

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-2964PL

JORGE L. PRUNEDA, L.M.T.,

Respondent.

RECOMMENDED ORDER

On September 6, 2017, a hearing was held by video teleconference at locations in West Palm Beach and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Keith C. Humphrey, Esquire
Raj Misra, Esquire
Florida Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Jorge L. Pruneda, pro se
18 Walcott Drive
Boynton Beach, Florida 33426

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent engaged in sexual misconduct in the practice of massage therapy, in violation of section 480.0485, Florida Statutes; engaged in

improper sexual activity, in violation of Florida Administrative Code Rule 64B7-26.010; or failed to appropriately drape a client, in violation of section 480.046(1)(i); and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On March 20, 2017, the Florida Department of Health (Petitioner or Department) served an Administrative Complaint against Jorge L. Pruneda (Respondent or Mr. Pruneda). Respondent disputed material facts alleged in the complaint and requested an administrative hearing. An Amended Administrative Complaint was later substituted at hearing to correct by one day the date the alleged misconduct occurred, upon the statement of Respondent that this change would not prejudice his defense in any way.

At hearing, Petitioner offered five exhibits, P-1, P-4 through P-6, and P-9, all of which were admitted into evidence. Exhibit P-1 was the deposition testimony of Ms. Jennifer Mason, L.M.T. Petitioner also offered the testimony of Patient L.G., a 29-year-old female and alleged victim, and that of Mr. J.N., Patient L.G.'s fiancé at the time of the alleged violations, and her husband by the date of the hearing. Respondent offered five exhibits. Exhibits R-1 through R-3 were admitted, while Petitioner's objections to the introduction of Exhibits R-4 and R-5 as being irrelevant were sustained. Respondent testified

on his own behalf and offered the testimony of his wife, Ms. Niurka Escalas, and that of his wife's daughter, Ms. Daily Lima. Mr. Pruneda participated at the hearing with the assistance of a duly-sworn interpreter, provided by the Department.

The one-volume final hearing Transcript was filed on October 10, 2017. Petitioner timely filed a proposed recommended order on October 20, 2017, which was considered in preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect on November 13, 2016, the date that violations were allegedly committed.

FINDINGS OF FACT

1. The Department, Board of Massage Therapy, is the state agency charged with regulating the practice of massage therapy within the state of Florida, pursuant to section 20.43 and chapters 456 and 480, Florida Statutes.

2. Mr. Pruneda is a licensed massage therapist within the state of Florida, having been issued license number MA 63779.

3. Mr. Pruneda's current address and address of record is 18 Walcott Drive, Boynton Beach, Florida 33426.

4. On or about November 13, 2016, Mr. Pruneda was employed at Shanti Ohm Spa at 321 Northeast Second Avenue, Delray Beach, Florida 33444.

5. On or about November 13, 2016, Patient L.G., a 29-year-old female, received a massage from Mr. Pruneda.

6. Patient L.G. had received massages about 20 times before, and had received a massage from Mr. Pruneda on one prior occasion.

7. The spa was normally closed on Sundays, but Patient L.G. called and requested massage appointments for massages for herself and her fiancé for Sunday, November 13, 2016.

8. Mr. Pruneda testified that when an appointment for a massage is made, the receptionist gives the names of the massage therapists and the patient chooses among them. However, Patient L.G. testified that she did not request Mr. Pruneda. In any event, the spa made special arrangements for Mr. Pruneda and another massage therapist to come in to the spa on that Sunday. On November 13, 2016, Patient L.G. said that after filling out some paperwork, Mr. Pruneda came into the reception area and that was when she first learned he would be her massage therapist.

9. Before the massage began, Patient L.G. disrobed and lay face-down on the massage table and covered herself with a large draping. Patient L.G. was wearing her underwear but no bra.

