

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 19-5314PL

MINGLI LI, L.M.T.,

Respondent.

_____ /

RECOMMENDED ORDER

A final administrative hearing was held in the above-styled case on December 10, 2019, in Orlando, Florida, before Lynne A. Quimby-Pennock, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Zachary Bell, Esquire
Chad Wayne Dunn, Esquire
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For Respondent: Michael S. Brown, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed sexual misconduct in the practice of massage therapy and failed to appropriately

draped a client as alleged in the First Amended Administrative Complaint¹ (AAC), and if so, what disciplinary action should be taken against Respondent's license.

PRELIMINARY STATEMENT

On September 24, 2019, the Department of Health (DOH or the Department), on behalf of the Board of Massage Therapy (Petitioner), issued a three-count AAC against Respondent, Mingli Li (Respondent), a licensed massage therapist. The AAC set forth factual allegations and charges that Respondent committed sexual misconduct in the practice of massage therapy, and failed to practice massage therapy with that level of care, skill, and treatment that is recognized by a reasonably prudent massage therapist.

Respondent disputed the facts and requested an administrative hearing.² On September 27, 2019, DOH's Prosecution Services Unit filed Petitioner's Unopposed Motion to Re-Open Proceeding. At the parties' joint request, the final hearing was set for Tuesday, December 10, 2019, in Orlando, Florida, and proceeded as scheduled.

Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation in which they stipulated to several facts that would not require evidence at hearing. The stipulated facts, to the extent relevant, have been incorporated in the Findings of Fact below.

¹ This case was originally filed with DOAH on May 8, 2019, and assigned DOAH Case No. 19-2389PL. On July 3, 2019, Petitioner's Opposed Motion to Relinquish Jurisdiction (Motion) was filed. Within the Motion, Petitioner provided that "during Respondent's deposition," additional "factual allegations or charges should be included in" an amended complaint. The undersigned issued an Order Closing File and Relinquishing Jurisdiction on July 11, 2019. On September 27, 2019, Petitioner's Unopposed Motion to Re-Open Proceeding was filed, and the current docket number was assigned.

² A revised Elections of Rights form, specifically disputing the AAC allegations issued on September 24, 2019, was not filed with DOAH.

At hearing, Petitioner presented the live testimony of F.M., an undercover law enforcement officer (LEO) of the Metropolitan Bureau of Investigation (MBI), and, by deposition, Faith R. Buhler, Petitioner's expert witness. Petitioner's Exhibit 1, Respondent's June 25, 2019, deposition transcript was admitted without objection. Petitioner's Exhibits 2 and 3, Ms. Buhler's July 9, 2019, deposition and her curriculum vitae, were admitted over objection.

Respondent testified on her own behalf, and offered one exhibit which was admitted into evidence without objection. Respondent's Exhibit 1 pertained to Respondent's dismissed criminal charges.³ Lucy Halbert, a sworn Chinese Mandarin interpreter–translator, was present and assisted Respondent with her testimony and the proceeding.

At the conclusion of the hearing, Petitioner, with concurrence from Respondent via her counsel, requested that the undersigned set January 17, 2020, as the filing deadline for the proposed recommended orders (PROs). Both parties anticipated the hearing transcript would be filed ten business days after the hearing, which did not occur. On January 9, 2020, Petitioner's Unopposed Motion for Extension of Time to File Proposed Recommended Orders was filed. The Order, which granted the parties ten days following the filing of the hearing transcript to file their PROs, was issued on January 10, 2020.

The one-volume Transcript of the final hearing was filed on January 14, 2020. On January 15, 2020, an Amended Notice of Filing Transcript was issued providing that the PROs would be due on or before January 27, 2020. Both parties timely filed their PROs, and each has been considered in the preparation of this Recommended Order.

³ The criminal charges alleged: (1) entering or remaining in any place or structure for the purpose of prostitution; and (2) prostitution, both second-degree misdemeanors.

Except as otherwise indicated, citations to Florida Statutes and Florida Administrative Code Rules refer to the versions in effect in March 2016, the time during which the violations were allegedly committed.

