

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 16-6647PL

SI FANG TAO, LMT,

Respondent.

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RECOMMENDED ORDER

On March 9, 2017, a final hearing was held by video teleconference at locations in Orlando and Tallahassee, Florida, before J. Lawrence Johnston, an Administrative Law Judge (ALJ), assigned by the Division of Administrative Hearings (DOAH) to preside over this matter.

APPEARANCES

For Petitioner: Carrie Beth McNamara, Esquire
Oaj S. Gilani, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Respondent, Si Fang Tao, engaged in sexual misconduct in the practice of massage therapy, in violation of sections

480.046(1)(p) and 480.0485, Florida Statutes (2014-2015); and if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On March 4, 2016, Petitioner, Department of Health (Department), filed an Administrative Complaint against Respondent, a licensed massage therapist. The complaint charged Respondent with sexual misconduct in the practice of massage therapy, in violation of section 480.0485. Ms. Tao disputed material issues of fact in the complaint and requested a formal administrative hearing.

The final hearing took place on March 9, 2017. At hearing, Petitioner offered the testimony of law enforcement officers Denise Rosario, Q.A., and F.M. Petitioner also offered the deposition testimony of Iris Burman, a licensed massage therapist and expert in massage therapy, taken in lieu of live testimony. In addition, Petitioner's Exhibits 1 through 4 were received in evidence. Respondent was not present and did not offer any evidence or testimony.

The parties were allowed to submit proposed recommended orders within ten days after the filing of the transcript of the final hearing. The Transcript was filed on March 23, 2017. Petitioner filed a Proposed Recommended Order, which has been considered. Respondent did not file a proposed recommended order.

Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect on June 12, and July 8, 2015, the dates the violations were allegedly committed.

FINDINGS OF FACT

1. Petitioner 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 (2016).

2. At all times material to the complaint, Respondent was licensed to practice massage therapy in the state of Florida, having been issued license number MA 76085 on or about April 21, 2014.

3. At all times material to the complaint, Respondent owned and operated Massage Connection 1 (Massage Connection), located at 11301 South Orange Blossom Trail, Suite A-209, Orlando, Florida 32837.

4. At all times material to the complaint, Respondent was the sole massage therapist working at Massage Connection.

5. The Metropolitan Bureau of Investigation (MBI) is a joint police task force for Orange County and Osceola County. MBI routinely investigates narcotics, vice, human trafficking, and organized crime.

6. In June and July 2015, MBI conducted an undercover operation for suspected acts of prostitution occurring at Massage Connection.

7. Officer Q.A. has been a deputy sheriff with the Orange County Sheriff's Office since 2007 and was working in the Vice and Organized Crime Unit of MBI on June 12, 2015.

8. On June 12, 2015, Officer Q.A. entered Massage Connection posing as a patient and requested a 60-minute massage from Respondent, who introduced herself as "Michelle."

9. Officer Q.A. paid Respondent \$80.00 for the massage, and Respondent led Officer Q.A. to a massage room where Officer Q.A. disrobed completely and lay face down on the massage table.

10. Respondent did not drape Officer Q.A.'s buttocks or genitals during the course of this massage. Respondent repeatedly touched Officer Q.A.'s inner thighs, lightly touching them with the back of her hands, palm of her hands, and fingernails. Respondent pointed to Officer Q.A.'s penis and made a hand gesture with a clenched fist moving up and down, colloquially understood to indicate manual masturbation of the penis. Respondent then told Officer Q.A., "I can massage your full body" and asked how much he would pay for this. Respondent agreed to perform the manual masturbation of Officer Q.A.'s penis for an additional \$80.00 and told Officer Q.A. not to tell anyone that she was doing this.

11. Respondent asked Officer Q.A. for the money, accepted partial payment of \$50.00 from Officer Q.A., and left the room. When Respondent returned to the room, she exposed her breasts to Officer Q.A. Respondent then began massaging Officer Q.A. again and touched his penis, at which point Officer Q.A. stated he did not want to proceed with manual penile masturbation.

12. Officer F.M. has been a law enforcement officer with the Orange County Sheriff's Office for the past nine years and was working in the Vice and Organized Crime Unit of MBI on July 8, 2015.

13. On July 8, 2015, Officer F.M. entered Massage Connection posing as a patient and requested a 30-minute massage from Respondent, who introduced herself as "Crystal."

