STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MASSAGE THERAPY,

Petitioner,

vs. Case No. 19-1304

KAI XIN SPA, INC.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference, with locations in Miami and Tallahassee, Florida, on June 7, 2019.

APPEARANCES

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

For Respondent: W. Samuel Holland, Esquire
12700 Biscayne Boulevard, Suite 402
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STATEMENT OF THE ISSUE

Whether the doctrine of equitable tolling applies to excuse the late filing of Respondent's Election of Rights form.

PRELIMINARY STATEMENT

On June 28, 2018, Petitioner, Department of Health ("the Department"), filed an Administrative Complaint seeking disciplinary sanction of the massage establishment license of Respondent, Kai Xin Spa, Inc. The Department served Respondent the Complaint along with a cover letter and an Election of Rights form ("EOR") on July 14, 2018, via certified U.S. mail at Respondent's address of record.

On August 20, 2018, the Department received Respondent's executed EOR, disputing the material facts in the Administrative Complaint and requesting a formal hearing. The Department received Respondent's EOR 37 days after Respondent received the Complaint.

On or about September 12, 2018, the Department denied Respondent's request for an administrative hearing, due to Respondent's untimely request, pursuant to Florida Administrative Code Rule 28-106.111.

On or about October 9, 2018, Respondent disputed that the request for a formal hearing was untimely. On March 14, 2019, the Department referred the case to the Division of Administrative Hearings for a limited evidentiary hearing to determine whether Respondent's petition was timely, pursuant to rule 28-106.111.

The final hearing was held on June 7, 2019. At the hearing, the parties offered Joint Exhibits A through K which were admitted.

The Department's Exhibit A and Respondent's Exhibit A were both admitted into evidence. Respondent offered the live testimony of Jing Hui Gou, the former owner of Respondent's establishment, and retired attorney, Jule Paulk. The one-volume Transcript of the proceeding was filed on July 2, 2019. Respondent requested and was granted an extension of time within which to file its proposed recommended order. The parties' proposed recommended orders were given due consideration in the preparation of the Recommended Order.

Unless otherwise indicated, all statutory references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating massage establishments pursuant to chapter 20 and section 20.43, Florida Statutes.

2. Respondent is licensed as a massage establishment in the State of Florida, having been issued license number MM 33902.

3. Respondent's address of record is 440 South Military Trail, West Palm Beach, Florida 33415.

The August 5, 2016, Letter and First Response

4. On or about August 5, 2016, the Department issued a letter to Respondent at its address of record ("August 5 Letter"), advising Respondent that the Department was conducting an investigation based on an internally generated complaint that on July 24 and August 1, 2016, Respondent ran an advertisement on www.backpage.com ("Backpage") with images "of Asia women dressed in swim wear and lingere," which was considered by the Department as designed to "induce sexual misconduct." The August 5 Letter also alleges that Respondent failed to include a license number in the advertisement. The advertisement in question was not provided to Respondent by the Department.

5. The August 5 Letter advised Respondent that it could submit a written response within 20 days of receiving the letter and that it was not possible to estimate how long it would take to complete the investigation.

6. Respondent, who at that time was owned by Ms. Jing Hui Guo, contacted a retired attorney, Jule Paulk, regarding the correspondence from the Department. Ms. Guo only reads and speaks Mandarin. Ms. Guo had purchased the business, formerly known as "Ocean Spa," about 15 months prior. She was not familiar with the advertising content of Ocean Spa. When she purchased the business, Ms. Guo changed the name to Kai Xin Spa,

Inc., and she kept paying the invoice from the prior advertising agency.

7. After receipt of the August 5 Letter, Ms. Guo provided a copy of it to her advertising agency and directed that they remove and/or stop running the offending advertisements. According to her testimony, she approved new advertisement content with the business license number and with none of the cited offending content. That new advertisement ran as of August 8, 2016.

8. On August 15, 2016, Mr. Paulk drafted a written response to the August 5 Letter ("First Response Letter") on behalf of Respondent. The First Response Letter was electronically signed by Ms. Guo and it contained the new advertisement which included the business license number and removed the women in bathing suits and lingerie.

9. The First Response Letter states:

> We have taken immediate steps to address the issues in the letter mentioned above. We will continue to do so until all issues are resolved. We hope this letter will show our sincere efforts to bring our business into compliance. (Emphasis added).

