

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-2751PL

SUHUA ZHANG, L.M.T.,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was scheduled in this case for July 12, 2017. On July 3, the parties moved to proceed instead by written submissions, including five listed joint exhibits and a stipulation of facts. The motion was granted, the final hearing was canceled, and the parties were required to file the stipulated evidence and a proposed recommended order (PRO) by July 12. The Petitioner filed the evidence (labeled Petitioner's Exhibits 1 through 5) and a PRO. The Respondent has not filed anything. The evidence and the Petitioner's PRO have been considered.

STATEMENT OF THE ISSUES

The issues are whether the Respondent, a licensed massage therapist, violated section 480.046(1)(c), Florida Statutes (2010),^{1/} by pleading nolo contendere to four separate cases of

prostitution; whether, she violated section 456.072(1)(x), Florida Statutes, by failing to report the pleas to the Board of Massage Therapy within 30 days, as alleged in the Administrative Complaint filed by the Petitioner; and, if so, the appropriate penalty.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with regulating the practice of massage therapy in Florida under section 20.43 and chapters 456 and 480, Florida Statutes (2017).

2. At all times material to the Administrative Complaint, the Respondent was licensed to practice massage therapy in Florida, having been issued license number MA 58567 by the Board of Massage Therapy.

3. On October 28, 2010, the Respondent entered pleas of nolo contendere to the crime of prostitution in four separate cases in Hillsborough County, Florida, which are identified by case numbers 10-CM-011030, 10-CM-011031, 10-CM-011032, and 10-CM-011417.

4. The Respondent did not report any of her pleas in those cases to the Board of Massage Therapy within 30 days of entering the plea.

5. When the Respondent pled nolo contendere to the prostitution charges, adjudications were withheld and the nolo

contendere pleas were held in abeyance pending the successful completion of probation.

6. The Respondent did not successfully complete her probation for any of the four cases, and the probations were terminated for non-compliance with the conditions of probation.

7. Despite her nolo contendere pleas, the Respondent testified in this case that she was not guilty of prostitution.

8. The Respondent stipulated that the crime of prostitution directly relates to the practice of massage therapy or to the ability to practice massage therapy. Merriam-Webster defines the term "relate" as "to show or make a connection between (two or more things)." There was direct connection between the Respondent's practice of massage and her convictions for prostitution. The Respondent used her position as a massage therapist to offer to commit prostitution.

CONCLUSIONS OF LAW

9. 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).

10. 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))).

11. The grounds proven in support of license discipline 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 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).

12. Count I of the Administrative Complaint alleges that the Respondent entered pleas of nolo contendere to prostitution in four separate cases in Hillsborough County, in violation of section 780.046(1)(c), Florida Statutes.

13. Section 480.046(1)(c) provided, in pertinent part:

(1) The following acts constitute grounds for . . . disciplinary action, as specified in s. 456.072(2):

* * *

(c) Being convicted or found guilty of, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of massage or to the ability to practice massage. Any plea of nolo contendere shall be considered a conviction for purposes of this chapter.

14. Section 796.07(2)(e), Florida Statutes, made it a crime for someone over the age of 18 to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation.

15. Section 796.07(1)(a) defined prostitution as the giving or receiving of the body for sexual activity for hire.

16. Sexual activity was defined in section 796.07(1)(d) as:

oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation [except when done for bona fide medical purposes].

17. Lewdness was defined in section 796.07(1)(b) as "any indecent or obscene act." Assignation was defined in section 796.07(1)(d) as "making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement."

18. Florida Administrative Code Rule 64B7-26.010(1),^{2/} prohibits sexual activity by any person or persons in any massage establishment. Prostitution involves sexual activity and is forbidden in the practice of massage therapy.

