

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-3336PL

XUMEI SUN, L.M.T.,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

A final hearing was scheduled in this case for August 16, 2017. On August 8, the parties moved to proceed instead by written submissions, including agreed exhibits and a stipulation of facts. The motion was granted, the final hearing was canceled, and the parties were required to file the agreed exhibits and a proposed recommended order (PRO) by August 16. The Petitioner filed the evidence (labeled Petitioner's Exhibit 1, which is a composite of criminal court records, and Exhibit 2, which is a transcript of the Respondent's deposition in this case) 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

(2015),<sup>1/</sup> by pleading nolo contendere to one count of prostitution; whether she violated section 456.072(1)(x), Florida Statutes, by failing to report the plea 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 76935 by the Board of Massage Therapy.

3. On January 14, 2016, the Respondent entered a plea of nolo contendere in case 15-CM-019206-A in Hillsborough County, Florida, to one count of prostitution in violation of section 796.07(2)(e), Florida Statutes (2015), a second-degree misdemeanor. Adjudication was withheld, and the Respondent was required to pay \$270 in court costs.

4. The Respondent did not report her plea in that case to the Board of Massage Therapy within 30 days of entering the plea.

5. The Respondent stipulated that the crime of prostitution is directly related to the practice of massage therapy, and that

offering to perform a sexual act on a massage client during the course of a massage by a licensed massage therapist is outside the scope of the practice of massage therapy.

6. Despite her nolo contendere plea, the Respondent testified in this case that she was not guilty of prostitution. She also testified that she entered the plea without fully understanding its meaning and consequences, and without legal counsel, and that she would not have entered the plea had she known its meanings and consequences. She introduced no other evidence to corroborate or support her claims.

#### CONCLUSIONS OF LAW

7. 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).

8. 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))).

9. 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).

10. The Administrative Complaint alleges that the Respondent pled nolo contendere to prostitution in Hillsborough County in violation of section 780.046(1)(c), Florida Statutes.

11. 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.

12. Section 796.07(2)(e) 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.

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

14. 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].

15. Lewdness was defined in section 796.07(1)(b) as "any indecent or obscene act." Assignment 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."

16. At the time of the alleged offense in early 2016, Florida Administrative Code Rule 64B7-26.010(1)<sup>2/</sup> prohibited sexual activity by any person or persons in any massage establishment. Prostitution involves sexual activity and is forbidden in the practice of massage therapy.

17. As the Respondent concedes, the crime of prostitution is directly related to the practice of massage therapy. A massage therapist who solicits a patient to engage in sex for money is using her position as a massage therapist to commit the crime of prostitution. 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 Petitioner proved this charge by clear and convincing evidence.

18. 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.

19. 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.

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

21. 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).

22. At the time of the alleged offense in early 2016, rule 64B7-30.002(3)(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.

23. At the time of the alleged offense in early 2016, rule 64B7-30.002(1)(y) provided that the penalty for violating section 456.072(1)(x) was a reprimand, \$250 fine and suspension for a first offense and a \$1,000.00 fine and continuing education.

24. At the time of the alleged offense in early 2016, rule 64B7-30.002(4) 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.

The Respondent asks for lenience primarily because she claims she was not actually guilty of prostitution. However, she pled nolo contendere, and did not report the plea, which constitute the violations charged. Her claims that she was innocent and that

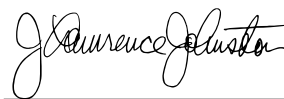
she was not told the consequences of a plea of nolo contendere to the charge were self-serving and not supported by any other evidence. Consideration of the applicable aggravating and mitigating factors balance out, and a deviation from the penalty guidelines is not warranted.

25. 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 29th day of August, 2017, in Tallahassee, Leon County, Florida.



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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 29th day of August, 2017.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, statutory references are to the 2015 codification of the Florida Statutes, which was in effect at the time of the alleged offense.

<sup>2/</sup> All rule references are to the version of the Florida Administrative Code in effect at the time of the alleged offense.

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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.