

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-3246PL

ERNESTO RODRIGUEZ, L.M.T.,

Respondent.

RECOMMENDED ORDER

On July 20, 2017, a hearing was held by video teleconference at locations in Lauderdale Lakes and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary A. Iglehart, Esquire
Jaquetta Johnson, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Michael E. Jones, Esquire
Law Office of Michael E. Jones, P.A.
440 South Andrews Avenue
Fort Lauderdale, Florida 33301

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 rule 64B7-30.001(5); and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On April 11, 2017, the Florida Department of Health (Petitioner or Department) served an Administrative Complaint against Ernesto Rodriguez (Respondent or Mr. Rodriguez). Respondent disputed material facts alleged in the complaint and requested an administrative hearing.

At the hearing, the parties offered nine joint exhibits: J-1 through J-9. Petitioner offered two additional exhibits, P-1 and P-2, while Respondent offered four exhibits, R-1 through R-4. All exhibits were admitted without objection, with the caveat that several contained hearsay that could not, in itself, support a finding of fact, but could only be used to support or explain other competent evidence. Exhibit J-1 was the deposition transcript of Respondent. Petitioner offered the testimony of two live witnesses: Patient R.A., a student and alleged victim; and Detective Carlson of the Hallendale Beach Police Department. Respondent testified on his own behalf.

The one-volume final hearing Transcript was filed on August 8, 2017. Both parties timely filed proposed recommended orders on August 18, 2017, which were carefully considered in the 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 January 9, 2017, the date that the violations were allegedly committed.

FINDINGS OF FACT

1. The Department of Health, 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. Rodriguez is a licensed massage therapist within the state of Florida, having been issued license number MA 75735. He has been licensed since 2014.

3. Mr. Rodriguez's current address and address of record is 812 Northeast 2nd Street, Apartment 1, Hallandale, Florida 33009.

4. On or about January 9, 2017, Mr. Rodriguez was employed at Om'echaye Wellness & Fitness Center (Om'echaye) located at 1100 East Hallandale Beach Boulevard, Hallandale Beach, Florida 33009.

5. On or about January 9, 2017, Patient R.A., a 24-year-old female, received a body scrub and a massage from Respondent.

6. Patient R.A. had never received a massage at Om'echaye before, though she and her boyfriend lived close by and had eaten lunch at the Om'echaye restaurant a few times. It was on one of these earlier visits that she saw a special promotion for a body scrub and Swedish massage. She bought a gift card for the promotion for her boyfriend for his birthday. He was not enthusiastic about getting a massage there, however, so they decided that Patient R.A. would use the card herself. She reported what happened during the massage shortly after the incident. Her testimony at hearing was detailed and was consistent with previous accounts. These factors, along with her demeanor at hearing, made her testimony clear and convincing, and her testimony is credited.

7. Patient R.A.'s appointment was at 6:15 p.m., and she arrived a few minutes early. The receptionist introduced her to Mr. Rodriguez. In the massage room, Patient R.A., having never received a body scrub before, asked Mr. Rodriguez whether she should leave her underwear on, as she had always done during massages she had received. He told her that no one did that, saying that otherwise it would be difficult to perform the body scrub. Patient R.A. asked if she should go under covers, but he

directed her not to. He asked her to lie face up on the massage table and left the room so that she could undress. There were two 16" x 24" towels on the table, with which she covered herself notwithstanding his instruction, placing one over her lower body and one over her breasts.

8. Mr. Rodriguez returned to the room and began to wet her skin with a hot towel. He asked her how she heard about Om'echaye. She told him about the gift card she had originally bought for her boyfriend's birthday, and that it was almost her birthday and that she was using the card. He learned that she was a foreign student from Germany studying psychology. He told her that his sister-in-law was a psychologist in Brazil. Patient R.A. asked him if he was from Brazil, and he told her no, that he was from Peru. He began the body scrub as they were talking. He applied a coconut and sugar body scrub solution, pushing her legs apart as he quickly worked up her legs, the back of his hands touching her vagina several times. As he bent her leg at the knee the towel slid onto her stomach, exposing her. He removed the towel completely, touched her vagina again, and then scrubbed the front part of her vagina with the body scrub.

9. Mr. Rodriguez continued working up her body, removing the upper towel and, without asking her, began scrubbing her

breasts. Afterwards, he removed the scrubbing solution from the front of her body with a hot towel. He then asked her to turn over.

