

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

Case Nos. 20-4754PL
20-4755PL

vs.

KENNETH JAMES DIPERSIO, L.M.T.,

Respondent.

RECOMMENDED ORDER

The final hearing was held in this case by Zoom Video Conference in Tallahassee, Florida, on March 4 and 5, 2021, before Brian A. Newman, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Ann L. Prescott, Esquire
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For Respondent: Richard A. Greenberg, Esquire
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STATEMENT OF THE ISSUES

The issues in these consolidated cases are whether Respondent committed sexual misconduct as charged in the Administrative Complaints, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 14, 2020, the Department of Health (Department) filed two Administrative Complaints before the Board of Massage Therapy (Board) against Kenneth James DiPersio, L.M.T. (Respondent). In DOAH Case No. 20-4754PL, the Department charged Respondent with sexual misconduct while treating a client identified as M.S., in violation of sections 480.046(1)(p) and 480.0485, Florida Statutes, and Florida Administrative Code Rule 64B7-26.010(1) and (3).¹ In DOAH Case No. 20-4755PL, the Department charged Respondent with committing sexual misconduct while treating a client identified as S.B., in violation of the same provisions. Respondent timely filed a request for a hearing involving disputed issues of material fact in both cases.

On October 23, 2020, the Department transmitted the Administrative Complaints to DOAH for assignment of an administrative law judge to conduct the requested hearings. On November 9, 2020, DOAH Case Nos. 20-4754PL and 20-4755PL were consolidated for all purposes.

The final hearing scheduled for January 13, 2021, was continued at the request of both parties for good cause and was rescheduled to be heard via Zoom Video Conference on March 4 and 5, 2021.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, in which they identified their proposed witnesses and exhibits, set forth their objections to the other party's proposed exhibits, and agreed to several

¹ The Administrative Complaints are based on events that occurred in 2017 and 2018. All references herein to statutes and rules are to the versions in effect at the time the events at issue occurred.

statements of fact and law. The parties' agreed facts have been incorporated in the Findings of Fact below to the extent relevant.

At the hearing, the parties offered Joint Exhibit 1, which was admitted. The Department presented the live testimony of S.B., M.S., Maxine Satrape, and Jasmin Driessen, and the testimony of expert witness Faith Bueller, L.M.T., by deposition transcript. Department Exhibits 1 through 4, and 7 were admitted. Respondent presented the testimony of expert witness Donald C. Kelley, L.M.T., and testified on his own behalf. Respondent's Exhibits 1 and 2 were admitted.

The three-volume Transcript of the hearing was filed on March 29, 2021. The deadline to file proposed recommended orders (PROs) was extended to April 26, 2021, at the request of Respondent. Both parties timely filed PROs, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is charged with regulating the practice of massage therapy pursuant to chapters 456 and 480, Florida Statutes.

2. At all times material to this case, Respondent was a licensed massage therapist in Florida, having been issued license number MA 11149.

Respondent has practiced massage therapy for approximately 30 years.

Client M.S., DOAH Case No. 20-4754PL

3. On January 10, 2018, M.S. completed her initial client intake form with Respondent which contained several sections. M.S. wrote that she suffered from post-concussion syndrome. According to M.S., she was diagnosed with post-concussion syndrome and mild traumatic brain injury after a log fell on her head in August of 2017. Under the heading "concerns," M.S. wrote: "I'm going crazy and losing memory completely—eyes burning." Under "recent changes," M.S. wrote: "loss of memory, confusion, irate, irritability,

uncontrollable anxiety, depression, extreme vertigo, unable to focus or comprehend, extreme nervousness and feeling out of control emotions.”

4. M.S. had four massage sessions with Respondent on January 10, 19, 24, and 31, 2018. M.S. removed her shoes but was otherwise fully clothed during all four massage sessions.