10. Patient L.G. testified that at the beginning of the massage, Mr. Pruneda spent an excessive amount of time massaging the backs of her legs and that the strokes were coming very close to her buttocks, making her feel uncomfortable. After he moved on to her lower back, the massage went quickly, and she said that she remembered wishing he would spend more time on her back. After her back, he massaged her arms. Then Mr. Pruneda asked Patient L.G. to turn over onto her back, and Patient L.G. complied.

11. Patient L.G. credibly testified that when she turned over, Mr. Pruneda did not avert his eyes and that he then failed to properly drape her, so she had to cover her breasts with the blanket herself. She did not give consent for him to leave her undraped.

12. Patient L.G. testified that Mr. Pruneda again spent an excessive amount of time massaging the tops of her legs and that she felt his hand going under the strap of her underwear. She testified that he then moved her underwear aside and touched her genital area. She testified that she told him "no, no, no, no." She said that her eyes were closed and that she was in shock and fear. Patient L.G. testified that he had his hand on her shoulder and said to her, "If you say no it is no, if you say yes it is yes." She said that he did not try to improperly touch her again. She said that she felt uncomfortable and she

adjusted the blanket. She testified that Mr. Pruneda continued the massage on her arms, up to the top, and then massaged her shoulders.

13. Patient L.G. did not give informed consent for Mr. Pruneda to remove the draping from her breasts.

14. Patient L.G. did not give informed consent for Mr. Pruneda to adjust or remove her underwear.

15. Mr. Pruneda agreed that he had performed a massage on Patient L.G. on one prior occasion, but his testimony was otherwise contrary to that of Patient L.G.'s in every relevant aspect. He denied that he exposed Patient L.G.'s breasts, failed to appropriately drape her breasts, pulled aside her underwear, or touched her genital area. He testified that he simply performed a deep tissue massage with the appropriate level of care and professionalism.

16. Mr. J.N., Patient L.G.'s fiancé, testified that although he and Patient L.G. each had an appointment for a 60-minute massage, his massage was completed first, and he had to wait for 10 to 15 minutes for his fiancé to complete hers. He said that when she came out, he noticed discomfort on her face and asked her if everything was okay. She replied that it was. On the way home, he asked her two more times if everything was okay, receiving the same response. He testified that when they had almost arrived at the house, she finally told him that she

had been the victim of sexual misconduct. Patient L.G. confirmed this account, explaining that she said nothing to her fiancé in response to his questioning until they were close to the house to avoid an incident at the spa.

17. Patient L.G. testified that after she returned to the house, she called the spa to report what had happened and, a couple of days later, also contacted the police.

18. Mr. Pruneda introduced Exhibit R-3, a "Square Sales List" from Shanti Ohm Spa, which contained entries dated November 13, 2016, showing a tip of \$20 from Patient L.G. to "Jorge," and a tip of \$20 from J.N. to his therapist. The list also shows a single line drawn through the tip of \$20 from Patient L.G. There was speculation at hearing that this was because the tip was later returned to Patient L.G., but no evidence from spa personnel was offered to explain the entries on the list. Mr. Pruneda argues that Patient L.G. would not have left a tip had she actually been sexually assaulted. Patient L.G. admitted at hearing that she did leave a \$20 tip for Mr. Pruneda. She stated that she believed if she failed to do so, her fiancé would realize something was wrong and that she wished to avoid an incident while at the spa.

19. Mr. Pruneda introduced into evidence a copy of a November 14, 2016, posting from a social media internet site belonging to a business specializing in cosmetic makeovers. The

document showed Patient L.G. after a cosmetic makeover and contained her comment stating, "Thank you so much . . . I had so much fun today and feel amazing!! Off to rock this photo shoot thanks to you ladies!!" While Mr. Pruneda argues that this social media posting showed that Patient L.G.'s attitude on November 14, 2016, was completely inconsistent with that of a person who had actually suffered a sexual assault on the previous day, this argument is not accepted. Patient L.G. admitted the posting, but explained that the appointment had been made some time before, could not be rescheduled, and that she was obliged to go on with the session in order to meet deadlines for her upcoming wedding.

