

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 15-1175PL

JOHN D. NIELSEN-COLLINS, L.M.T.,

Respondent.

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RECOMMENDED ORDER

On May 1, 2015, a hearing was held by video teleconference at locations in West Palm Beach and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lindsay Annette Wells Grogan, Esquire  
Louise Wilhite-St Laurent, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: John D. Nielsen-Collins, L.M.T., pro se  
321 Fordham Drive  
Lake Worth, Florida 33460

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent engaged in sexual misconduct in the practice of massage therapy in violation

of section 480.0485, Florida Statutes, and if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On March 5, 2015, Petitioner, Department of Health (Department), issued an Amended Administrative Complaint against Respondent, John D. Nielsen-Collins, L.M.T. The complaint charged Respondent with sexual misconduct in the practice of massage therapy, in violation of section 480.0485. Respondent disputed material facts alleged in the complaint and requested an administrative hearing.

At hearing, Petitioner offered seven exhibits, admitted as Exhibits P-1 through P-7. These included the deposition of Ms. Iris Burman, L.M.T., who was unavailable as a live witness. Petitioner also offered the testimony of Ms. Amy Senior, investigation manager at the Department; S.T., complainant and patient at Village Chiropractic and Healing Arts Center (VCHAC); and Ms. Samantha Trevegno, office manager at VCHAC. Respondent testified himself and offered the testimony of his mother, Ms. Annetta Nielsen, L.M.T. Respondent also offered three exhibits, admitted as Exhibits R-1 through R-3.

The one-volume final hearing Transcript was filed on June 4, 2015. Petitioner timely filed a Proposed Recommended Order on June 15, 2015. It was considered in preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect on September 22, 2014, the date that the violation was allegedly committed.

#### FINDINGS OF FACT

1. The Department of Health, Board of Massage Therapy, is the state agency charged with regulating the practice of massage therapy in the state of Florida, pursuant to section 20.43, and chapters 456 and 480, Florida Statutes.

2. At all times material to this proceeding, Mr. John D. Nielsen-Collins was licensed as a massage therapist in Florida, having been issued license number MA 63151.

3. At all times material to this proceeding, Mr. Nielsen-Collins worked as an independent contractor at VCHAC in West Palm Beach, Florida.

4. S.T., an adult female, started receiving massages at VCHAC in 2012. Her physical therapist had recommended massage to help manage some scarring associated with endometriosis and pelvic adhesive disease. S.T. would receive a standard "deep tissue" full body massage about every week or ten days, almost always from Mr. Nielsen-Collins.

5. On September 22, 2014, S.T. went to VCHAC for a massage. She greeted Mr. Nielsen-Collins. He then left the room while she got undressed. She laid face-up on the massage table, covered with

draping. Mr. Nielsen-Collins began the massage as usual, massaging her neck, arms, and legs. She then flipped over to a prone position and he massaged her back and upper portions of her buttocks with firm kneading, as he always did.

6. Mr. Nielsen-Collins then began to massage the lower portions of her buttocks. Rather than kneading, it was more of a light rub, which S.T. described as much more "sensual" in nature. Mr. Nielsen-Collins used both hands on either side of S.T.'s buttocks to spread the cheeks and expose her anus. In progressive steps, he moved his hands closer and closer toward S.T.'s anus, finally rubbing it through her thong. This contact was not accidental. S.T. flinched, and Mr. Nielsen-Collins removed his hands from her buttocks.

7. S.T. felt uncomfortable, but she was trying to convince herself that it was just a mishap. She "let it go because when I flinched, he did move away."

8. The draping was moved to expose S.T.'s right leg, and Mr. Nielsen-Collins began massaging it, beginning at the calf and moving up toward her thigh. She noticed he was gradually pulling her right leg apart from her other leg, further exposing her. He started to rub her inner thigh, and then began to massage S.T.'s vagina through her underwear. S.T. testified that it did not feel like a massage, but like an "attempted arousal." This contact was not accidental. Mr. Nielsen-Collins then asked her, "How is the

pressure?" S.T. reached behind her in an attempt to remove Mr. Nielsen-Collins's hand. Mr. Nielsen-Collins took S.T.'s hand and held onto it, preventing her from removing his other hand from her vagina. S.T. then tried to move her right shoulder to twist around, and then the hand that was holding her hand pressed down on her back, steadying her in position. S.T. closed her legs tighter, and Mr. Nielsen Collins removed his hand.

9. Mr. Nielsen-Collins let go of S.T.'s shoulder and covered her to the waist. He rubbed her back for a moment. He fanned out the cover and put it on her back. He said that the massage was complete and left the room.

10. S.T. was confused and extremely hurt. She testified that she had trusted Mr. Nielsen-Collins for a year-and-a-half. She was in a vulnerable position and he was supposed to be professional, but he had absolutely violated her trust.

