

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-2441PL

BLAKE C. RICE, L.M.T.,

Respondent.

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RECOMMENDED ORDER

On February 5, 2018, Administrative Law Judge (ALJ)
J. Lawrence Johnston of the Division of Administrative Hearings
(DOAH) conducted a disputed-fact hearing in this case by video
teleconference at sites in St. Petersburg and Tallahassee.

APPEARANCES

For Petitioner: Keith C. Humphrey, Esquire
Eric L. Fryson, Esquire
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For Respondent: John Angelo Richert, Esquire
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STATEMENT OF THE ISSUES

Whether the Respondent, a licensed massage therapist, should
be disciplined under section 480.046(1)(p), Florida Statutes

(2016),^{1/} for sexual misconduct in the practice of massage therapy; and, if so, the appropriate discipline.

PRELIMINARY STATEMENT

On November 22, 2016, the Petitioner filed an Administrative Complaint against the Respondent. In January 2017, the Respondent disputed the charges and requested a hearing. The Petitioner forwarded the case to DOAH in April 2017, and the hearing was scheduled for June 27. After three continuances for good cause, the parties filed a Joint Pre-hearing Stipulation and the hearing was held on February 5, 2018.

At the hearing, the Petitioner's Exhibits 1 through 8 were received in evidence without objection. (These exhibits, including subparts, are found at Tabs 1 through 16 of the Petitioner's exhibit book.) The Petitioner called two witnesses: St. Petersburg Police Department Detective Lisa Vanderbilt; and the complaining patient, R.S. The Respondent testified and called one witness, Alisa Miller.

A Transcript of the hearing was filed, and the parties filed proposed recommended orders that have been considered.

FINDINGS OF FACT

1. The Petitioner licenses and regulates the practice of massage therapy in Florida, including discipline of licensees who are in violation of the governing statutes and rules. The Respondent holds massage therapy license MA 53361. He has been

practicing massage therapy in Florida for eleven years. There was no evidence of any violations in that time, other than the alleged violations at issue in this case.

2. On September 8, 2016, the Respondent (who is male) was self-employed as a massage therapist in St. Petersburg. R.S. was a 21-year-old woman. On that day, R.S. went to the Respondent's place of business to use a Groupon for a Thai yoga massage. They had never met before. R.S. was running late for her 5 p.m. appointment and called once to tell the Respondent and again to ask for directions. The Respondent met her on the street because his place of business was not marked by prominent signage. He led her into his nondescript location and therapy room. The facility appeared to be "pretty empty" and "just kind of a room" with a bed. It gave her a "cold weird feeling." No one else was on the premises at the time. She asked him if he owned the place. He said he did. Actually, he rented the space.

3. Thai yoga massage therapy involves passive stretching into yoga poses with the physical assistance of the therapist, and the use of the therapist's hands, fists, elbows, knees and feet to massage the recipient's muscles. Both the recipient and therapist remain fully clothed, usually in loose-fitting exercise clothing.

4. In the therapy room, the Respondent had R.S. lay down on the massage table face down. The massage proceeded without

incident at first. Then, the Respondent spread and held R.S.'s legs apart, lay on top of her, and rubbed his genital area on her buttocks. She felt his hardened penis pressing against her buttocks.

5. At that point, R.S. became upset and uncomfortable with the Respondent's "massage" but was afraid to say anything to make him stop because she was alone in the building with the Respondent, and she did not know how he would react. She "froze" and said nothing.

6. Then, the Respondent flipped R.S. onto her back and continued with the massage. Her eyes were closed. Eventually, the Respondent again spread her legs and lay on top of her. She felt his breath and his dreadlocks on her face. He began rubbing his genital area against her vaginal area. Again, she felt his hardened penis. She opened her eyes and saw him in a trance-like state with his eyes closed. Again, she was afraid to say or do anything to make him stop. This went on for what R.S. thought was several minutes before the Respondent stopped, ended the massage, and brought her water and a towel. He did not apologize or offer not to accept payment for the massage. R.S. did not say anything to him about the massage before leaving.