20. Both the original and the Amended Administrative Complaint also charged that Mr. Pruneda touched Patient L.G.'s breasts without her consent. Further, Ms. Mason, expert witness of Petitioner, testified by deposition, based in part upon her review of the administrative report that had been prepared, that she was of the opinion that Mr. Pruneda's improper touching of Patient L.G.'s breasts constituted sexual misconduct. Yet at hearing, no evidence of Mr. Pruneda improperly touching or trying to massage Patient L.G.'s breasts was presented.^{1/} At that time, Patient L.G., the only person who could have made such an accusation, testified:

Q: Did Mr. Pruneda ever try to massage anywhere on your chest?

A: He was massaging my shoulder area. But no.

21. Patient L.G. testified that after the incident, she was very upset for a very long time. Mr. J.N. testified that Patient L.G. felt nervous and had breakdowns. He testified that their relationship had changed a little bit, but that they were working to make it better and improve it going forward.

22. Patient L.G.'s testimony as to the events that took place at the Shanti Ohm Spa on November 13, 2016, was precise, clear, and convincing.

23. Ms. Mason credibly testified that she was familiar with the standards of practice of massage therapists in Florida and that the failure to properly drape a patient without express permission falls below those standards.

24. Mr. Pruneda was fired from Shanti Ohm Spa.^{2/} He was restricted from the practice of massage therapy on female patients and, at the time of hearing, was no longer working as a massage therapist.

25. Ms. Escalas testified that she has been married to Mr. Pruneda for 20 years and had been with him several years before they were married. She testified that the charges against him have damaged their lives and that it has been shameful to have to admit that he was being investigated. She

testified that he was now working in a cleaning company, and eventually, would be working at a shower door company, but was making less money than he made as a massage therapist.

26. Ms. Lima testified that although Mr. Pruneda is not her biological father, he has been just like her father for 20 years. She said that he has always demonstrated high values as a person and that he has never acted badly in all of that time. She testified that the accusations have greatly damaged the family.

27. Mr. Pruneda has been licensed as a massage therapist for 30 years.

28. Mr. Pruneda has never had any prior discipline imposed in connection with his massage therapy license.

29. The case management system of the Clerk and Comptroller of Palm Beach County, Florida, contains no record of felony, criminal traffic, or misdemeanor charges involving Mr. Pruneda.

CONCLUSIONS OF LAW

30. 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.

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

32. A proceeding to suspend, revoke, or impose other discipline upon a professional 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)).

33. 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)).

34. 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).

35. Respondent is charged in Count I with engaging in sexual misconduct in the practice of massage, in violation of section 480.0485, and engaging in prohibited sexual activity, in violation of rule 64B7-26.010. On November 13, 2016, section 480.0485 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.

36. Rule 64B7-26.010 prohibited "sexual activity" in the therapist-client relationship, defined in part as "any direct or indirect physical contact by any person or between persons that is intended to erotically stimulate either person or both, or which is likely to cause such stimulation."

37. Patient L.G.'s testimony that Respondent inappropriately pulled her underwear aside and touched her

genital area was clear and convincing. There was no competent evidence that Respondent ever touched her breasts.

38. Petitioner proved by clear and convincing evidence that Respondent violated section 480.046(1)(p), by engaging in sexual misconduct or sexual activity in violation of section 480.0485 and rule 64B7-26.010.

39. Respondent was also charged in Count II with violation of section 480.046(1)(i), which provided that the failure to practice massage with that level of care, skill, and treatment which is recognized by a reasonably prudent massage therapist as being acceptable under similar conditions and circumstances, was grounds for disciplinary action. Rule 64B7-30.001(5) provides that without specific informed consent, the failure to appropriately drape a client, including draping of the genitalia of all clients, and breasts of female clients, constitutes the failure to practice massage therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar massage therapist as being acceptable under similar conditions and circumstances. Ms. Mason credibly testified that she was familiar with the standards of practice of massage therapists in Florida and that the failure to properly drape a patient without their express permission falls below those standards.

