

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 18-0898PL

SHUFANG LI, L.M.T.,

Respondent.

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RECOMMENDED ORDER

On April 16, 2018, a final hearing was held by video teleconference at locations in Miami and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lealand L. McCharen, Esquire  
Gerald C. Henley, II, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

For Respondent: Gennaro Cariglio, Jr., Esquire  
Law Office of Gennaro Cariglio, Jr.  
Penthouse 701  
8101 Biscayne Boulevard  
Miami, Florida 33138

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent engaged in sexual misconduct in the practice of massage therapy in

violation of section 480.0485, Florida Statutes, or in the practice of a health profession, in violation of section 456.072(1)(v), Florida Statutes; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On December 21, 2017, the Department of Health (Petitioner or Department) issued an Administrative Complaint against Ms. Shufang Li (Respondent or Ms. Li), a licensed massage therapist. The complaint charged Respondent with sexual misconduct in violation of sections 480.0485 and 456.072(1)(v). Respondent disputed material facts alleged in the complaint and requested an administrative hearing.

At hearing, Petitioner offered the testimony of Detective Avidon of the Palm Beach County Sheriff's Office. Exhibit P-1, consisting of portions of an investigative report, was admitted into evidence, with the caveat that it was hearsay and could only be used to supplement or explain competent evidence and could not support a finding of fact in itself. Respondent testified on her own behalf and offered no exhibits. Mr. Hailin Huang, provided by the State of Florida, was sworn as an official Mandarin interpreter to translate the proceedings.

The one-volume final hearing Transcript was filed on May 2, 2018. Both parties filed proposed recommended orders that were considered in preparation of this Recommended Order.

Except as otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect in November 2016, the time during which the 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 in the state of Florida, pursuant to section 20.43 and chapters 456 and 480, Florida Statutes.

2. At all times material to this proceeding, Ms. Li was a licensed massage therapist in the state of Florida, holding license number MA82765.

3. Ms. Li's current address of record is 620 East Colonial Drive, Orlando, Florida 32803. Ms. Li's native language is Mandarin Chinese. She came to the United States from China in 2014, and her ability to communicate in English is limited.

4. On November 16, 2016, Ms. Li was employed by Empire Day Spa (Empire), located in Lake Worth, Florida.

5. On that day, Detective Avidon, as part of the City of Lake Worth Community Policing Street Crimes Unit, was participating in an ongoing investigation into possible prostitution. He entered Empire in an undercover capacity and was greeted by Ms. Li. Detective Avidon asked her how much it would be for a one-hour massage. Ms. Li advised him it cost \$70.

6. Detective Avidon asked Ms. Li if she would give him a "full service" massage, which, from his experience in investigating vice, he understood to be a phrase commonly used to refer to the performance of sexual acts during or after a massage.

7. As he testified, Ms. Li took Detective Avidon into an enclosed hallway to the left of the counter, where she told him he would have to pay extra money. Ms. Li then led him to a massage room.

8. Later in the massage room, Detective Avidon asked her, "how much?" Ms. Li came over to him, rubbed his upper thigh just below the genital area, gestured as if she were performing masturbation, and asked him, "you want?"

9. As he testified, Detective Avidon, using a slang term for oral sex, then asked Ms. Li, "How much for a blow job?" Ms. Li answered, "You tell me." Detective Avidon then asked, "Sixty?" Ms. Li responded, "One hundred." Detective Avidon confirmed, "One hundred dollars?" Ms. Li said, "Yes."

10. Detective Avidon told Ms. Li he needed to put his phone and wallet in his car and exited Empire. Detectives already on scene then entered Empire along with Detective Avidon. Ms. Li was positively identified by Detective Avidon, and she was placed into custody. Ms. Li was later formally identified using the Florida Driver's license in her possession.

11. Detective Avidon shortly thereafter completed the probable cause affidavit, which later was introduced into evidence to supplement and explain his live testimony at hearing.

12. Ms. Li's contrary testimony, to the effect that while she was in the massage room with Detective Avidon, she did not agree to engage in sexual activity, was not credible and is rejected. While it is accepted that Ms. Li's ability to communicate in English is limited, the credible testimony of Detective Avidon as to all the circumstances surrounding their communications makes it very clear that Ms. Li completely understood that she was agreeing to engage in sexual activity in exchange for payment.

13. Ms. Li's actions on November 16, 2016, were outside the scope of practice of massage therapy.

14. Ms. Li used the massage therapist-patient relationship to attempt to engage Detective Avidon in sexual activity. Ms. Li engaged in sexual misconduct in the practice of massage therapy.

15. Ms. Li has never had any prior discipline imposed against her license.

#### CONCLUSIONS OF LAW

16. 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 (2017).

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

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

19. 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)).

20. 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 Conser. 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).

Count I

21. Respondent is charged with engaging in sexual misconduct in the practice of massage, in violation of section 480.0485, which at the relevant time 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.

22. Respondent used the massage therapist-patient relationship to attempt to engage Detective Avidon in sexual activity outside of the scope of practice of massage therapy.

23. 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.

Count II

24. Respondent is also charged with violation of section 456.072(1)(v) for the incident occurring on November 16, 2016. At that time, the statute stated that disciplinary action

may be taken against a licensee for engaging or attempting to engage in sexual misconduct as defined and prohibited in section 456.063(1), which provided:

(1) Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession. Sexual misconduct in the practice of a health care profession is prohibited.

25. Respondent used the massage therapist-patient relationship to attempt to engage Detective Avidon in physical sexual activity outside the scope of the professional practice of massage therapy.

26. Petitioner proved by clear and convincing evidence that Respondent engaged in sexual misconduct in the practice of a health care profession, in violation of section 456.072(1)(v).

27. Section 480.046(1)(p) provides that disciplinary action may be imposed for violation of any provision of chapters 456 or 480.

Penalty

28. 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).

29. Section 456.079 requires the Board of Massage Therapy to adopt disciplinary guidelines for specific offenses by rule. Penalties imposed must be consistent with those disciplinary guidelines. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

30. The Board of Massage Therapy adopted Florida Administrative Code Rule 64B7-30.002(3)(o)2. In November 2016, it 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.

31. Rule 64B7-30.002(3)(x) similarly provided that the discipline for a violation of section 456.072(1)(v) should be a fine of \$2,500 and revocation of the license.

32. Rule 64B7-30.002(4) set forth possible aggravating and mitigating circumstances in light of which the Board of Massage Therapy might deviate from the 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 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.

33. Respondent has never before been disciplined by the Board of Massage Therapy and has no related violations in other states; there was little actual damage from the violation in this case; and imposition of the penalty guideline will have a severe effect on the licensee's livelihood. On the other hand, there was no evidence of rehabilitation, and Respondent had full knowledge of the violation, which involved her voluntary personal

conduct. While sexual conduct in the practice of massage inherently constitutes a recognized danger to the public, that fact is already taken into account in the penalty guidelines for this offense and is not a separate aggravating factor in the specific context of this case. Considered as a whole, the circumstances do not warrant deviation from the guideline penalty.

34. At the time of the violation, section 456.072(4) provided that in addition to any other discipline imposed for violation of a practice act, the Board of Massage Therapy 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 Ms. Shufang Li in violation of sections 480.0485 and 456.072(1)(v), Florida Statutes, constituting grounds for discipline under section 480.046(1)(p); imposing a fine of \$2,500; revoking her license to practice massage therapy; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 18th day of May, 2018, in Tallahassee,  
Leon County, Florida.

*F. Scott Boyd*

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F. SCOTT BOYD  
Administrative Law Judge  
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Filed with the Clerk of the  
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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.