FINDINGS OF FACT

1. Petitioner 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, Respondent was licensed as a massage therapist in Florida, having been issued license number MA 80545. In the time since Respondent was licensed, no prior disciplinary action has been taken against her license.

3. Respondent was born in the Liaoning Province, North China, and came to the United States in 2005. Respondent is a U.S. citizen. Respondent attended a Beauty School for her massage education and her educational instruction at school was in English. Further, when she took the examination to become a Florida licensed massage therapist, the examination was in English, and no one helped her to translate the material.

4. Respondent's address of record is 9986 Red Eagle Drive, Orlando, Florida, 32826.⁴

5. At all times relevant to the AAC, Respondent practiced massage therapy, as defined in section 480.033(3), at Golden Asian Massage, LLC, doing business as The Wood Massage (Golden Asian). Golden Asian was located at 1218 Winter Garden Vineland Road, Suite 124, Winter Garden, Orange County, Florida.

⁴ On November 26, 2019, the parties filed a Joint Pre-hearing Stipulation, stipulating that Respondent's address of record was in New York. At some point after the March 2016 investigation, Respondent moved out of Florida. Then, either before or after November 26, 2019, Respondent moved back to Florida, but failed to advise her counsel or DOH of her address change. Respondent's counsel stated that he would ensure Respondent filed the appropriate change of address information with DOH.

6. At the time of the investigation, the LEO had been trained at the police academy, had multiple courses in vice-related investigations, human trafficking investigations, and drug trafficking investigations, including prostitution activities. The LEO has participated in “well over a hundred” undercover prostitution operations. The LEO’s investigation assignments “as a whole” include “anything that would be vice-related, drug trafficking or human trafficking.”

7. The MBI is a joint police task force for the Ninth Judicial Circuit, which includes Orange County and Osceola County. MBI routinely investigates vice, human trafficking crimes, and mid-level to upper-level narcotic organizations.

8. Once the MBI receives a complaint about a massage parlor, an undercover investigation is initiated. An undercover investigation team usually consists of five law enforcement personnel: a supervisor-in-charge; the undercover agent (agent); and two to three additional support personnel. An agent goes into the establishment, posing as a customer. Once the agent is on the massage table, the agent waits for the massage therapist to initiate, either via conversation or through an overt act, a predisposition for sexual activity. In some instances, the massage therapist might glide their fingers in the inner thigh, or speak of some sexual activity. Once the massage therapist initiates an actual sex act, the agent then tries to stop the sex act, while engaging in conversation.

9. On March 9, 2016, after receiving a tip or complaint about the establishment, the MBI conducted an undercover investigation of the Golden Asian. The LEO arrived at the Golden Asian, met Respondent at the counter, and in English, asked for a 30-minute massage. Respondent responded in English and told the LEO it would cost \$50 for a 30-minute massage. The LEO agreed to the cost, and Respondent led the LEO to a massage room within the Golden Asian.

10. The LEO got completely undressed and positioned himself on his stomach, face-down on the massage table. Upon entering the room,

Respondent grabbed a towel and placed it on the LEO's back midsection. The LEO described the area covered as "pretty much my buttocks to, like, my lower back," but the towel was not tucked in. Using oil, Respondent massaged the LEO's back, thighs, and neck. While the LEO was still on his stomach and roughly ten to 15 minutes through the massage, the towel fell off. The LEO did nothing to dislodge the towel while he was on his stomach.

11. Roughly halfway through the 30-minute massage, Respondent "stopped massaging and it was more of a gliding motion from [the LEO's] back to [the LEO's] inner thighs." With this action, the LEO determined that Respondent was predisposed to engage in sexual activity.

12. Respondent directed the LEO to turn over, which he did. The LEO testified that after he turned over his genitals were exposed. Respondent put more oil on her hands and massaged the LEO's chest to his thigh area. Respondent further testified that Respondent "would glide and touch [the LEO's] penis and scrotum."