10. Mr. Rodriguez scrubbed the back body of Patient R.A. He scrubbed her buttocks and touched her anus with the side of his hands. After wiping off the body scrub solution, he told her that he would begin the Swedish massage. Mr. Rodriguez did not receive consent from Patient R.A. that she would remain undraped. He dripped hot oil onto Patient R.A. and rubbed it over her body, rubbing her buttocks, with his hands frequently against her anus, spilling oil down her buttocks. He then asked her to turn over.

11. He massaged Patient R.A.'s front, including her breasts, and touched her vagina. He then began to rub his finger against her clitoris. Patient R.A. grabbed his wrist and told him not to touch her down there. He then returned his massage to her breast area and began to tickle her nipples. He moved his hands to her lower body several other times, touching her vagina. He came close to her clitoris, but did not touch her there again.

12. Less clear and convincing was Patient R.A.'s testimony that Mr. Rodriguez pressed his penis against her elbow at some point during the massage. In cross examination, she stated:

Q: Now, did you say in your direct testimony that there was an erect penis that touched you?

A: At first was the--I believe so, but I'm not sure. That's what I said first. And even--then I mentioned I felt his genitals, but I don't think he was erect. I'm not sure. I felt it, but if he was erect--

Q: Okay. So something--

A: --I'm not sure--

Q: --something touched you, but you don't know whether it was his penis or his arm or--

A: His genitals.

Patient R.A. stated at the hearing that she did not see Mr. Rodriguez touch her, but felt him touch her right arm. She did not remember how many times. Her testimony that Mr. Rodriguez pressed his penis against her was not clear and convincing.

13. After the massage, Mr. Rodriguez asked Patient R.A., "How was it?" Patient R.A. responded that it was not a Swedish massage and that he needed to be careful about the way he performed massages. She asked him if he always did his massages like that. He responded saying, "That's how I do it with my clients. I don't know what other massage therapists do." She again said that he needed to be very careful with what he was doing. He apologized, saying, "Thank you for being cool." He

gave her his business card. He offered to give her a deep tissue massage for free at his studio. He said that all of his clients come there because "it is too expensive here." Patient R.A. declined. The door to Om'echaye was locked because of the late hour that she was leaving, and Mr. Rodriguez had to open the door to let her out. At hearing, Patient R.A. said that she did not do more to prevent the assault because at first she refused to believe it was happening and later she was afraid.

14. Patient R.A. was ashamed of herself when she got outside Om'echaye, thinking she should have stood up for herself more. At first, she was not going to tell anyone that she had been sexually assaulted, but ended up telling her boyfriend and going back to Om'echaye early the next morning and talking to the owner. She met with police later that day and gave them statements. She later notified the Department.

15. Respondent denied Patient R.A.'s account in every material element. He testified that he never touched her vagina, anus, breasts, nipples, or clitoris, either intentionally or accidentally. He testified that he acted within the scope of massage therapy practice and that no sexual misconduct occurred. He testified that she remained properly draped the entire time. He suggested that Patient R.A. made up the entire incident and that there was no video recording or witnesses.^{1/}

16. Respondent also asserted that he would not have committed sexual misconduct against Patient R.A. because she was a female and he was gay, and so was not attracted to her. Curiously, Mr. Rodriguez sought to bolster this claim with testimony that he had performed some massage therapy at Ed Logan's, represented to be a gay resort, and that at one time he had advertised in a gay publication. Since the massage therapist-patient relationship does not appropriately involve sexual motivation of any kind--whether homosexual, bisexual, or heterosexual--it is not entirely clear why Mr. Rodriguez was suggesting that these activities, even had they been supported by additional documentary evidence of some sort, somehow confirmed his testimony.

17. In any event, the assertion that he was gay, even if accepted, would not exonerate Mr. Rodriguez in light of the clear and credible testimony of R.A. in this case. The definition of sexual activity is not limited to physical contact intended to erotically stimulate the therapist, but also includes contact intended to erotically stimulate the patient, as well as contact which is likely to cause such stimulation, regardless of intention, as discussed further in the Conclusions of Law below.

18. Respondent's touching of Patient R.A.'s breasts, nipples, anus, vagina, and clitoris, as described by Patient

R.A., was direct physical contact likely to erotically stimulate either person or both. It was clearly outside the scope of practice of massage therapy. The touching described by Patient R.A. was sexual activity as defined under the rule. Patient R.A.'s testimony was clear and convincing and proved that Respondent used the therapist-patient relationship to engage in sexual activity.

19. Patient R.A. testified that after reporting the incident, she "could not function anymore." She saw a poster saying "get a massage for \$20 for 30 minutes" on campus, and she broke out in tears. She started counseling and soon after that was put on an antidepressant for a period of five months.

