

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 17-6176PL

DAVID CRAWFORD, L.M.T.,

Respondent.

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RECOMMENDED ORDER

On December 22, 2017, Administrative Law Judge (ALJ) J. Lawrence Johnston of the Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing in this case by video teleconference at sites in Tampa and Tallahassee.

APPEARANCES

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

For Respondent: No appearance

STATEMENT OF THE ISSUES

Whether the Respondent, a licensed massage therapist, should be disciplined under section 480.046(1)(p), Florida Statutes (2016),<sup>1/</sup> for sexual misconduct in the practice of massage therapy; and, if so, the appropriate discipline.

## PRELIMINARY STATEMENT

On November 8, 2017, the Petitioner filed an Amended Administrative Complaint against the Respondent. The Respondent disputed the charges and requested a hearing. The Petitioner forwarded the case to DOAH, and the hearing was scheduled for December 22.

The Respondent did not appear at the final hearing. The Petitioner called the complaining witness to testify. The Petitioner's Exhibits 2 and 4 were received in evidence. Reservations expressed during the hearing regarding the Petitioner's Exhibit 3 have been resolved in favor of admissibility, and it is received in evidence as well. The Transcript of the hearing was filed on January 8, 2018. Neither party filed a proposed recommended order within ten days of the filing of the Transcript.

## FINDINGS OF FACT

1. The Petitioner licenses and regulates the practice of massage therapy in Florida, including discipline of licensees who are in violation of the governing statutes and rules. The Respondent holds massage therapy license MA 80154.

2. In March 2017, the Respondent was employed as a massage therapist at Hand and Stone Massage and Facial Spa in Brandon, Florida.

3. On March 29, 2017, Y.B., went to Hand and Stone to use a gift card for a free massage that had been given to him by his fiancée. The Respondent approached and introduced himself to Y.B., and asked if he could help him. Y.B. told him why he was there, and the Respondent led him back to a therapy room.

4. In the therapy room, Y.B. asked the Respondent to focus on his upper body, arms, and fingers. The Respondent had him undress and lay down on the massage table face down, covered only by a sheet. The massage proceeded without incident at first. Then, the Respondent asked for permission to massage Y.B.'s legs. Y.B. granted permission. As the massage proceeded, Y.B. closed his eyes and relaxed. When the Respondent finished massaging the back of Y.B.'s legs, he asked Y.B. to roll over onto his back. As the massage proceeded, Y.B. again closed his eyes and relaxed. After massaging Y.B.'s upper body, arms, and fingers, the Respondent asked, "May I?" Thinking the Respondent was asking if he had permission to massage the front of his legs, Y.B. said, "yes, do what you have to do." Before Y.B. knew what was happening, the Respondent grasped Y.B.'s penis in his hand and put it in his mouth. Startled and shocked, Y.B. opened his eyes, sat up, and made the Respondent stop, saying "Whoa, whoa, whoa, what do you think you're doing? I'm not gay." At that point, the Respondent stopped and brought Y.B. water and a towel.

5. What the Respondent did was very upsetting to Y.B. He was so upset and angry that he was distracted while being checked out by another employee of Hand and Stone. He unwittingly presented his gift card and answered questions. He discovered later that he not only had paid for the massage but also had given the Respondent a tip.

6. Y.B. continued to be bothered by what happened and returned to Hand and Stone the next day to confront the Respondent and have him explain the reason for what he had done the day before. During this confrontation, the Respondent admitted to his misconduct and tried to apologize, saying "I thought we had a connection."

7. Y.B. continues to be affected by what the Respondent did to him. He received counseling through his employer. He still is less affectionate than he used to be, even towards his family. To this day, he still becomes anxious when reminded of the incident.

#### CONCLUSIONS OF LAW

8. Because the Petitioner seeks to impose license discipline, it has the burden to prove the 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).

9. 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))).

10. The grounds proven in support of the Petitioner's assertion that the Respondent's license should be disciplined

must be those specifically alleged in the Amended 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 instruments, 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).

11. The violations charged in the Amended Administrative Complaint were proven by clear and convincing evidence. The Respondent engaged in prohibited sexual misconduct, as defined in section 480.0485. He also violated Florida Administrative Code Rule 64B7-26.010,<sup>2/</sup> which prohibits the use of the therapist-client relationship to engage in sexual activity with a client (defined as direct or indirect physical contact intended or likely to erotically stimulate either person). The Respondent also is subject to discipline under section 480.046(1)(p) for violating any provision of chapter 480 or 456, Florida Statutes, or any rule adopted to implement those statutes.

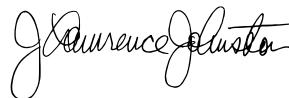
12. At the time of the alleged offense in March 2017, rule 64B7-30.002(3)(o)2. provided that the penalty for violating section 480.0485 was a \$2,500 fine and license revocation.

13. At the time of the alleged offense in March 2017, rule 64B7-30.002(4) provides that, in applying the penalty guidelines, the aggravating and mitigating circumstances can be taken into account and can allow the Board of Massage Therapy to deviate from the penalty guidelines. Consideration of those factors does not warrant a deviation from the penalty guidelines.

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 the Respondent guilty as charged; revoking his license; and fining him \$2,500.

DONE AND ENTERED this 23rd day of January, 2018, 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 23rd day of January, 2018.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, the Florida Statutes cited refer to the 2016 codification, which contains the statutes that were in effect in March of 2017, when the alleged violations occurred.

<sup>2/</sup> All rule citations are to the rules that were in effect in March of 2017, when the alleged violations occurred.

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.