11. She got up, got dressed, left a tip on the counter as she always did, and walked out. She left the building, got in her car, and drove off. When she got to the corner, she determined she had to report the incident, pulled to the side of the road, and called VCHAC on her cell phone. She asked the person who answered to let her speak with the manager. She then told Ms. Samantha Trevegno, the office manager, that she had had an "inappropriate experience" during her appointment, and explained

how she had been touched inappropriately by Mr. Nielsen-Collins. S.T. never returned to VCHAC for another massage.

12. Mr. Nielsen-Collins had left VCHAC to go to a local supermarket. When he returned, Ms. Trevegno told him she wanted to talk to him in the pilates studio. She told Mr. Nielsen-Collins that she had received a call from S.T. alleging an inappropriate massage. Mr. Nielsen-Collins did not ask Ms. Trevegno what S.T. had claimed happened, but instead immediately became visibly upset, teared up, and stated, "I thought she was sweet on me, too." He told Ms. Trevegno that he knew that she needed to end his contract with VCHAC.

13. Ms. Trevegno left and talked to Dr. Horowitz, the chiropractic doctor at VCHAC. When she returned she told Mr. Nielsen-Collins that he should leave. Mr. Nielsen-Collins asked if he should talk to the doctor. Ms. Trevegno said, "No, he wants you to go."

14. S.T. did not request that Mr. Nielsen-Collins massage the area between S.T.'s buttocks, her anus, or her vagina. Mr. Nielsen-Collins did not request permission to touch the area between S.T.'s buttocks, her anus, or her vagina and she did not give him consent to do so.

15. Consistent with the testimony of Ms. Iris Burman, L.M.T., Mr. Nielsen-Collins's touching of the area between S.T.'s buttocks, her anus, and her vagina, as described here, was

outside the scope of generally accepted examination or treatment of massage therapy patients.

16. Mr. Nielsen-Collins's contrary contention, to the effect that he only performed standard massage techniques on patient S.T., and that her perception that she had been inappropriately touched must have been based upon transfer of sensation was not credible, and is rejected.

17. Mr. Nielsen-Collins used the massage therapist-patient relationship to engage in sexual activity and to attempt to induce patient S.T. to engage in sexual activity. Mr. Nielsen-Collins engaged in sexual misconduct in the practice of massage therapy.

18. Mr. Nielsen-Collins has never had any prior discipline imposed against his license.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 480.046(4), 120.569 and 120.57(1), Florida Statutes.

20. Petitioner has authority to investigate and file administrative complaints charging violations of the laws governing licensed massage therapists. § 456.073, Fla. Stat.

21. A proceeding 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). Petitioner must therefore prove the charges against Respondent by clear and convincing evidence. Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

22. The clear and convincing standard of proof has been described 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 Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

23. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992).



24. Respondent is charged with engaging in sexual misconduct in the practice of massage, in violation of section 480.0485, which provides:

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.

25. In a related context, Florida Administrative Code Rule 64B7-26.010 defines the term "sexual activity" in part as "any direct or indirect physical contact by any person or between persons that is intended to erotically stimulate either person or both, or which is likely to cause such stimulation."

26. Respondent used the massage therapist-patient relationship to engage in sexual activity and to attempt to induce patient S.T. to engage in sexual activity.

27. Petitioner proved by clear and convincing evidence that Respondent engaged in sexual misconduct in the practice of massage therapy, in violation of section 480.0485.

28. Section 480.046(1)(p) provides that disciplinary action may be imposed for violation of any provision of chapter 480.

## Penalty

29. Penalties in a licensure discipline case may not exceed those in effect at the time a violation was committed. Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

30. Section 456.079 requires the Board of Massage to adopt disciplinary guidelines for specific offenses. Penalties imposed must be consistent with any disciplinary guidelines prescribed by rule. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

31. The Board of Massage Therapy has adopted Florida Administrative Code Rule 64B7-30.002(3)(o)2., which provides that the discipline for a violation of the sexual misconduct prohibition in section 480.0485 should be a fine of \$2,500.00 and revocation of the license.

32. Rule 64B7-30.002(4) sets forth possible aggravating and mitigating circumstances. No circumstances were shown here that would warrant deviation from the guideline penalty.

33. Section 456.072(4) provides that in addition to any other discipline imposed for violation of a practice act, the board shall assess costs related to the investigation and prosecution of the case.

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 finding John D. Nielsen-Collins violated section 480.0485, constituting grounds for discipline under section 480.046(1)(p), imposing a fine of \$2,500.00, revoking his license to practice massage therapy, and imposing costs of investigation and prosecution.

DONE AND ENTERED this 22nd day of June, 2015, in Tallahassee, Leon County, Florida.



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F. SCOTT BOYD  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of June, 2015.

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.