to induce, or engage or attempt to engage, clients in unlawful sexual misconduct?

E. Did Queen Spa fail to include its license number in its backpage.com and anyitem.com advertisements?

PRELIMINARY STATEMENT

Petitioner, Department of Health (Department), Board of Massage Therapy, filed its Administrative Complaint against Ms. Liu on November 7, 2014, and filed a separate complaint against Queen Spa on December 30, 2014. The complaint against Ms. Liu alleges she performed sexual activities with two patients in violation of section 480.0485, Florida Statutes (2014).^{1/} The complaint also alleges Ms. Liu performed a massage at an

unlicensed location without qualifying exemption in violation of section 480.046(1)(o).

The complaint against Queen Spa alleges sexual activity occurred within its establishment in violation of Florida Administrative Code Rule 64B7-26.010. The Complaint also alleges Queen Spa advertised "erotic pleasure," without including its license number in violation of sections 480.046(1)(e) and 480.0465.

Ms. Liu and Queen Spa requested a formal administrative hearing. The Department referred the matters to DOAH to conduct the hearings. The cases were consolidated. The hearing was noticed for April 15, 2015, and was reset for August 5, 2015.

The undersigned conducted the hearing on August 5, 2015. Four witnesses testified for the Department: Christy Robinson; Patient N.D.; Jennifer Mason; and Ms. Liu. The Department submitted Patient J.H.'s deposition (with attached exhibits) in lieu of live testimony as Exhibit 15. The Department's Exhibits 3, 10, 13, 15, and 18 through 21 were admitted in evidence. The parties timely filed proposed recommended orders. They were considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Section 20.43 and chapters 456 and 464, Florida Statutes, charge the Department with licensing and regulation of massage therapy.

2. At all times material to the allegations in the Administrative Complaint, Ms. Liu was a licensed massage therapist in the State of Florida. She holds license MA 68834.

3. At all times material to the allegations in the Administrative Complaint, Queen Spa was a licensed massage therapy establishment in the State of Florida. It holds license MM 32567 registered at 10915 Bonita Beach Road, Unit 1121, Bonita Springs, Florida 34135, and license MM 32546 registered at 51 9th Street South, Naples, Florida 34102.

4. Patient N.D. was a criminal investigation detective for the narcotics and vice division of Lee County Sheriff's Office.

5. On March 27, 2014, N.D., as part of an undercover investigation, scheduled an appointment for a massage at Ms. Liu's home, 9951 Utah Street, Bonita Springs, Florida 34135.

6. During the massage, Ms. Liu touched N.D.'s penis and asked if he wanted it massaged. N.D. offered an additional \$50.00 tip and Ms. Liu began masturbating his penis. Ms. Liu was charged with prostitution. On April 30, 2014, Ms. Liu entered into a deferred prosecution agreement with the Lee County State Attorney's Office.

7. Ms. Liu's home on Utah Street has a home occupational license issued by the city for a massage therapy administration office. It is not a licensed massage establishment.

8. J.H. is a police officer in the crime suppression unit for the City of Naples, Florida. On May 9, 2014, the Naples Police Department began investigating Ms. Liu's massage parlor.

9. On July 24, 2014, J.H., as part of an undercover investigation, scheduled a massage appointment with Ms. Liu at the Queen Spa in Naples. After the massage, J.H. gave Ms. Liu a \$20.00 tip and she gave him a separate business card. She explained this card was for "special customers" and had a different phone number than her regular card.

10. J.H. scheduled a second massage for July 29, 2014. At some point near the end of that massage, J.H. asked if Ms. Liu offered special or extra services. Ms. Liu replied by asking if he was trouble or a cop. J.H. asked how much it would cost, but Ms. Liu did not take additional payment. Ms. Liu then began masturbating J.H.'s penis until he ejaculated.