14. Officer F.M. paid Respondent \$55.00 for the massage, and Respondent led Officer F.M. to a massage room where Officer F.M. disrobed completely and lay face down on the massage table. Respondent did not drape Officer F.M.'s buttocks during the course of this massage.

15. When Officer F.M. turned over during the massage, Respondent covered Officer F.M.'s genitals with a small towel but then placed her hand on top of Officer F.M.'s penis and asked if he wanted Respondent to massage him there. Respondent told Officer F.M. that she had a very good technique and made a hand gesture with a clenched fist moving up and down, colloquially

understood to indicate manual masturbation of the penis.

Respondent told Officer F.M. that she would rub him "very good."

16. When Officer F.M. asked Respondent for oral sex, Respondent offered to expose her breasts instead. When Officer F.M. asked if he could receive a nude massage from Respondent if he returned to Massage Connection, Respondent again offered to expose her breasts instead.

17. Officer F.M. then asked Respondent how much the "full body massage" would cost while pointing at his penis, indicating manual masturbation of his penis. Respondent indicated that a "fully body massage" would cost an additional \$40.00. When Officer F.M. told Respondent that \$40.00 was too much just to "jerk [him] off," or masturbate him, Respondent stated that she does a "good job" and people tip her \$20.00 even if she does not "massage [them] there." Officer F.M. declined, stating that "\$40 for a hand job is a lot." Respondent replied "no, it's very good technique," and told Officer F.M. "how about for you, \$35?" Officer F.M. again declined, and the massage concluded.

18. On July 9, 2015, both MBI Officers Q.A. and F.M. positively identified Respondent as the massage therapist that had offered to perform sexual acts on them.

19. It is common for patients to be completely disrobed during a massage. However, massage therapists must drape the patient to maintain professional boundaries. Generally, a

patient is completely draped and only the areas being massaged at that time are exposed. At the very least, appropriate draping of a patient requires draping of the buttocks and genitalia and the breasts of female patients, unless the patient gives specific informed consent to be undraped.

20. Massaging the upper inner thigh of a patient without first obtaining informed consent is outside the scope of practice of massage therapy. Informed consent from the patient is necessary before massaging the upper inner thigh due to the sensitive nature of the area, to avoid confusion about the intent of the touch, and to maintain boundaries. If a massage therapist does not clarify this treatment, it can indicate that the massage therapist is willing to engage in sexual activity.

21. There is no generally accepted massage therapy technique that requires massage therapists to use the back of their hands to massage the inner thigh of a patient.

22. There is no generally accepted massage therapy technique that requires massage therapists to use their fingernails to lightly touch a patient's inner thigh. Using fingernails to lightly touch the inner thigh of a male patient during a massage can cause sexual arousal and is not likely to be therapeutic.

23. There is no accepted practice within the scope of massage therapy that allows massage therapists to touch or massage the penis of a patient.

24. There is no accepted practice within the scope of massage therapy that allows massage therapists to expose their breasts to a patient.

25. The following constituted sexual activity outside the scope of massage therapy and sexual misconduct in the practice of massage therapy: Respondent's failure to drape Officer Q.A.'s buttocks and genitals; her exposure of her own breasts to Officer Q.A.; the light touching of Officer Q.A.'s inner thighs with the back of her hands and fingernails; the touching of Officer Q.A.'s penis; and her offering or agreeing to masturbate Officer Q.A.'s penis.

26. The following constituted sexual activity outside the scope of massage therapy and sexual misconduct in the practice of massage therapy: Respondent's failure to drape Officer F.M.'s buttocks; her touching of Officer F.M.'s penis; offering or agreeing to masturbate Officer F.M.'s penis; and her offering to expose her breasts to Officer F.M.

CONCLUSIONS OF LAW

27. Petitioner has authority to investigate and file administrative complaints charging violations of the laws

governing licensed massage therapists. § 456.073, Fla. Stat. (2016).

28. Because Petitioner seeks to impose license discipline, Petitioner has the burden to prove its allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Davey, 645 So. 2d 398, 404 (Fla. 1994). See also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) (citations omitted).

29. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887,

888 (Fla. 5th DCA 1984) (“[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.” (citing State v. Pattishall, 126 So. 147 (Fla. 1930))).