40. Petitioner proved by clear and convincing evidence that Respondent failed to properly drape Patient L.G. and failed to practice massage with that level of care, skill, and treatment which is recognized by a reasonably prudent massage therapist as being acceptable under similar conditions and circumstances, in violation of section 480.046(1)(i).

Penalty

41. Section 480.046(1)(p) provided that disciplinary action may be imposed for violation of any provision of chapter 480.

42. 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).

43. Section 456.079, Florida Statutes, required 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).

44. The Board of Massage Therapy adopted rule 64B7-30.002(3)(o)2., which provided that the discipline for a violation of the sexual misconduct prohibition in

section 480.0485 should be a fine of \$2,500 and revocation of the license.

45. Rule 64B7-30.002(3)(o)13., similarly, provided that the discipline for a violation of rule 64B7-26.010 should be a fine of \$2,500 and revocation.

46. Rule 64B7-30.002(3)(i) provided that the discipline for a first violation of section 480.046(1)(i) should be a fine of \$1,000 and probation.

47. On November 13, 2016, rule 64B7-30.002(4) set forth possible aggravating and mitigating circumstances warranting deviation from established penalty guidelines, including:

- (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.

48. There is no evidence that Respondent has ever previously been disciplined in this or any other state. Suspension or revocation of his license would have a severe detrimental effect on his livelihood. On the other hand, Respondent had full actual knowledge of the violations, and Patient L.G. was emotionally damaged by the violations. While sexual misconduct in the practice of massage inherently constitutes a great danger to the public, that fact is already taken into account in the penalty guideline for this offense, and it is not a separate aggravating factor in the context of this case.

49. Considered as a whole, these factors do not warrant either mitigation or aggravation of the penalty suggested by the guidelines.

50. 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 Board of Massage Therapy enter a final order finding Jorge L. Pruneda in violation of sections 480.0485 and 480.046(1)(i) and rule 64B7-26.010; imposing a fine of \$3,500; revoking his license to practice massage therapy; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 1st day of November, 2017, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
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 1st day of November, 2017.

ENDNOTES

^{1/} Although Patient L.G. testified that she gave contemporaneous accounts of sexual misconduct, first to spa personnel and then to the police, no evidence as to the content of these accounts was offered at hearing. A CD Audio of a Delray Beach Police Controlled Call and CD/DVD of a Delray Beach Police Interview with Respondent were listed as Petitioner Exhibits, but were withdrawn at hearing. In a civil trial, it is not clear whether section 90.801(2)(b), Florida Statutes, would allow the introduction of her previous statements to spa personnel or police, but in an administrative hearing, chapter 120 allows the introduction of hearsay, even in the absence of an exception, for the purpose of supplementing or explaining other competent evidence.

^{2/} Mr. Pruneda's response to Interrogatories on June 12, 2017, and his testimony at hearing on September 5, 2017, indicated that he was fired from his job at Shanti Ohm Spa following the allegations against him, testimony which is credited. In between these two accounts, in his deposition on August 24, 2017, Mr. Pruneda stated that the spa took no disciplinary action against his employment, that it was he who "took the initiative," and that no one from Shanti Ohm Spa ever told him he was terminated. This version may have been colored by embarrassment. Under all of the circumstances, however, this minor discrepancy was not considered a critical factor in assessing Mr. Pruneda's credibility.

COPIES FURNISHED:

Keith C. Humphrey, Esquire
Raj Misra, Esquire
Florida Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265
(eServed)

Jorge L. Pruneda
18 Walcott Drive
Boynton Beach, Florida 33426

Nichole C. Geary, General Counsel
Florida Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1701
(eServed)

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