11. Ms. Liu contends that penis manipulation is part of a "full body" massage. But she testified during the hearing that this was an additional service to the full body massage. Further, she testified that she only conducted each "extra service," because J.H. and N.D. requested it. This establishes that masturbation was not part of the massage. It was a sexual service. Testimony of the expert witness Jennifer Mason also proves this fact.

12. Backpage.com is a classified advertising website that contains listings explicitly for prostitution. The adult entertainment section of backpage.com is linked to the majority of the Naples police investigations into prostitution.

13. Ms. Liu posted ads for Queen Spa on backpage.com and anyitem.org. The backpage.com ad titled "erotic pleasure" was listed in the adult services section. The anyitem.org ad titled "erotic pleasure" was listed in the escort section. Ms. Liu contends the postings did not advertise sexual services and that the application on her phone mistranslated the word erotic from Mandarin to English. However, the character of backpage.com and posting the advertisements as adult services, rather than as massage services, supports the conclusion the postings advertised sexual activities.

14. The backpage.com and anyitem.com advertisements did not include the license number of Queen Spa.

15. Touching of the genitalia is not within the scope of a full body massage. Stimulation of the genital area is considered sexual misconduct. It is not part of an ethical massage. There is no therapeutic value to massaging a client's penis.

16. Sexual innuendo or stimulation is a problem in massage therapy. The industry has worked to remove it from the practice to create a safe and therapeutic environment. Training of massage therapists requires them to "decline, leave the room,

terminate the massage" when sexual stimulation is requested by a patient.

17. When discussing "extra services," Ms. Liu told J.H. about her friend who got into trouble after performing certain acts and that the friend had lost her license; "no license, no job".

18. Ms. Liu engaged in sexual misconduct with J.H. just three months after she signed a deferred prosecution agreement disposing of the Lee County charges.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2015).

20. Section 480.046(1)(p) authorizes the Board of Massage Therapy (Board) to impose discipline against a licensee for violating any provision of chapters 480 and 456, or the rules adopted by the Board.

21. Section 480.0485 prohibits sexual misconduct in the practice of massage therapy. "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.”

22. Section 480.046(1)(o) authorizes the Board to impose discipline against a licensee for “[p]racticing massage at a site, location, or place which is not duly licensed as a massage establishment, except that a massage therapist, . . . may provide massage services . . . at the residence of a client, at the office of the client, at a sports event, at a convention, or at a trade show.”

23. Rule 64B7-26.010, “absolutely” prohibits sexual activity by any person or persons in any massage establishment. Sexual activity is defined as “direct or indirect physical contact . . . which is intended to erotically stimulate either person or both or which is likely to cause such stimulation and includes . . . masturbation. For purposes of this subsection, masturbation means the manipulation of any body tissues with the intent to cause sexual arousal.”

24. Section 480.046(1)(e) authorizes the board to impose discipline against a licensee for “[a]dvertising to induce or attempt to induce, or to engage or attempt to engage, the client in unlawful sexual misconduct as described in section 480.0485.”

25. Section 480.0465 requires each licensed massage establishment to include its license number in any advertisement of massage services.

26. This is a proceeding to take disciplinary action against Ms. Liu's massage therapy license and Queen Spa's massage therapy establishment license. Because this is a penal proceeding, the Department must prove its allegations by clear and convincing evidence. Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205 (Fla. 1st DCA 1995). As the Supreme Court of Florida stated, quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983):

[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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

27. In disciplinary proceedings, the statutes and rules allegedly violated must be strictly construed in favor of the licensee. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988).

28. Clear and convincing evidence proved that Ms. Liu agreed to engage in and engaged in sexual activity with J.H. during his massage at Queen Spa on July 29, 2015.

29. Clear and convincing evidence proved that Ms. Liu agreed to and engaged in sexual activity with N.D. during his massage at Ms. Liu's home on March 27, 2014.

30. Clear and convincing evidence established that the advertisements for Queen Spa on backpage.com and anyitem.org were to induce sexual misconduct and did not include its license number.