10. Ms. Guo sold the business in the beginning of 2017 to Mr. Haibing Wang. Hearing nothing further from the Department prior to sale, she reasonably assumed the Department approved of her new advertising and that matter was closed.

The April 12, 2018, Letter and Second Response

11. Despite receipt of the First Response Letter, the Department continued to "investigate" Respondent's alleged misconduct. On April 12, 2018, 20 months after its original notification to Respondent, the Department issued a second letter to Respondent ("April 12 Letter"), advising Respondent that the matter was still ongoing.

12. The Department's April 12 Letter was identical to the August 5 Letter except for the date.

13. When it was received by the new business owner, Mr. Wang, he forwarded it to Ms. Guo telling her that it was her problem because she did not tell him about the investigation at the time of the sale. Ms. Guo provided the letter to Mr. Paulk.

14. Mr. Paulk recognized the letter as identical to the August 5 Letter, but noted there was a new document included, dated August 1, 2016, which was styled "Health Care Provider Complaint Form." This form states, "[w]e will send a copy of the Complaint to the health care provider if the complaint is assigned for investigation." The Complaint with the Department of Health was certainly assigned for investigation in 2016, but this form was not given to Respondent until 2018.

15. Mr. Paulk also noted the following additional discrepancies in the Health Care Provider Complaint form:

a. It was dated August 16, 2016, but attached to a letter dated April 12, 2018.

b. The form identified the reason for the complaint to be that of advertising.

c. The box for sexual contact was not checked.

d. Attached to the Health Care Provider Complaint Form was a document signed by Mr. Kevin Lapham dated August 1, 2016. Such document identified the same advertisements, which were the subject of the prior investigation which were published on August 1 and June 24, 2016, and which he thought was resolved.

16. Further, the initial August 5 Letter included an attachment which specifically references advertising to induce sexual misconduct and identifies specific Florida Statutes. However, the Department's April 12 Letter, nor the attachments thereto, reference sexual misconduct or a statute dealing with sexual misconduct.

17. On or about April 16, 2018, Mr. Paulk submitted a written response to the Department's April 12 Letter ("Second Response Letter"), on behalf of Respondent. The letter was electronically signed by Ms. Guo.

18. The Second Response Letter states:

> Your letter of April 12, 2018 refers to 2016 Case Number 2016-20171. By our letter of August 15, 2016 (copy enclosed), we responded to this Case, assuring your office that we had taken steps to correct the

> concerns you had listed. We are not sure why you are still addressing this same Case. We assumed that our August 15, 2016 letter had satisfied the concerns.
>
> In addition, the concerns expressed in your August, 2016 letter involved a Backpage ad. We corrected those issues at that time. Now, Backpage has been removed from the internet.
>
> We hope this information resolved this matter. Please contact us if otherwise.

19. Ms. Guo received no response from the Department to her Second Response Letter.

The Administrative Complaint

20. On June 28, 2018, the Department filed an Administrative Complaint against Respondent, alleging that Respondent inappropriately advertised to induce sexual misconduct and failed to include its license number in its advertising.

21. The cover letter included with the Administrative Complaint stated:

> Please review the attached documents and return the Election of Rights form to my attention. You must sign the Election of Rights form and return the completed form to my office within twenty-one (21) days of the date you receive it. Failure to return this form within twenty-one (21) days may result on the entry of a default judgement against you without hearing your side of the case. (Emphasis added).

22. The cover letter also referenced an enclosed Voluntary Relinquishment form for consideration described as "an offer to resolve this matter without the necessity of further proceedings and the expense of further proceedings."

23. The Administrative Complaint contained a Notice of Rights section, which informed Respondent that "[a] request or petition for an administrative hearing must be in writing and must be received by the Department within 21 days from the day Respondent received the Administrative Complaint, pursuant to Rule 28-106.111(2), Florida Administrative Code."

24. The EOR form included with the Complaint stated:

> In the event that you fail to make an election in this matter within twenty-one (21) days from receipt of the Administrative Complaint, your failure to do so may be considered a waiver of your right to elect a hearing in this matter, pursuant to Rule 28-106.111(4), Florida Administrative Code, and the Board may proceed to hear your case. (Emphasis added).

25. The Department mailed the Administrative Complaint, a Notice of Rights, and an EOR form via certified U.S. mail to Respondent's address of record.