7. Two days later, R.S. contacted the Respondent by text messaging to complain about his conduct. She texted:

It took me a day or two to decide that I would like to speak up about how unprofessional and inappropriate your Thai massage was. I understand that I was clothed. But in no way should your crotch be anywhere near mine. You were clearly grinding on my private areas. Please do not try to deny your intention, I am intuitive and I know when something is not right. I have been sexually violated before so in the moment I freeze up and that's why I didn't tell you to stop. I especially felt uncomfortable when you flipped me over and you were between my legs rubbing yourself on me. Please don't give me any bullshit that that's how Thai massage works. I know Thai massage is a bit intimate but you were inappropriate without a doubt. I felt very uncomfortable because I was alone there with you and I don't know you and what you would have done if I were to tell you to stop or try to leave. I walked out feeling a bit violated and no woman should ever feel close to feeling that way. I could report you and ruin your career but I am not that kind of person so I would like to speak to you first.

8. The Respondent's reply did not deny what R.S. wrote. Instead, he asked for an opportunity to explain. She insisted on texting. During their exchange of text messages, the Respondent attempted to explain that he was doing legitimate Thai massage stretches he thought were best suited to her needs and that he did not mean to make R.S. feel uncomfortable. She refused to accept the explanation, texting in reply:

It's not Thai technique that made me feel uncomfortable. It was that you spent more time than [sic] in the positions that had your crotch rubbing right up against me, completely unnecessary. There are many positions and modifications you could have

taken to avoid contact and it was obvious that it was purposeful and with intent. I'm feeling like I want to report. I just don't want you getting away with that again.

He kept trying to convince her of his good intentions and the legitimacy of his massage technique. She replied: "I'm not an idiot and I've gotten plenty of massages dude. And I sure as hell know they taught you in massage school to keep your dick off a woman's vagina." The Respondent offered to make things right by giving her a free massage. She declined, texting: "I would never come back there." Instead, she wrote that he could start by refunding her money. He agreed, but she said she still was not happy and asked: "You really can't admit that you can see how you pushed it? And why I feel this way?" He replied:

I understand. im just trying [to] make things better. Can I be honest with you [?] . . . Like im seriously scared. . . . But im always in a meditative state during the massage and I swear have never been fully aroused I cant xplain y I became fully aroused. And once I noticed what was goin on I stop[p]ed it.

R.S. replied by denying the Respondent stopped the massage once he became aroused, writing "you never stopped. You continued throughout the massage." The Respondent then admitted it, writing: "No I kno I didn't kno how to handle receiving that energy and that type of work."

9. Eventually, R.S. asked if he really owned the building where he gave massages, as he told her at the beginning. He

admitted that he rented space for \$400 a month. She then wrote that she would "keep her mouth shut" for \$400. She wrote, that would be a "good deal" for him because she could sue him. She then wrote:

And I need you to promise me that you will try to stay aware of your physical body during your meditative state. You need to learn boundaries and not lead with your dick n hormones because your f[*****] lucky it's me and im giving you the option to pay me or I will sue you.

He replied: "Ok jus give me lil time. Its [sic] after the first[.] I done paid all bills already. Have [to] make it first." R.S. wrote that she did not want to give him time because she did not trust him. He begged her to trust him, he would have the money in a week. She then wrote:

"Can't believe you were basically having dry sex with me and acting your [sic] helpless and couldn't stop yourself like you're the victim or some shit. And since I have to wait, I want 400 as soon as you can and another 400 for waiting. Then you will never hear from me again or about this whole thing. And you sure as hell better not do this to another woman.

After R.S. reiterated why she was doing him a favor by not pressing charges, he replied: "Well I don't have it tonight but maybe a week."