13. Respondent asked the LEO if he liked it when Respondent "tapped" the LEO's penis. The LEO answered "yes" to Respondent's question. The touching of the LEO's penis and scrotum again provided the predisposition that sexual activity could be engaged. The LEO then asked Respondent for oral sex, i.e. a blow job. Respondent declined to perform oral sex. The two engaged in talking and hand gesturing regarding manual masturbation and its cost. The LEO testified Respondent raised her hand to indicate manual masturbation would be \$40.00. Respondent testified that she said "no" and did not state a price. As provided below, Respondent's testimony was not credible.

14. The LEO told Respondent that \$40.00 was too expensive for masturbation. He then grabbed the original towel that had draped him from between his legs, cleaned the oil, dressed, and left the massage establishment. Shortly thereafter, Respondent was arrested.⁵

⁵ The dismissal of Respondent's criminal charges is not probative of whether she committed the regulatory violations.

15. Respondent's hearing testimony of how the towel fell off during the LEO's massage differs from her deposition testimony. At hearing, Respondent testified that when the LEO flipped over, the towel fell off and she did not grab it fast enough. Respondent then added it took her "one minute, two minutes" to adjust the towel. Respondent admitted that she exposed the LEO's genitals without his permission. However, during her deposition, Respondent blamed the type of oil massage that she was administering to the LEO for the towel falling off. Respondent claimed that her hand movement was "pretty hard. So with the movement, the towel shifting a little bit by little bit, and then [the towel] fell off completely." Respondent also testified that she "saw it [the towel] dropped off, then [she] put it back right away." In either instance, the LEO's genitals were exposed without his consent.

16. At the hearing, Respondent's description of the towel used on the LEO changed from her deposition. During the hearing, Respondent testified the towel was "one to two feet wide . . . the length is about 1.5 meters [over four feet]. I'm not exactly sure." However, in her deposition, Respondent provided that the towel was "more like a facial towel. It's not a very big shower towel, but it's more a facial towel size . . . one [foot] by two [foot]."

17. Respondent's testimony describing the LEO's massage is not clear or credible and is rejected. The LEO's testimony was credible, clear, convincing, and credited.

18. Ms. Buhler is a licensed massage therapist and based on her education, training, and experience, she is accepted as an expert in massage therapy.

19. "Draping" is covering the body while a massage therapist is working on it for the client's comfort and privacy. Usually, a sheet is used for draping a client (if the room is too cold, a blanket could be added). As a massage therapist works on specific body areas, that body part is uncovered and the towel repositioned when the therapy to that area is completed. Ms. Buhler opined that the size of the towel ("1 [foot] x 2 [foot]" as described by

Respondent in her deposition) is “very small,” and is an unusual drape size. Further, she opined that a “1 x 2 towel barely covers anything. It would be almost impossible not to either view something or potentially accidentally bump something with a drape of that size.” If any drape were displaced during a massage, the standard of care requires that the drape be put back in place immediately, not in one or two minutes.

20. Ms. Buhler opined that “anytime a therapist attempts to, either for their own pleasure or for the pleasure of the client, to get any sort of sexual gratification, that is considered sexual misconduct.” A therapist has a choice when any type of sexual activity is suggested or offered. A therapist can redirect someone, state that the activity is not appropriate for the setting, threaten to terminate the massage, or in fact, terminate the massage by leaving the treatment room. Respondent provided that she continued to massage the LEO for one or two minutes after the request for oral sex. Although Respondent claimed she said “No,” she did not take any affirmative action to terminate the session or remove herself from the situation.

21. Respondent’s actions on March 9, 2016, were outside the scope of generally accepted treatment of massage therapy patients.

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

CONCLUSIONS OF LAW

23. 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.

24. Petitioner initiated this disciplinary proceeding pursuant to its authority to prosecute complaints charging violations of the licensing laws governing licensed massage therapists such as Respondent. § 456.073, Fla. Stat.

25. In this penal proceeding, Petitioner has the burden of pleading with particularity in the administrative complaint, the facts, and law on which it

relies to take disciplinary action against Respondent. *Trevisani v. Dep't of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); *Willner v. Dep't of Prof'l Reg., Bd. of Medicine*, 563 So. 2d 805, 806 (Fla. 1st DCA 1990). The AAC meets these standards.

