

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-1358PL

LAUREN DILLMAN-BELL, L.M.T.,

Respondent.

RECOMMENDED ORDER

On May 4, 2017, a final hearing was held by video teleconference at locations in Sarasota and Tallahassee, Florida, before J. Lawrence Johnston, an Administrative Law Judge (ALJ), who was assigned by the Division of Administrative Hearings (DOAH) to preside over this matter.

APPEARANCES

For Petitioner: Lealand L. McCharen, Esquire
Jaquetta Johnson, Esquire
Department of Health
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 the Respondent, Lauren Dillman-Bell, obtained her Florida license to practice massage therapy through fraud or error, in violation of

section 456.072(1)(h), Florida Statutes (2009), or made misleading, untrue, deceptive, or fraudulent representations on her application for licensure, in violation of section 456.072(1)(w), both of which constitute violations of section 480.046(1)(o); and if so, the appropriate sanction. (Unless otherwise indicated, citations to the Florida Statutes and rules of the Florida Administrative Code refer to the versions in effect when the Respondent's license was issued on July 1, 2009.)

PRELIMINARY STATEMENT

On November 12, 2013, the Petitioner filed an Administrative Complaint against the Respondent. On January 14, 2014, counsel for the Respondent disputed the charges and requested a hearing.

The matter was not referred to DOAH until March 3, 2017. The reason for the delay is not clear from the record. The hearing was scheduled for May 4, 2017.

On March 28, 2017, counsel for the Respondent moved to withdraw due to an inability to contact the Respondent either by correspondence or by telephone. Leave to withdraw was granted. Subsequently, it became apparent that the Respondent was not receiving mail at either her address of record or the address given for her in her request for a hearing.

The Respondent did not appear for the final hearing. Counsel for the Petitioner reported that numerous unsuccessful attempts had been made to contact the Respondent both by

telephone and by mail at both her address of record and the address listed in the request for a hearing.

The final hearing took place as scheduled on May 4, 2017. At hearing, the Petitioner presented: its investigative report as Exhibit 1; the Respondent's application file as Exhibit 2; and certified copies of criminal court records from Oklahoma pertaining to the Respondent as Exhibit 3. The exhibits were received in evidence. No other evidence was presented.

No transcript of the hearing was prepared, and no proposed recommended orders were filed.

FINDINGS OF FACT

1. The 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 Administrative Complaint, the Respondent was licensed to practice massage therapy in the State of Florida, having been issued license number MA 56509 on or about July 1, 2009.

3. When the Respondent applied for licensure in June 2009, she answered "no" to a question whether she had "ever been convicted of, or entered a plea of guilty, nolo contendere, or no contest to a crime in any jurisdiction other than a minor traffic offense."

4. When the Respondent's license was issued, the Petitioner was unaware that the answer to the question on the application should have been "yes." This was not brought to the Petitioner's attention until June 2013. The Petitioner investigated, and the Administrative Complaint was filed.

5. It is clear from the evidence presented at the hearing that the Respondent entered the following pleas in the District Court of Oklahoma County, Oklahoma, in December 2005: guilty to one count of possession of a controlled, dangerous substance with intent to distribute; guilty to one count of possession of a controlled, dangerous substance (methamphetamine) with intent to distribute; guilty to one count of possession of a stolen vehicle/receiving stolen property; and guilty to two counts of possession of a weapon.

6. Although the Respondent did not appear or testify at the hearing, it can be inferred that she knew or should have known that her answer to the question on her license application about criminal convictions and guilty pleas was false. Even if the answer were unintentionally false, the Petitioner relied on it when it issued the Respondent's license without conducting any investigation into the Respondent's fitness for licensure notwithstanding the guilty pleas. (It also could be inferred from the Respondent's failure to pursue her request for a hearing, and her failure to provide effective contact information

so as to receive notices regarding the case, that she has withdrawn and waived her disputes as to the facts alleged in the Administrative Complaint.)

CONCLUSIONS OF LAW

7. The Petitioner has authority to investigate and file administrative complaints charging violations of the laws governing the licensure of massage therapists in Florida. § 456.073, Fla. Stat. (2016).

8. Because the Petitioner seeks to impose license discipline, the 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 Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) (citations omitted).

9. 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))).

10. The grounds proven in support of the Petitioner's assertion that the 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 Petitioner from taking disciplinary action against the Respondent 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).

11. The Administrative Complaint charges the Respondent with obtaining her Florida license to practice massage therapy through fraud or error, in violation of section 456.072(1)(h), Florida Statutes (2009), and with making misleading, untrue, deceptive, or fraudulent representations on her application for licensure, in violation of section 456.072(1)(w), both of which constitute violations of section 480.046(1)(o). The charges were proven by clear and convincing evidence.

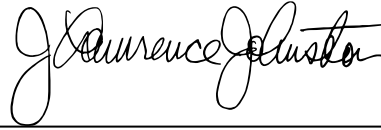
12. The Board of Massage Therapy must impose penalties against the Respondent in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B7-30.002. Under that rule, revocation is within the guidelines and is the appropriate penalty in this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be issued:

(1) finding that the Respondent violated section 480.046(1)(o) by violating sections 456.072(h) and (w); and (2) revoking her massage therapy license.

DONE AND ENTERED this 30th day of May, 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 30th day of May, 2017.

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.