10. The Respondent did not pay R.S. any money. Instead, two days after the incident, he filed criminal charges against her for extortion. Two days after that, R.S. filed criminal

charges against him for lewd and lascivious behavior. Two days after that, R.S. filed a complaint with the Department of Health that eventually resulted in the Administrative Complaint.

11. The Respondent contends that R.S. was guilty of extortion, which entirely destroyed her credibility. He argues that her initial question as to whether he owned the building proved she was planning to extort him from the beginning and that she fabricated her allegations as part of her extortion scheme. He also argued that R.S.'s inability to clearly recall some details undermined her credibility on the essence of her allegations. The Respondent's arguments have serious flaws. First, R.S. did not ask for money until after the Respondent admitted he did not own the building. Second, her recollection of the essence of her allegations was crystal clear, and it is not unreasonable under the circumstances that she would not recall each and every relatively unimportant detail. Finally, and most significantly, the Respondent's text messages admitted his wrongdoing. (The Respondent's admissions distinguish this case from the cases cited by him where violations were not proven by clear and convincing evidence when the alleged victims delayed reporting sexual misconduct.)

12. Perhaps recognizing that his admissions were fatal to his argument that R.S. fabricated her allegations, the Respondent testified that R.S. was to blame for causing him to become

aroused when she resisted stretching and tried to initiate body contact with the Respondent, tried to "come into his space," and "lightly touched his hand." He testified that she also wrapped her legs around him while she was on her back and pulled him towards her in a "sexualized way," causing him to lose his balance and fall on top of her, which caused him to become erect. He testified that he immediately stopped the massage when this happened.

13. R.S. denied the Respondent's testimony as to what happened during the massage. The Respondent's testimony cannot be squared with his text messages to R.S., or with his admission that R.S. never made any sexual comments to him during the massage. R.S.'s testimony as to the Respondent's sexual misconduct is more credible and is accepted as true.

14. R.S.'s offer to accept money for not reporting the incident was inappropriate and may have been illegal. But it does not lessen or excuse the Respondent's misconduct during the massage, which was proven by clear and convincing evidence.

CONCLUSIONS OF LAW

15. Because the Petitioner seeks to impose license discipline, it has the burden to prove the 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).

16. 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 also 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))).

17. 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 a licensee based on matters not specifically alleged in the charging instruments, 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).

18. The violations charged in the Administrative Complaint were proven by clear and convincing evidence. The Respondent engaged in prohibited sexual misconduct, as defined in section 480.0485. He also violated Florida Administrative Code Rule 64B7-26.010,^{2/} which prohibits the use of the therapist-client relationship to engage in sexual activity with a client (defined as direct or indirect physical contact intended or likely to erotically stimulate either person). The Respondent also is subject to discipline under section 480.046(1)(p) for violating

any provision of chapter 480 or 456, Florida Statutes, or any rule adopted to implement those statutes.

19. At the time of the alleged offense in September 2016, rule 64B7-30.002(3)(o)2. provided that the penalty for violating section 480.0485 was a \$2,500 fine and license revocation, and rule 64B7-30.002(3)(o)13. provided the same penalty for violating rule 64B7-26.010.

20. At the time of the alleged offense in September 2016, rule 64B7-30.002(4) provided that, in applying the penalty guidelines, the aggravating and mitigating circumstances can be taken into account and can allow the Board of Massage Therapy to deviate from the penalty guidelines. However, the Respondent has not offered any rationale for deviating from the penalty guidelines.

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 the Respondent guilty as charged and, unless the Respondent offers the Board a persuasive reason for deviating from the penalty guidelines, revoking his license and fining him \$2,500.

DONE AND ENTERED this 19th day of March, 2018, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of March, 2018.

ENDNOTES

^{1/} The 2016 codification of the Florida Statutes were in effect in September of 2016. All statutory citations refer to the 2016 codification.

^{2/} All rule citations are to the rules that were in effect in September of 2016, when the alleged violations occurred.

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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.