

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 16-5478PL

RANJIE XU, L.M.T.,

Respondent.

RECOMMENDED ORDER

On February 20, 2017, a final hearing was held by video teleconference at locations in Lauderdale Lakes and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carrie B. McNamara, Esquire
Leland L. McCharen, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: June H. Zhou, Esquire
June Zhou, PLLC
2136 Saint Andrews Boulevard, Suite 209
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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 provisions of Florida Administrative Code Rule 64B7-

26.010 and sections 480.046(1)(o) and 480.0485, Florida Statutes; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On January 12, 2012, the Florida Department of Health (Petitioner or Department) issued an Administrative Complaint against Ranjie Xu,^{1/} licensed massage therapist (Respondent or Ms. Xu). The complaint charged Respondent with sexual misconduct in the practice of massage therapy, in violation of rule 64B7-26.010 and section 480.0485. Respondent disputed material facts alleged in the complaint and requested an administrative hearing.

At hearing, Petitioner offered the testimony of Officer F.C., who at the time of the events was an undercover police officer in the vice, narcotics, and intelligence unit of the Hallandale Police Department. Petitioner offered three exhibits, P-1, P-3, and P-4, including the deposition testimony of Jennifer Mason, a licensed massage therapist and expert in massage therapy. All of Petitioner's exhibits were admitted, with the caveat that portions of the Department investigative file contained hearsay that was not sufficient in itself to support a finding of fact, but could only be used to supplement or explain other competent evidence. Respondent testified and offered three exhibits, R-3, R-5, and R-8, including the deposition testimony of Ms. Wei Zhou, Respondent's daughter, who was unavailable to appear in person at the hearing. All of Respondent's exhibits

were admitted. An official interpreter provided by the State of Florida was sworn in to correctly translate all testimony for Ms. Xu, who has difficulty communicating in the English language.

The one-volume final hearing Transcript was filed on March 17, 2017. Petitioner timely filed a Proposed Recommended Order that was 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 2010, the time of the alleged violations.

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, Ms. Xu was a licensed massage therapist in the state of Florida, holding license number MA56426.

3. During all times relevant to the complaint, Ms. Xu was employed by Massage Elite, located at 800 East Hallandale Beach Boulevard in Hallandale Beach, Florida.

4. On November 22, 2010, Officer F.C., working in an undercover capacity with Officer C.T., went to Massage Elite,

where they were greeted by Ms. Xu, who introduced herself as Diana. Ms. Xu stated that a one-hour full body massage was \$70.00. They each paid, and Officer F.C. was taken to a separate room and told to disrobe and lie face down. Minutes later, Ms. Xu came into the room and began a massage. After some time, Ms. Xu asked Officer F.C. to turn over. After he did so, Ms. Xu began touching Officer F.C. on his penis, asking, "Do you want me to massage this?" Officer F.C. asked her, "How much?" Ms. Xu replied, "Sixty dollars." Officer F.C. said he only had \$30.00, and Ms. Xu replied, "No, not for thirty, maybe next time." The massage was then completed.

5. On November 23, 2010, Officer F.C. returned to Massage Elite. Other arrests were made at that time, but Ms. Xu was not on the premises.

6. On November 30, 2010, Officer F.C. returned to Massage Elite with Officer R.A. He asked for Diana, and they called her from the back. Ms. Xu came in. Officer F.C. made a positive identification, based upon her appearance, that Ms. Xu was the same woman who had earlier introduced herself to him as Diana, and had given him the massage. She was placed under arrest.

7. Ms. Xu's contrary testimony, to the effect that she was not at work on November 22, 2010, that she had never seen Officer F.C. before November 30, 2010, is not credible, and is rejected.

8. Ms. Wei Zhou, Ms. Xu's daughter, testified through deposition that she came to Florida for Thanksgiving in 2010, and that her mother stayed with her the entire time in a hotel. She said she could not remember exactly when she was there or if she arrived before or after Thanksgiving Day. At another point in her testimony, she said she arrived around the 19th or 20th of November. She said she couldn't remember if her grandmother traveled with her or not. She indicated that she did not know what kind of work her mother did. Her testimony, to the extent it was intended to establish that Ms. Xu did not work at Massage Elite on November 22, 2010, was not credible. Her vague account of events did not cast doubt on Officer F.C.'s clear and convincing testimony.

9. As noted in the deposition testimony of Ms. Jennifer Mason, there is no reason for a licensed massage therapist to ever touch the genitalia of a patient.

10. Officer F.C. paid for a massage, and Ms. Xu began to give him a massage. She was governed by the requirements of the massage therapist-patient relationship.

11. Ms. Xu's actions on November 22, 2010, were outside the scope of generally accepted treatment of massage therapy patients.

12. Ms. Xu used the massage therapist-patient relationship to attempt to induce Officer F.C. to engage in sexual activity and to attempt to engage him in sexual activity.

13. Ms. Xu engaged in sexual misconduct in the practice of massage therapy.

14. There is no evidence that Ms. Xu has ever had any prior discipline imposed against her license.

CONCLUSIONS OF LAW

15. 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 (2016).

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

17. 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)).

18. 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)).

19. 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).

20. Respondent is charged with engaging in sexual misconduct in the practice of massage therapy, in violation of section 480.0485, which provided:

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.

21. Under section 480.035(7), the Board of Massage Therapy was granted authority to adopt rules to implement chapter 480.

22. The Board of Massage Therapy adopted rule 64B7-26.010, which provided in part:

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

* * *

(3) No licensed massage therapist shall use the therapist-client relationship to engage in sexual activity with any client or to make arrangements to engage in sexual activity with any client.

(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 and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. 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 and is not dependent on whether penetration, orgasm, or ejaculation has occurred. Nothing herein shall be interpreted to prohibit a licensed massage therapist, duly qualified under Rule 64B7-31.001, F.A.C, from practicing colonic irrigation.

23. 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 and rule 64B7-26.010.

Penalty

24. Section 480.046(1)(o) provides that disciplinary action may be imposed for violation of any provision of chapter 480 or for violation of rules adopted under that chapter.

25. 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).

26. Section 456.079 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).

27. The Board of Massage Therapy established penalty guidelines in Florida Administrative Code Rule 64B7-30.002(1)(k)1. It provided that the discipline for a violation of the statutory prohibition against sexual misconduct in section 480.0485 should be a \$1000.00 fine and revocation of the license. Rule 64B7-30.002(1)(k)12. provided that the penalty guideline for the first violation of rule 64B7-26.010 should range from a \$1000.00 fine and probation to a \$2500.00 fine and revocation.

28. At that time, rule 64B7-30.002(3) set forth possible aggravating and mitigating circumstances. It provided that the Board should consider:

- (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 licensees 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.

29. The evidence shows that over six years have elapsed since the violation, and Respondent has never been previously disciplined. It is recognized that revocation would have a significant effect on Respondent's livelihood; however, given the serious nature of the offense, no deviation below the minimum guideline penalty is warranted.

30. 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 Department of Health, Board of Massage Therapy, enter a final order finding Ms. Ranjie Xu in violation of Florida Administrative Code Rule 64B7-26.010 and section 480.0485, Florida Statutes, constituting grounds for discipline under section 480.046(1)(o), Florida Statutes; revoking her license to practice massage therapy; imposing a fine of \$1000.00; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 4th day of April, 2017, 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 4th day of April, 2017.

ENDNOTE

^{1/} There was testimony that Ms. Xu has since taken the family name of her husband, but for the sake of clarity in the record all references will continue to reflect her name as it was in November of 2010.

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.