

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,  
BOARD OF MASSAGE THERAPY,

Petitioner,

vs.

Case No. 18-3638PL

FENGYAN LIU, L.M.T.,

Respondent.

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RECOMMENDED ORDER

On September 28, 2018, a final hearing was held in Jacksonville, Florida, before Yolonda Y. Green, a duly assigned Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Derrick Jovan McBurrows, Esquire  
Amanda M. Godbey, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Richard A. Brown, Esquire  
Estell Reginald, Jr., P.A.  
301 North Liberty Street  
Jacksonville, Florida 32202

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 chapter 480, Florida Statutes, as alleged in the Administrative Complaint; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On May 2, 2018, the Department of Health (Petitioner or Department) filed a two-count Administrative Complaint (Complaint) against Respondent Fengyan Liu, L.M.T. (Respondent or Ms. Liu), a licensed massage therapist. The Complaint alleged that Respondent engaged in sexual misconduct in violation of section 480.0485 and Florida Administrative Code Rule 64B7-26.010(1) and (3). On or about June 4, 2018, 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. Petitioners Exhibits 1 through 3, 5, 6, and 10 (deposition of Katelin Reagh, L.M.T.) were admitted into evidence. Petitioner also offered Exhibit 9, pertaining to email communications between Ms. Liu and the Department's investigator, which were not admitted on the grounds that they were improper communications with a represented party. Petitioner presented the testimony of Detective N.E. of the Jacksonville Sheriff's Office (JSO) and Katelin Reagh, Department's expert by deposition in lieu of live testimony. Respondent offered no additional exhibits and did

not present any witnesses. Ms. Erchen Zheng, an official Mandarin Chinese interpreter provided by the Division, was sworn in to translate the proceeding for Respondent as she has limited understanding of English.<sup>1/</sup>

Stipulated facts from the Joint Pre-Hearing Stipulation were accepted and are incorporated in the Findings of Fact below, to the extent relevant.

During preliminary matters, the undersigned heard argument from both parties regarding Petitioner's Motion in Limine, which was denied.

The parties were allowed to submit proposed recommended orders within 10 days of the filing of the final hearing transcript. The one-volume final hearing Official Transcript was filed on October 22, 2018. Petitioner timely filed a Proposed Recommended Order, which has been considered in preparation of this Recommended Order (RO). Respondent did not submit a post-hearing submittal. However, Respondent did present a closing argument before conclusion of the final hearing, which has also been considered in the preparation of this RO.

Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect in 2016, the applicable statutory period during which violations were allegedly committed.

## FINDINGS OF FACT

The following Findings of Fact are based on the testimony presented at the final hearing, exhibits accepted into evidence, and admitted facts set forth in the pre-hearing stipulation.

1. Petitioner is the State agency charged with regulating the practice of massage therapy pursuant to section 20.43, Florida Statutes; chapter 456, Florida Statutes; and chapter 480, Florida Statutes.

2. At all times material to the Complaint, Respondent was licensed to practice massage therapy in Florida since April 27, 2016, having been issued license number MA81902.

3. Respondent's address of record is 3830 Williamsburg Park Road, Jacksonville, Florida 32257. She also maintains an address of 121 East Norwood Avenue, Apartment C, San Gabriel, California 91776.

4. Respondent moved from her native country, China, to the United States in 2012. Respondent's native language is Mandarin Chinese and her ability to communicate in English is very limited.

5. The JSO Vice Unit is the law enforcement office which investigates prostitution at massage therapy establishments in Jacksonville.

6. Detective N.E. has been a civilian law enforcement officer for approximately 13 years. He was working in the JSO Vice Unit on June 29, 2017.

7. As a member of the vice unit, Detective N.E. has conducted approximately 10 to 20 undercover prostitution investigations of massage therapy establishments.

8. On or about June 29, 2017, JSO conducted an undercover prostitution investigation at Luxury Massage located at 3830 Williamsburg Park Road, Suite 4, Jacksonville, Florida.

9. Detective N.E. entered Luxury Massage undercover, posing as a client. Detective N.E. requested a 30-minute massage from Respondent, for which he paid Respondent \$50. Respondent escorted Detective N.E. to a massage room where Detective N.E. completely disrobed and laid face down on the massage table.

10. As Detective N.E. lay on his stomach, Respondent began performing a massage on him. A towel was covering him as he lay on his stomach. Respondent massaged Detective N.E.'s back, and she later asked him to flip over onto his back, which he did.

11. While Detective N.E. was on his back, Respondent began massaging his chest. At some point, Respondent pointed to Detective N.E.'s penis. Then Detective N.E. asked Respondent "is \$60 good?" Respondent nodded her head indicating, "yes." Detective N.E. continued to ask Respondent questions, for

example, whether Respondent would use oil and Respondent verbally responded, "yes." When asked whether she had towels to avoid making a mess, Respondent again verbally responded, "yes." Although Respondent did not testify at hearing, Respondent's verbal responses were recorded on a concealed recording device as part of the investigation.

