

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 15-3293PL

NA LI, L.M.T.,

Respondent.

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RECOMMENDED ORDER

On August 14, 2015, a final hearing was held by video teleconference at locations in Miami and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kristen M. Summers, Esquire
Oaj S. Gilani, Esquire
Brynna J. Ross, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Simon Patrick Dray, Esquire
S. Patrick Dray, P.A.
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40 Northwest Third Street
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STATEMENT OF THE ISSUES

The issues to be determined 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 June 4, 2015, Petitioner, Department of Health, issued an Amended Administrative Complaint against Respondent, Na Li, licensed massage therapist. 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 the testimony of R.S., a detective with the Davie Police Department; M.B., a police officer with the Davie Police Department; and Ms. Jennifer Mason, a licensed massage therapist. Respondent testified on her own behalf. Neither party offered any exhibits. Mr. Feng Xiao, provided by the State of Florida, was sworn as the official Mandarin interpreter to translate the proceedings. Ms. Tao Tan, who accompanied Respondent, was also sworn in as a Mandarin interpreter and was prepared to interrupt the proceeding, if necessary, to call the parties' attention to anything that she believed was not being interpreted correctly. This did not happen during the course of the proceeding.

The one-volume final hearing Transcript was filed on August 28, 2015. Both parties timely filed proposed recommended

orders that were considered in preparation of this Recommended Order.

Except as otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect in November and December of 2013, the time during which the violations were 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, Na Li was a licensed massage therapist in the state of Florida, holding license number MA71793.

3. Between November 2013 and December 2013, Na Li was employed by A Golden Massage and Spa, located in Hallandale Beach, Florida, where she performed Swedish massages and deep tissue massages.

4. During November and December 2013, M.B. assisted the Hallandale Police Department in a criminal investigation. On November 13, 2013, M.B., working in an undercover capacity with Detective R.S., went to A Golden Massage and Spa as a client seeking a massage.

5. When M.B. and R.S. entered A Golden Massage and Spa, they were greeted by a woman who introduced herself as Cici. They told Cici that R.S. was M.B.'s boss, that he had just won some money in a casino, and that he was treating M.B. to a massage. R.S. paid for two massages and Cici led M.B. to a massage room and told him to disrobe. M.B. disrobed and lay face down, covered by a towel.

6. Na Li then came into the room and introduced herself as "Yumi." She asked M.B. if he needed a massage in any particular place, to which he said "no." Na Li put oil on her hands and began to massage M.B. from the neck down. Na Li was concentrating on M.B.'s lower back, and then removed the towel and began massaging M.B.'s buttocks and inner legs and thighs, occasionally touching M.B.'s testicles with the back of her hand. Each time Na Li touched M.B.'s testicles, she would giggle.

7. Na Li then asked M.B. to lie on his back. M.B. turned over, Na Li put a pillow behind M.B.'s head, and she covered his genitals with a towel. Na Li resumed massaging M.B., working his upper body, shoulders, and chest.

8. Na Li then removed the towel and placed it to the side. Na Li began massaging M.B.'s upper thigh and again occasionally touched M.B.'s genitals with the back of her hand. She then indicated through gestures that M.B. should make a fist with his right hand and put it over his penis. When M.B. complied, she

placed her own hand on top of M.B.'s hand and began to move it in a circle and up and down. She was moving his hand, as M.B. testified, in a "masturbation way."

9. M.B. stopped Na Li and asked her "how much for her to do it." Na Li giggled, and resumed massaging M.B. Then, a second time, she put his hand on his penis and her hand on top of his. Again, M.B. asked her how much. She replied "tip," indicating that she would expect a better tip. M.B. did not agree to give a better tip, saying that his "boss" had his money. Na Li next began to massage M.B.'s arm, and worked down to his fingers. She then placed her face in M.B.'s left hand and tried to lick his middle finger.

10. On December 4, 2013, M.B. again went to the A Golden Massage and Spa with R.S. as part of the continuing investigation. On this occasion, he paid for himself, and was again shown to a massage room.

11. Na Li came into the room. M.B. and Na Li recognized each other, and Na Li giggled. She again asked M.B. if he needed a massage in any particular place; he again said no. She used oil and began to massage M.B., eventually removing the towel, massaging his thighs, and touching his testicles with the back of her hand. She began tickling M.B. and licking her lips while looking at M.B.'s penis. He asked her how much for her to "do it with her lips." She giggled and continued tickling him, but gave

no answer. When he again asked her how much, she said "no, no," which M.B. interpreted as declining to engage in oral sex.

12. M.B. did not ask that the draping covering his genitals be removed. He did not ask Na Li to touch his genitals or give her permission to do so on either November 13th or December 4th.

13. Consistent with the testimony of Ms. Jennifer Mason, a licensed massage therapist and expert in massage therapy, there is no reason for draping to be removed during the course of a massage. If draping comes off by accident, it is usually put back on right away. There is no massage technique that requires the use of a massage therapist's tongue or mouth. While massage of the buttocks and inner thigh of a male patient is sometimes appropriate, it should be done with careful draping and tucking of the drape to avoid inadvertent touching of the genitalia. There is never a reason for a massage therapist to touch a patient's genitalia.

14. Na Li's actions on November 13 and December 4, 2013, were outside the scope of generally accepted treatment of massage therapy patients.

15. Na Li's contrary testimony, to the effect that she performed only standard massage techniques on M.B., was not credible and is rejected.

16. Na Li used the massage therapist-patient relationship to attempt to induce M.B. to engage in sexual activity and to

attempt to engage him in sexual activity. Na Li engaged in sexual misconduct in the practice of massage therapy.

17. Na Li has never had any prior discipline imposed against her license.

CONCLUSIONS OF LAW

18. 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 (2015).

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

20. 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)).

21. 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)).

22. 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).

23. 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.

24. 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 which is intended to erotically stimulate either person or both, or which is likely to cause such stimulation."

25. Respondent used the massage therapist-patient relationship to attempt to induce M.B. to engage in sexual activity and to attempt to engage him in sexual activity.

26. 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.

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

Penalty

28. 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. Reg., Bd. of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

29. Section 456.079, Florida Statutes, requires the Board of Massage Therapy 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).

30. The Board of Massage Therapy adopted Florida Administrative Code Rule 64B7-30.002(3)(o)2. As in effect in November and December of 2013, it provided 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.

31. At that time, rule 64B7-30.002(4) set forth possible aggravating and mitigating circumstances. No circumstances were shown here that would warrant deviation from the guideline penalty.

32. Section 456.072(4) provided 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 Na Li in violation of section 480.0485, Florida Statutes, constituting grounds for discipline under section 480.046(1)(p), Florida Statutes; imposing a fine of \$2,500.00; revoking her license to practice massage therapy; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 23rd day of September, 2015, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

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 23rd day of September, 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.