

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 18-2662PL

YANLING WANG,

Respondent.

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RECOMMENDED ORDER

On September 13, 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: Gerald C. Henley, Esquire
Kimberly L. Marshall, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Hongwei Shang, Esquire
The Law Office of Hongwei Shang, LLC
7350 Southwest 89th Street, Suite 100
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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 March 14, 2018, the Department of Health (Petitioner or Department) issued an Administrative Complaint against Ms. Yanling Wang (Respondent or Ms. Wang), 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, the parties jointly offered six exhibits, accepted as Exhibits J-1 through J-6. Petitioner offered no additional exhibits, but presented the testimony of Detective David Gariepy of the Coral Springs Police Department. Respondent offered five additional exhibits: Exhibits R-7 through R-9, pertaining to dismissed criminal charges against Respondent that were not admitted on the ground that they were irrelevant; and Exhibits R-10 and R-11, that were admitted without objection. Respondent testified herself through a sworn interpreter, Mr. Hailin Huang. Stipulated facts from the Joint Pre-hearing Stipulation were accepted and are included among the Findings of Fact below.

The one-volume final hearing Transcript was filed on October 1, 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 May 2016, the time during which the violations were allegedly committed.

FINDINGS OF FACT

1. The Department, Board of Massage Therapy (Board), 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 the complaint, Ms. Wang was a licensed massage therapist within the State of Florida, having been issued license number MA 80935 on or about December 31, 2015.

3. Ms. Wang's address of record is 9844 Sandalfoot Boulevard, Boca Raton, Florida 33428.

4. Ms. Wang began working as a massage therapist at Wellness Spring Center (Wellness) 7865 West Sample Road in Coral Springs, Florida, on May 2, 2016.

5. On or about May 26, 2016, the Coral Springs Police Department (CSPD) conducted a prostitution investigation at Wellness.

6. Detective Gariepy, a detective in the vice, intelligence, and narcotics unit of the CSPD, working undercover, requested a one-hour full body massage and was advised it would cost \$60.00. Detective Gariepy paid the \$60.00 in official investigative funds, and he was escorted to a private room.

7. Detective Gariepy got undressed and lay face down on a massage table.

8. Ms. Wang provided Detective Gariepy with a massage.

9. Ms. Wang began working on Detective Gariepy's back side, and later asked him to flip over onto his back, which he did. She then massaged the front side of his body. She put her hand on his testicles and then on his penis, and began stroking it in a sexual manner. After only a few seconds, Detective Gariepy stopped her, saying he was a married man.

10. Detective Gariepy testified on cross-examination that Ms. Wang never asked him for any money when she was touching him.

11. Detective Gariepy got dressed and left the massage establishment.

12. CSPD officers entered the massage establishment and made contact with Ms. Wang, who was then positively identified by Detective Gariepy as the therapist who massaged him.

13. It was stipulated by the parties prior to hearing that Ms. Wang provided Detective Gariepy with a massage. Ms. Wang's contrary testimony at hearing, to the effect that the person to

whom she gave a massage that day was not Detective Gariepy was not credible and is rejected. Her testimony that she did not inappropriately touch Detective Gariepy's testicles and penis, was not credible and is rejected.

14. While Detective Gariepy admitted he was unable to pick out a photograph of Ms. Wang a little over two years later in a deposition, he explained that as he was receiving the massage, he focused on exactly what Ms. Wang was wearing and concentrated on her physical features so that he could positively identify her to the arresting officers. The parties stipulated prior to hearing that Ms. Wang was positively identified by Detective Gariepy as the therapist who had massaged him. His testimony was credible.

15. On May 26, 2016, Ms. Wang used the massage therapist-patient relationship to attempt to engage Detective Gariepy in sexual activity. Ms. Wang engaged in sexual misconduct in the practice of massage therapy.

16. Ms. Wang has never had any prior discipline imposed against her license.

CONCLUSIONS OF LAW

17. 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 (2018).

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

19. 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)).

20. 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)).

21. 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

22. 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.

23. Respondent used the massage therapist-patient relationship to attempt to engage an undercover detective in sexual activity outside of the scope of practice of massage therapy.

24. 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

25. Respondent is also charged with violation of section 456.072(1)(v) for the incident occurring on May 26, 2016.

At that time, the statute provided 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 stated:

(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.

26. Respondent used the massage therapist-patient relationship to attempt to engage an undercover detective in physical sexual activity outside the scope of the professional practice of massage therapy.

27. 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).

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

Penalty

29. 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).

30. Section 456.079 requires the Board 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).

31. The Board adopted Florida Administrative Code Rule 64B7-30.002(3)(o)2. In May 2016, it provided that the discipline for a violation of the sexual misconduct prohibition in section 480.0485 should be a fine of \$2,500.00 and revocation of the license.

32. 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 \$2,500.00 and revocation of the license.

33. Rule 64B7-30.002(4) set forth possible aggravating and mitigating circumstances in light of which the Board 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.

34. Respondent has never before been disciplined by the Board 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 would 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.

35. 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 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 Florida Department of Health, Board of Massage Therapy, enter a final order finding Ms. Yangling Wang in violation of sections 480.0485 and 456.072(1)(v), Florida Statutes, constituting grounds for discipline under section 480.046(1)(p), Florida Statutes; imposing a fine of \$2,500.00; revoking her license to practice massage therapy; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 24th day of October, 2018, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of October, 2018.

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.