26. On July 14, 2018, Mr. Wang received the Administrative Complaint and gave the Administratve Complaint and EOR to Ms. Guo, who provided the documents to Mr. Paulk. Mr. Paulk consulted with counsel for Respondent, Mr. Samuel Holland, Esquire, about the EOR.

27. Mr. Holland completed and signed the EOR on August 8, 2018. However, neither Mr. Paulk nor Mr. Holland returned the completed EOR to the Department until August 17, 2018, nine days later.

28. Mr. Paulk testified that this nine-day delay was because he and Mr. Holland were "confused," "not quite sure how to proceed the best way," that he "needed to collect [his] thoughts," and that he needed to "do a little more looking into [the] matter" in order to decide the "best approach."

29. This confusion is understandable and in large part created by the Department's own doing.

30. At no time did the Department supply Respondent with a copy of the alleged offending advertisement. In fact, even the Administrative Complaint does not attach the advertisement at issue.

31. The allegations in the Administrative Complaint deviate from the matters of which Respondent was provided notice were under investigation. For the first time, the Department indicates a concern that the advertisement contained hearts with arrows going through them, women in "sexually suggestive poses," and massage therapists described as "hot," "beautiful," and "young."

32. The EOR and the penalty for failure to return such was not stated in absolute terms. The EOR form states, "[f]ailure

to return this form within twenty-one days may result in the entry of a default judgment against you without hearing your side of the case." The use of the word "may" detracts from any finality to the consequences of failure to return the signed EOR. This sentence also suggests that a hearing will be conducted with or without the return of the EOR.

33. Eventually, Mr. Paulk and Mr. Holland decided the best course of action would be to submit the EOR because "any further delay might be harmful."

34. Twenty-one days from July 14, 2018, was August 3, 2018. The Department ultimately received the EOR via regular mail on August 20, 2018; 16 days after it was due.

35. On or about September 12, 2018, the Department sent a letter to Mr. Holland ("Denial Letter"), denying Respondent's request for a formal administrative hearing. On October 15, 2018, the Department received a letter from Respondent ("October 9 Letter") contesting the Denial Letter. In the October 9 Letter, counsel for Respondent, Mr. Holland, explained the reason for the untimely filing and asked for a hearing.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1), Florida Statutes (2019).

37. The Administrative Complaint alleges that Respondent violated provisions of the Florida Statutes and administrative rules that would subject it to the imposition of penalties. Respondent has standing to request a hearing on whether its request for hearing was made within the 21-day period or equitable tolling should apply to extend the time for filing, and, if either is shown, on the allegations of the Administrative Complaint. Nicks v. Dep't of Bus. & Prof'l Reg., 957 So. 2d 65, 68 (Fla. 5th DCA 2007); Phillip v. Univ. of Fla., 680 So. 2d 508, 509 (Fla. 1st DCA 1996).

38. The Department has the burden to show that notice of intended action was received and that Respondent's request for hearing was untimely. Respondent, as the party seeking equitable tolling, has the burden of proof as to that issue. Menominee Indian Tribe of Wis. v. U.S., 136 S. Ct. 750, 755-56 (2016). The standard of proof for each of the parties is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

39. The requirement that a hearing must be requested within 21 days of receipt of the notice of agency action is clear. Rule 28-106.111 provides in relevant part:

> (2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition

> for hearing with the agency within 21 days of receipt of written notice of the decision.
>
> * * *
>
> (4) Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

40. Section 120.569(2)(c) provides that a request for hearing "shall be dismissed . . . if it has been untimely filed." (Emphasis added). The statute goes on to expressly note that this does not eliminate the availability of equitable tolling as a defense.

41. In this case, it is undisputed that the EOR was returned more than 21 days after receipt. However, Respondent asserts that the doctrine of equitable tolling applies to excuse the late filing and permit Respondent a hearing on the merits.

42. In Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988), the Florida Supreme Court stated, "[g]enerally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."

43. There was no argument or evidence presented to suggest that Respondent was prevented from asserting its rights, or

timely asserted them in the wrong forum. Respondent argues that it was misled or lulled into inaction by the Department.

44. The Administrative Complaint was filed against Respondent on June 28, 2018--almost 23 months after Respondent initiated its investigation and received not one, but two, written responses on behalf of Respondent indicating its immediate efforts, in August 2016, to come into compliance with applicable regulations concerning advertising.

