

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-3337PL

QIAN GAO, L.M.T.,

Respondent.

RECOMMENDED ORDER

The final hearing in this case was held on September 14, 2017. It was conducted by video teleconference between sites in Tampa and Tallahassee. J. Lawrence Johnston was the Administrative Law Judge.

APPEARANCES

For Petitioner: Lealand L. McCharen, Esquire
Elana J. Jones, Esquire
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Tallahassee, Florida 32399-3265

For Respondent: Alex Yu, Esquire
Law Office of Alex Yu, P.A.
Somerset Professional Park
15255 Amberly Drive
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STATEMENT OF THE ISSUES

The issues are whether the Respondent, a licensed massage therapist, violated applicable sections of the Massage Practice

Act, by attempting to engage in prohibited sexual activity with a client or patient; and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

The Petitioner filed an Administrative Complaint against the Respondent in April 2017. The Respondent denied the charges and requested a hearing. The matter was referred to the Division of Administrative Hearings on June 12 and was scheduled for hearing on August 9. On the Petitioner's unopposed motion, the hearing was continued to September 14.

At the hearing, the Petitioner called one witness, Hillsborough County Sheriff's Office Detective M.D. Petitioner's Exhibit 1 was received in evidence. The Respondent testified with the help of a Mandarin Chinese/English interpreter. After the hearing, the Transcript was filed, and the Petitioner filed a Proposed Recommended Order. (The Respondent did not.)

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 (2015).^{1/}

2. In 2015, the Respondent was licensed to practice massage therapy in Florida, having been issued license number MA 67956 by the Board of Massage Therapy.

3. In November 2015, the Vice Unit of the Hillsborough County Sheriff's Office conducted an operation to investigate a

complaint that prostitution was taking place at VIP Massage (VIP), located at 5915 Memorial Highway in Tampa, which advertised "hot, beautiful, friendly Asian ladies" under the "body rub" section of advertisements on an internet website.

4. On November 12, 2015, Detective M.D., who was working undercover, entered VIP. He was met by the Respondent, and she confirmed the appointment for a one-hour massage that he had made the day before, led him to a massage room, and collected the \$60 charge. She then left the room with the money and returned after M.D. disrobed, except for his boxer shorts, and got on the massage table.

5. The Respondent performed the hour massage in an appropriate manner and left to get M.D. some water. When she returned she asked him why he did not remove his boxer shorts. He said he was shy. She then asked if he was the police. He said, no, he was just shy. At this point, the Respondent made a hand motion indicating masturbation and asked, "do you want?" M.D. asked, "how much?" She said, "40," meaning \$40. M.D. asked if she would "suck" him, referring to oral sex. The Respondent said, "no, only," and repeated the hand gesture for masturbation. He declined, saying that he was too shy, and that he was married. This was a pre-arranged signal for his investigative team of law enforcement officers to enter the VIP and make an arrest for prostitution.

6. M.D. identified the Respondent to the arresting officers and explained to the Respondent that she was being arrested for prostitution. The Respondent understood the charge and loudly denied it.

7. The Respondent again denied the charges in her testimony at the hearing. She said there was a misunderstanding between M.D. and her due to her poor command of English (and his inability to speak or understand Chinese). She said that she actually asked M.D. if he wanted an additional hour of massage and that she was referring to the charge for that when she said, "40."

8. Although there were some minor details of M.D.'s testimony that were inconsistent or misremembered and later corrected, his testimony as to essentially what occurred at VIP on November 12, 2015, was clear and convincing, especially since it was consistent with what was in the arrest affidavit he signed under oath that same day.

9. The Respondent's argument that it was all a misunderstanding due to a language barrier is rejected. She appeared to have little difficulty understanding some of the conversation between him and her regarding his massage, or understanding the criminal charge when she was arrested, and there was no mistaking the meaning of her hand gesture for masturbation.

10. The Respondent also raised the question why she would have waited until returning with water to ask if he wanted her to masturbate him. While there is some appeal to the logic of her argument at first blush, there are a number of plausible explanations for her timing.

CONCLUSIONS OF LAW

11. 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).

12. 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))).

13. 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).

14. Count I of the Administrative Complaint alleges that the Respondent violated sections 480.046(1)(p) and 480.0485, Florida Statutes. At the time of the alleged offense in November 2015, section 480.046(1)(p) made it a ground for license discipline for a licensed massage therapist to violate a provision of chapter 480 or 456, Florida Statutes, or any rule adopted under those statutes; and section 480.0485 stated that the massage therapist-patient relationship is founded on mutual trust and that sexual misconduct in the practice of massage therapy violates that relationship and is prohibited.

15. Count II of the Administrative Complaint alleges that the Respondent is subject to license discipline for engaging or attempting to engage in sexual misconduct, as defined in section 456.063(1), which was prohibited by section 456.072(1)(v) at the time of the alleged offense in November 2015.

16. The charges in the Administrative Complaint were proven by clear and convincing evidence.

17. The Board of Massage Therapy imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B7-30.002.^{2/} See Parrot Heads, Inc. v. Dep't of Bus. and Prof'l Reg., 741 So. 2d 1231 (Fla. 5th DCA 1999).

18. At the time of the alleged offense in November 2015, rule 64B7-30.002(3)(o)2. provided that the penalty for violating

section 480.0485 is a \$2,500 fine and license revocation and rule 64B7-30.002(3)(x) provided that the penalty for violating section 456.072(1)(v) was a \$2,500.00 fine and license revocation.

19. At the time of the alleged offense in November 2015, 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.

Consideration of the applicable aggravating and mitigating factors balance out, and a deviation from the penalty guidelines is not warranted.

20. At the time of the alleged offense in November 2015, 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 the Massage 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 sections 480.046(1)(p), 480.0485, and 456.072(1)(v); fining her \$2,500; revoking her license to practice massage therapy; and awarding costs of investigation and prosecution of this matter to the Petitioner.

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



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 1st day of November, 2017.

ENDNOTES

^{1/} 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.

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

COPIES FURNISHED:

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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.