20. Mr. Rodriguez testified that he depends on his massage business to make his living, that he is no longer working at Om'echaye spa, and that he has been painting buildings to pay his bills.

21. There was no evidence to indicate that Mr. Rodriguez has ever had any prior discipline imposed in connection with his massage therapy license.

CONCLUSIONS OF LAW

22. 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.

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

24. 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)).

25. 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)).

26. 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).

27. Respondent is charged 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. Section 480.0485 provides:

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.

28. Rule 64B7-26.010 prohibits "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."

29. Respondent's touching of Patient R.A.'s breasts, nipples, anus, vagina, and clitoris, as described by Patient R.A., was sexual activity as defined under the rule. Petitioner proved by clear and convincing evidence that Respondent engaged in sexual misconduct in the practice of massage therapy, in violation of section 480.0485, and prohibited sexual activity, in violation of rule 64B7-26.010.

30. Respondent was also charged with violation of rule 64B7-30.001(5). This rule provided that failure to drape the buttocks and genitalia of all clients, and breasts of female clients, unless the client gives specific informed consent to be undraped, is a 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.

31. The testimony of Patient R.A. was clear and convincing that Respondent directed Patient R.A. to undress completely and not use a drape of any kind for the body scrub, later removed the small towels she had used to cover herself contrary to his directions, and failed to receive consent from Patient R.A. before beginning the Swedish massage that she would remain undraped.

32. Petitioner proved by clear and convincing evidence that Respondent failed to drape the buttocks, genitalia, and breasts of Patient R.A., despite the fact that she had not given specific informed consent to be undraped, and so failed 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, in violation of rule 64B7-30.001(5).

Penalty

33. At the time of the incident, section 480.046(1)(p) provided that disciplinary action may be imposed for violation of any provision of chapter 480.

34. 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).

35. Section 456.079 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).

36. 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 \$2,500.00 and revocation of the license.

37. 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 \$2,500.00 and revocation.

38. Respondent was also charged in Count II with violation of rule 64B7-30.001(5), for failure to appropriately drape a client. While section 480.046(1)(p) subjects a massage therapist to discipline for violation of rules of the Board of Massage Therapy, Petitioner did not point to any corresponding penalty guideline established for violation of this particular rule, and none was found. Respondent was not adequately put on notice of the penalties he might face for violation of the draping rule, consequently, no additional penalty has been recommended for this violation.^{2/}

39. Rule 64B7-30.002(4) sets forth the following possible aggravating and mitigating circumstances warranting deviation from established penalty guidelines:

- (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.

40. 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 R.A. was emotionally and mentally damaged by the violations. While sexual misconduct in the practice of massage therapy 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.

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

42. Section 456.072(4) provides 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 Department of Health, Board of Massage Therapy, enter a final order finding Ernesto Rodriguez in violation of section 480.0485, Florida Statutes, and Florida Administrative Code Rules 64B7-26.010 and 64B7-30.001(5), constituting grounds for discipline under section 480.046(1)(p), Florida Statutes; imposing a fine of \$2,500.00; revoking his

license to practice massage therapy; and imposing costs of investigation and prosecution.

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

ENDNOTES

^{1/} Petitioner's objection to Respondent's attempt to elicit testimony regarding Patient R.A.'s prior sexual history was sustained on this record on the grounds of relevance. See Esteban v. State, 967 So. 2d 1095, 1099 (Fla. 4th DCA 2007) (admission of sexual history not appropriate except in instances where the specific incident or relationship involved provided a direct motive for fabrication); Dep't of Prof'l Reg. v. Wise, 575 So. 2d 713, 714-15 (Fla. 1st DCA 1991) (while rape shield statute was not applicable to administrative proceedings, testimony as to prior sexual histories of victims, including sexual abuse as children, was not relevant).

^{2/} Compare § 456.079, Fla. Stat., with § 455.2273, Fla. Stat., at issue in Arias v. Dep't of Bus. & Prof'l Reg., 710 So. 2d 655, 659 (Fla. 3d DCA 1998). See also Fernandez v. Fla. Dep't of Health, 82 So. 3d 1202, 1204-05 (Fla. 4th DCA 2012).

COPIES FURNISHED:

Mary A. Iglehart, Esquire
Jaquetta Johnson, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399
(eServed)

Michael E. Jones, Esquire
Law Office of Michael E. Jones, P.A.
440 South Andrews Avenue
Fort Lauderdale, Florida 33301
(eServed)

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

Kama Monroe, Executive Director
Board of Massage Therapy
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.