30. The grounds proven in support of the Department’s assertion that Respondent’s license should be disciplined must be those specifically alleged in the Administrative Complaint. See, e.g., Trevisani v. Dep’t of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep’t of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Dep’t of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Hunter v. Dep’t of Prof’l Reg., 458 So. 2d 842 (Fla. 2d DCA 1984). Due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Vill. Prop. Owners’ Ass’n, Inc. v. Dep’t of Env’tl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Delk v. Dep’t of Prof’l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

31. The Administrative Complaint against Respondent alleges that on two separate occasions, Respondent engaged in sexual misconduct when she used the massage therapist-patient

relationship to induce or attempt to induce, or engage or attempt to engage, Officers Q.A. and F.M. in sexual activity outside the scope of practice of massage therapy.

32. Section 480.046(1)(p) subjects a massage therapist to discipline for violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

33. Section 480.0485 prohibits sexual misconduct in the practice of massage therapy and defines sexual misconduct, in pertinent part, as:

[V]iolation 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.

34. Florida Administrative Code Rule 64B7-26.010(4) defines "sexual activity" as:

[A]ny 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 tissues with the intent to cause sexual arousal.

35. The Department presented clear and convincing evidence that Officers Q.A. and F.M. had a massage therapist-patient

relationship with Respondent by demonstrating that they each received a paid massage from Respondent at Massage Connection.

36. The Department presented clear and convincing evidence that Respondent induced or attempted to induce, or engaged or attempted to engage in sexual activity, as defined by rule 64B7-26.010(4), with Officer Q.A. when Respondent: failed to drape Officer Q.A.'s buttocks and genitals; exposed her breasts to Officer Q.A.; repeatedly touched Officer Q.A.'s inner thighs lightly with the back of her hands and fingernails; touched Officer Q.A.'s penis; and offered to perform masturbation of Officer Q.A.'s penis.

37. It constituted sexual misconduct during the course of a massage under section 480.0485 when Respondent: failed to drape Officer Q.A.'s buttocks and genitals; exposed of her own breasts to Officer Q.A.; lightly touched Officer Q.A.'s inner thighs with the back of her hands and fingernails; touched Officer Q.A.'s penis; and offered or agreed to masturbate Officer Q.A.'s penis.

38. The Department presented clear and convincing evidence that Respondent induced or attempted to induce, or engaged or attempted to engage in sexual activity, as defined by rule 64B7-26.010(4), with Officer F.M. when Respondent failed to drape Officer F.M.'s buttocks; placed her hand on Officer F.M.'s penis; offered to perform masturbation of Officer F.M.'s penis; and offered to expose her breasts to Officer F.M.

39. It constituted sexual misconduct during the course of a massage under section 480.0485 when Respondent: failed to drape Officer F.M.'s buttocks; touched Officer F.M.'s penis; offered or agreed to masturbate Officer F.M.'s penis; and offered to expose her breasts to Officer F.M.

40. Based on the foregoing, the Department proved by clear and convincing evidence that Respondent violated section 480.0485, and thereby violated section 480.046(1)(p), as charged in the Administrative Complaint.

41. The Board of Massage Therapy imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B7-30.002. See Parrot Heads, Inc. v. Dep't of Bus. and Prof'l Reg., 741 So. 2d 1231 (Fla. 5th DCA 1999).

42. Rule 64B7-30.002 provides that the penalty for violating section 480.0485 is a \$2,500 fine and revocation of the massage therapist's license.

43. Rule 64B7-30.002(4) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances may be taken into account, allowing the Board to deviate from the 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.

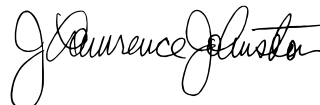
44. Because the penalty recommended is within the disciplinary guidelines, it is unnecessary to make any findings

related to the aggravating or mitigating factors set out in rule 64B7-30.002(4).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Health, Board of Massage Therapy, finding that Ms. Tao violated section 480.046(1)(p), by violating section 480.0485. For these violations, it is recommended that the Board impose a \$2,500 administrative fine on Respondent, revoke Respondent's license to practice massage therapy, and require Respondent to pay the Department's costs of investigation and prosecution of this matter.

DONE AND ENTERED this 25th day of April, 2017 in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2017.

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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.