26. 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) (*Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996)). As stated 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), (quoting *Slomowitz v. Walker*, 492 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 Electric Corp., Inc. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991) (citations omitted).

27. Disciplinary statutes and rules “must be construed strictly, in favor of the one against whom the penalty would be imposed.” *Griffis v. Fish & Wildlife Conserv. 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).

28. Respondent is charged with engaging in sexual misconduct in the practice of massage therapy, in violation of section 480.0485 and Florida Administrative Code Rule 64B7-26.010(1), (3), and (4), for which Respondent is subject to discipline pursuant to section 480.046(1)(p).

29. Section 480.046(1) provides in pertinent part:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(i) Gross or repeated malpractice or the failure to practice massage with that level of care, skill, and treatment which is recognized by a reasonably prudent massage therapist as being acceptable under similar conditions and circumstances.

* * *

(p) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

30. Section 480.0485 provides as follows:

Sexual misconduct in the practice of massage therapy.—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. 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.

(4) As used in this rule, “sexual activity” means any direct or indirect physical contact by any person or between persons which is intended to erotically stimulate either person or both or which is likely to cause such stimulation and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. For purposes of this subsection, masturbation means the manipulation of any body tissue with the intent to cause sexual arousal. As used herein, sexual activity can involve the use of any device or object and is not dependent on whether penetration, orgasm, or ejaculation has occurred. Nothing herein shall be interpreted to prohibit a licensed massage therapist, duly qualified under Rule 64B7-31.001, F.A.C, from practicing colonic irrigation.

32. Rule 64B7-30.001 provides in pertinent part:

The following acts shall constitute the failure to practice massage therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar massage therapist as being acceptable under similar conditions and circumstances:

* * *

(5) Failure to appropriately drape a client. Appropriate draping of a client shall include draping of the buttocks and genitalia of all clients, and breasts of female clients, unless the client gives specific informed consent to be undraped.

33. The Department presented clear and convincing evidence that the LEO had a massage therapist-patient relationship with Respondent by demonstrating the he received a paid massage from Respondent at Golden Asian.

34. The Department proved by clear and convincing evidence that, Respondent engaged in or attempted to engage in sexual misconduct in the practice of massage therapy in violation of section 480.0485 and Rule 64B7-26.010, when she: touched the LEO's penis; asked the LEO if he liked it; and engaged in communications about oral sex, manual masturbation, and the cost of such acts.

35. The Department proved by clear and convincing evidence, and in part through Respondent's admission, that the towel fell off the LEO exposing his genitals, without his specific permission, in violation of section 480.046(1)(i) and Rule 64B7-30.001(5).

36. The Board of Massage Therapy 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).

37. Rule 64B7-30.002 provides, that the penalty for engaging in or attempted to engage in sexual misconduct in the practice of massage therapy in violation of section 480.0485, is a \$2,500 fine and revocation of the massage therapist's license.

38. Rule 64B7-30.002 provides, that the penalty range for exposing a client's genitals, without his specific permission, in violation of section 480.046(1)(i), is a \$1,000 fine to probation for the massage therapist.

39. Rule 64B7-30.002(4) sets forth possible aggravating and mitigating circumstances that might warrant deviation from the normal penalty. In this case, no particularly weighty factors were proven either way. Respondent has no prior discipline before this violation. The failure to appropriately or adequately drape the LEO and the sexual misconduct offense are very serious breaches of the profession, but that is a factor taken into account in the disciplinary guideline. The disciplinary guideline penalties should apply here.

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 Respondent, Mingli Li, in violation of sections 480.046(1)(i) and 480.0485, Florida Statutes, constituting grounds for discipline under section 480.046(1)(p), imposing a fine of \$3,500.00; revoking her license to practice massage therapy; and assessing the cost of investigating and prosecuting the Department's case against Respondent.

DONE AND ENTERED this 13th day of February, 2020, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
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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.