12. At hearing, Detective N.E. testified that Respondent grabbed his penis after she pointed to it. However, there was no allegation that Respondent touched Detective N.E.'s penis in the police report, which was prepared following Respondent's arrest. On cross-examination, Detective N.E. explained that Respondent's touching of his penis is not routinely included in the police report. The undersigned finds it unusual that touching of genitalia would be excluded from a police report when conducting a prostitution investigation. Detective N.E.'s testimony on this point is not accepted.

13. Respondent denied that she engaged in any sexual activity in her response to the Complaint.

14. Based on the totality of the circumstances, the undersigned finds that Respondent offered to massage Detective N.E.'s penis for \$60.00.

15. After the encounter, Detective N.E. gave a signal and Respondent was arrested by other law enforcement officers who

came on the scene. Respondent was positively identified by Detective N.E. on the scene and at the final hearing.

16. Katelin Reagh is a licensed massage therapist and based on her education, training, and experience, she is accepted as an expert in massage therapy.

17. Ms. Reagh opined that offering to massage a patient's genitalia is not within the scope of practice for massage therapy.

18. As noted in the deposition testimony of Ms. Reagh, there is no accepted practice within the scope of licensed massage therapy that allows a therapist to ever touch, or offer to touch, the genitalia of a patient.

19. Respondent's actions on June 29, 2017, were outside the scope of generally accepted treatment of massage therapy patients.

20. Respondent used the massage therapist-patient relationship to attempt to engage Detective N.E. in sexual activity when she offered to massage Detective N.E.'s penis, by pointing at the detective's penis and agreeing to accept \$60 payment for the service.

21. There is no evidence that Respondent has had any prior discipline imposed against her license.

CONCLUSIONS OF LAW

22. 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).

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

24. A proceeding to suspend, revoke, or impose other discipline upon a professional 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 allegations 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., Inc., 670 So. 2d 932 (Fla. 1996)).

25. 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). "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).

26. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." 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, 1143 (Fla. 1st DCA 1992).

27. A respondent may not be found guilty of an offense, which has not been charged. See, e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005) (administrative complaint charged physician with a failure to create medical records; proof of a failure to retain medical records cannot support a finding of guilt).

28. The Complaint against Respondent charges her with two counts.

29. In Count I of the Complaint, Respondent is charged with engaging in sexual misconduct in the practice of massage therapy by using the therapist-patient relationship to induce or

attempt to engage the patient in sexual activity in violation of section 480.0485.

30. At all times relevant to this matter, section 480.0485 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.

31. The Department presented clear and convincing evidence that Detective N.E. had a massage therapist-patient relationship with Respondent by demonstrating that he received a paid massage from Respondent at Luxury Massage.

32. Respondent's use of the massage therapist-patient relationship to attempt to engage Detective N.E. in sexual activity was outside the scope of practice of massage therapy.

33. 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.

34. Count II of the Complaint charges Respondent with making arrangements to engage in sexual activity in violation of rule 64B7-26.010.

35. Rule 64B7-26.010 provides, in pertinent part:

(1) Sexual activity by any person or persons in any massage establishment is absolutely prohibited.

\* \* \*

(3) No licensed massage therapist shall use the therapist-client relationship to engage in sexual activity with any client or to make arrangements to engage in sexual activity with any client.

36. The Department also proved by clear and convincing evidence that Respondent used the therapist-patient relationship to make arrangements to engage in sexual activity in violation of rule 64B7-26.010.

37. The Board of Massage Therapy (Board) imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in 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).

38. 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).

39. 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).

40. The Board adopted rule 64B7-30.002(3). At the time of the alleged offense in June 2017, the rule provided that the penalty for a violation of section 480.0485, as well as rule 64B7-26.010, should be a fine of \$2,500.00 and license revocation.

41. Rule 64B7-30.002(4) sets forth aggravating and mitigating circumstances, which the Board may consider to deviate from the penalty guidelines:

- (a) Danger to the public;
- (b) 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; and
- (n) Any other mitigating or aggravating circumstances.

42. Respondent has never been disciplined by the Board and has no related violations in other states and there was little actual damage from the violation in this case. However, Respondent had full knowledge of the violation involving sexual misconduct, and there was no evidence of rehabilitation. Considered as a whole, the circumstances do not warrant deviation from the guideline penalty.

43. Since the penalty that will be recommended herein is within the disciplinary guidelines, it is unnecessary to make any findings related to the aggravating or mitigating factors set out in rule 64B7-30.002(3).

44. 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 the following:

- (a) Ms. Fengyan Liu, L.M.T. in violation of section 480.0485 and rule 64B7-26.010;
- (b) Revoking her license to practice massage therapy;
- (c) Imposing a fine of \$2,500; and
- (d) Assessing costs in an amount to be determined by the Board.

DONE AND ENTERED this 16th day of November, 2018, in Tallahassee, Leon County, Florida.



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YOLONDA Y. GREEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of November, 2018.

ENDNOTE

<sup>1/</sup> Generally, the agency charged with preserving all testimony in the proceeding should provide an interpreter, if necessary. However, the Division provided the interpreter in this matter because the Department opposed providing an interpreter for the proceeding. See §§ 90.606 and 120.57(1)(g), Fla. Stat.; Fla. Admin. Code R. 28-106.214.

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.