45. The Department does not have free reign to open an investigation and keep it open as long as it wants prior to making a determination and issuing a complaint. Section 456.073(2), Florida Statutes, provides:

> The department shall allocate sufficient and adequately trained staff to expeditiously and thoroughly determine legal sufficiency and investigate all legally sufficient complaints. For purposes of this section, it is the intent of the Legislature that the term "expeditiously" means that the department complete the report of its initial investigative findings and recommendations concerning the existence of probable cause within 6 months after its receipt of the complaint. The failure of the department, for disciplinary cases under its jurisdiction, to comply with the time limits of this section while investigating a complaint against a licensee constitutes harmless error in any subsequent disciplinary action unless a court finds that either the fairness of the proceeding or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. (Emphasis added).

46. Respondent was clearly lulled into inaction by the Department's failure to expeditiously investigate this matter. The extraordinary delay in filing the Administrative Complaint reasonably led the business owner to assume the matter was closed and sell the business without providing notice to the new owner. This is not harmless error.

47. The fairness of the proceeding is also compromised by this delay because the Backpage advertisement at issue was never produced to Respondent prior to, or with, the filing of the Administrative Complaint, nor can they be reproduced because Backpage was removed from the Internet.

48. It is specious at best to suggest that the Department was conducting an ongoing "investigation" during this 23-month period. The gravamen of the Administrative Complaint is one advertisement that ran on two dates in the summer of 2016. Other than the advertisement itself, and the response of the then owner, Ms. Guo, what was left to investigate?

49. The Department offered no witness or evidence to explain why the investigator never responded to either the First or Second Response Letters. No explanation was provided why it took 23 months for the Department to prepare an Administrative Complaint which included allegations which were never previously brought to the attention of Respondent. Instead, the Department wants to use the capital punishment of discipline, license

revocation of Respondent, against a new owner who has no connection to the advertisements at issue, in a game of "gotcha" because Respondent filed its EOR 16 days late.

50. Regarding the use of equitable tolling in administrative proceedings, the Machules Court explained,

> The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which "'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.'" Cocke v. Merrill Lynch & Co., 817 F.2d 1559, 1561 (11th Cir. 1987)(quoting Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981)). . . The doctrine [of equitable tolling] serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules.

Id. at 1134.

51. The Department's failure to respond to the First and Second Response Letters; the confusing inclusion of the Health Care Provider Complaint form with the April 12 Letter of investigation; the 23-month delay in filing an Administrative Complaint; and allegations in the Administrative Complaint that were never raised to Respondent during the investigation, coupled with the contradictory language of "may" versus "shall"

in the Notice of Rights and EOR, create a situation ripe for equitable tolling.[1/] Respondent was lulled into inaction by the Department's own actions described above.[2/] The principles of due process and equity would be violated in this case without the application of equitable tolling.

52. There is no prejudice to the Department in this case to permit Respondent a hearing on the merits of the Administrative Complaint. The offending advertisement was modified immediately upon notice of the Department's concerns three years ago. The Department was aware by the First Response Letter that Respondent intended to do anything necessary to come into compliance. License revocation by default as punishment for a late filing is exactly the type of result equitable tolling is designed to prevent. Equity and the interests of justice demand relief from the 21-day filing period in this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent's request for a formal hearing under section 120.57(1), Florida Statutes, be permitted in accordance with the doctrine of equitable tolling.

DONE AND ENTERED this 21st day of August, 2019, in Tallahassee, Leon County, Florida.

MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2019.

ENDNOTES

[1/] The Department cites to Department of Health v. Tito, Case No. 18-3636PL (Fla. DOAH Nov. 9, 2018; Fla. DOH June 7, 2019), a case in which the confusion created by the language in the EOR was discussed and rejected as a basis for equitable tolling of a late filing. Tito is distinguishable because it does not involve a situation where the Department failed to timely conclude its investigation resulting in hardship to the entity being investigated.

[2/] The cases cited by the Department regarding attorney misconduct are not persuasive. Mr. Paulk is retired and was not a practicing attorney when contacted to assist Ms. Guo as a favor to a mutual friend. Attorney Holland was contacted after receipt of the Administrative Complaint and arguably should have returned the EOR within the 21-day period. However, as discussed in detail above, the Department's own actions caused significant confusion and resulted in the comparatively short delay. The Department's criticism of Respondent's lack of diligence in ensuring that its representatives were meeting the deadline, is similarly misplaced. Ms. Guo, the prior owner tasked to respond to the Administrative Complaint, does not read, write, or speak English.

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.