19. The Respondent's crimes of prostitution were directly related to the practice of massage therapy. The Respondent used her position as a massage therapist to offer to commit crimes. See Rush v. Dep't of Bus. & Prof'l Reg., Bd. of Podiatry, 448

So. 2d 26, 27-28 (Fla. 1st DCA 1984) (although not arising in an office setting, crime of conspiracy to possess and import marijuana was a breach of trust and related to the practice of podiatry, which included dispensing drugs); Doll v. Dep't of Health, 969 So. 2d 1103 (Fla. 1st DCA 2007) (a crime that demonstrated a "lack of honesty, integrity, and judgment" related to the practice of chiropractic medicine); Dep't of Health, Bd. of Medicine v. Algirdas Krisciunas, M.D., Case 10-10229PL (Fla. DOAH June 27, 2011; Fla. DOH Amended FO, Aug. 17, 2011) (five counts of dispensing oxycodone and one count of conspiring to distribute oxycodone were related to the practice of medicine, in part, because the respondent's medical license was necessary to execute the crime); Dep't of Health, Bd. of Medicine v. Christopher Carter, M.D., Case 12-1575PL (Fla. DOAH Nov. 26, 2012) ("Whether or not a particular crime is related to a profession is not limited to its connection to the technical ability to practice the profession."). Thus, the crime of prostitution is directly related to the practice of massage therapy. The Petitioner proved this charge by clear and convincing evidence.

20. Section 480.046(1)(p) provided in relevant part:

(1) The following acts constitute grounds for . . . disciplinary action, as specified in s. 456.072(2):

* * *

(p) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

21. Section 456.072(1)(x) provided in relevant part:

(x) Failing to report to the board . . . in writing within 30 days after the licensee has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction.

22. The Respondent did not report her four nolo contendere pleas to prostitution within 30 days after she entered them. The Petitioner proved by clear and convincing evidence that the Respondent violated section 480.046(1)(c), as charged in the Administrative Complaint.

23. 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).

24. Rule 64B7-30.002(1)(b) provided that the penalty for violating section 480.046(1)(c) for prostitution or solicitation for prostitution was a \$1,000 fine and revocation. (The Petitioner's PRO incorrectly cites penalties for misdemeanors that do not relate to certain crimes with enhanced penalties, one of which is prostitution or solicitation for prostitution.)

25. Rule 64B7-30.002(1)(x) provided that the penalty for violating section 456.072(1)(x) (incorrectly listed as (w) in the guidelines in place in 2010) was \$1,000.00 fine and suspension for a first offense and a \$1,000.00 fine and revocation for any subsequent offense. Respondent committed four offenses.

26. Rule 64B7-30.002(3) provided 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.

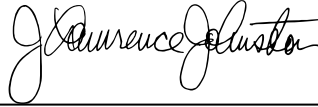
Consideration of the aggravating and mitigating factors do not warrant a deviation from the penalty guidelines.

27. Section 456.072(4) provided that the Board of Massage Therapy shall assess costs related to the investigation and prosecution, in addition to other discipline imposed for violating a practice act.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered: finding the Respondent guilty of violating section 480.046(1)(c) and section 456.072(1)(x); fining her \$1,000; revoking her license to practice massage therapy; and awarding costs of investigation and prosecution of this matter to the Petitioner.

DONE AND ENTERED this 24th day of July, 2017, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2017.

ENDNOTES

^{1/} Unless otherwise noted, statutory references are to the 2010 codification of the Florida Statutes, which was in effect at the time of the alleged offenses.

^{2/} All rule references are to the version of the Florida Administrative Code in effect at the time of the alleged offenses.

COPIES FURNISHED:

Lealand L. McCharen, Esquire
Department of Health
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399-3265
(eServed)

Alex Yu, Esquire
Law Office of Alex Yu, P.A.
Somerset Professional Park
15255 Amberly Drive
Tampa, Florida 33647
(eServed)

Jaquetta Johnson, Esquire
Department of Health
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399-3265
(eServed)

Kama Monroe, Executive Director
Board of Massage Therapy
Department of Health
Bin C-06
4052 Bald Cypress Way
Tallahassee, Florida 32399-3257
(eServed)

Nichole C. Geary, General Counsel
Department of Health
Bin A-02
4052 Bald Cypress Way
Tallahassee, Florida 32399-3265
(eServed)

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.