31. Section 480.046 permits the Board of Massage Therapy to impose the following penalties: suspension or permanent revocation of a license; restriction of practice of license; imposition of an administrative fine; issuance of a reprimand or letter of concern; placement of the licensee on probation for a period of time; corrective action; and/or requirement that the practitioner undergo remedial education.

32. Rule 64B7-30.002, establishes the penalty guidelines for violations. Ms. Liu violated sections 480.0485 and 480.046(1)(o).

33. The penalty for violating section 480.0485 is a \$2,500.00 fine and revocation of the massage therapist's license.

34. The penalty for violating section 480.046(1)(o) is a \$250.00 fine.

35. Queen Spa violated sections 480.046(1)(e), 480.0465, and section 480.046(1)(p) by violating Rule 64B7-26.010.

36. The penalty for violating section 480.046(1) (p) by violating Rule 64B7-26.010, is a \$2,500.00 fine and revocation of the license.

37. The penalty for violating section 480.046(1) (e) is a \$1,000.00 fine and suspension of the license.

38. The penalty for violating section 480.0465 is a \$500.00 fine and reprimand of the license.

39. Rule 64B7-30.002(4) provides aggravating and mitigating circumstances the board may use to deviate from penalties for violations charged:

- (a) The danger to the public;
- (b) The length of time since the violation;
- (c) The number of times the licensee has been previously disciplined by the Board;
- (d) The length of time licensee has practiced;
- (e) The actual damage, physical or otherwise, caused by the violation;
- (f) The deterrent effect of the penalty imposed;
- (g) The effect of the penalty upon the licensee's livelihood;
- (h) Any effort of rehabilitation by the licensee;
- (i) The actual knowledge of the licensee pertaining to the violation;
- (j) Attempts by licensee to correct or stop violation or refusal by licensee to correct or stop violation;

(k) Related violations against licensee in another state including findings of guilt or innocence, penalties imposed and penalties served;

(l) Actual negligence of the licensee pertaining to any violation;

(m) Penalties imposed for related offenses under subsections (1) and (2) above;

(n) Any other mitigating or aggravating circumstances.

40. Factors (f), (i), (j), and (n) are relevant in this case. They weigh as aggravating factors. Ms. Liu advertised and performed sexual services at Queen Spa less than three months after signing a deferred prosecution agreement for prostitution based on sexual services performed at her home. Ms. Liu knew that performing sexual services would jeopardize her license. These factors emphasize that it is unlikely that Ms. Liu will change her conduct. Ms. Liu's conduct directly interferes with the safe practice of massage therapy by others.

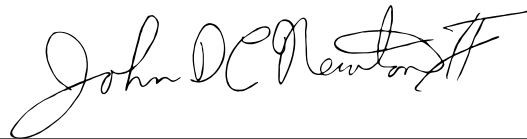
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Department of Health, Board of Massage Therapy, enter a final order: finding that Respondent, Jianping Liu, L.M.T., violated sections 480.0485 and 480.046(1)(o), Florida Statutes; revoking her license; requiring the payment of an administrative fines in the amount of

\$2,750.00; and awarding costs for the investigation and prosecution of this case to the Department.

Based on the foregoing Findings of Fact and Conclusions of Law, it is also RECOMMENDED that Petitioner, Department of Health, Board of Massage Therapy, enter a final order: finding that Respondent, Queen Spa, Inc., violated sections 480.046(1)(e) and 480.0465, Florida Statutes, and Florida Administrative Code Rule 64B7-26.010; revoking its license; requiring the payment of an administrative fine in the amount of \$4,000.00; and awarding costs for the investigation and prosecution of this case to the Department.

DONE AND ENTERED this 2nd day of October, 2015, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of October, 2015.

ENDNOTE

^{1/} All citations to the Florida Statutes are to the 2014 edition unless stated otherwise.

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.