5. The Department alleges that the sexual activity occurred during M.S.’s fourth and final session on January 31, 2018. Specifically, the Department alleges that Respondent touched M.S.’s labia with his fingers, rested his fingers on M.S.’s vagina, and cupped her vagina.²

6. During her testimony, M.S. demonstrated how Respondent touched her vagina. Using her own hand to demonstrate, M.S. placed her hand above her vagina with her fingers pointed in a horizontal position. M.S. did not indicate that Respondent “cupped” her vagina during this demonstration.

7. Respondent denies that he touched M.S.’s labia with his fingers, rested his fingers on her vagina, or cupped her vagina.

8. Respondent’s testimony as to the touching that occurred during the January 31, 2018, massage session was credible and more precise than that of M.S. Respondent’s testimony is accepted over the testimony of M.S. where it conflicts.

9. Dr. George Rozelle is the physician who owns the facility where Respondent performed massage therapy on M.S. The Department offered hearsay testimony from a witness who heard Dr. Rozelle say “not again” when M.S. told him that Respondent had touched her inappropriately during the massage session that occurred that day. The inference suggested by the Department is that Respondent had been previously accused of inappropriately touching other massage therapy clients on other occasions.

² The Department also states in its PRO that Respondent touched M.S.’s breasts. The Administrative Complaint in DOAH Case No. 20-4754PL does not, however, identify the touching of M.S.’s breasts as a sexual activity that occurred when Respondent massaged her, and therefore cannot serve as a basis for disciplinary action in this case. *Trevisani v. Dep’t of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005); *Delk v. Dep’t of Prof’l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

The testimony is hearsay for which the Department failed to establish an exception, and is unreliable because Dr. Rozelle did not testify to explain what he meant when he said “not again.” Even if Dr. Rozelle said “not again,” because there were one or more prior similar complaints about Respondent, such unproven allegations cannot be relied upon here to establish that Respondent had a propensity to commit sexual misconduct on massage therapy clients. § 120.57(1)(d), Fla. Stat. For all of these reasons, the “not again” statement is not accepted as evidence against Respondent.

10. The Department failed to prove that Respondent engaged M.S. in sexual activity, or that Respondent touched M.S. in a manner that was intended to, or likely to, erotically stimulate himself or M.S.

Client S.B., DOAH Case No. 20-4755PL

11. S.B. presented to Respondent for massage therapy for the first time on August 15, 2017. S.B. completed a client information form indicating that the reason for her visit was “low energy, lost, depressed.” S.B. wrote that she experienced these conditions for four years, that they followed an undisclosed accident, trauma, or illness, and that they were aggravated by “life.”

12. S.B. was seen by Respondent for massage therapy on nine different occasions on August 17 and 20, and October 10 and 19, 2017; January 16, 23, and 30, and February 6 and 15, 2018. Respondent was fully clothed during all the massage sessions with Respondent.

13. S.B. testified that Respondent told her that he “loved” her and that he was “never going to leave” her during several visits, but she could not identify when Respondent made those statements.

14. S.B. also testified that Respondent told her that she may experience an orgasm when he applied pressure to her groin during a session, but she could not recall when that happened. S.B. testified that she returned to see Respondent for message therapy after he touched her groin and allegedly made the “orgasm” comment, but that she had another female massage therapist with her during the session.

15. Additionally, S.B. testified that Respondent put his hands over her breasts during more than one session, but she could not say how often or when this occurred. S.B. denied that Respondent ever “grasped” her breasts and admitted that she never complained to Respondent about allegedly touching her breasts.

16. Respondent denied that he told S.B. that he “loved” her, that he was “never going to leave” her, or that she might experience an “orgasm.” According to Respondent, he touched S.B.’s adductor muscles and pubic bone—not her vagina—to help reduce her complaint of hip pain during her third visit on October 10, 2017.

17. S.B.’s testimony was imprecise and the facts to which she testified were not distinctly remembered. Respondent’s testimony is accepted over S.B.’s testimony where it conflicts.

18. The Department failed to prove that Respondent engaged S.B. in sexual activity or that Respondent touched S.B. in a manner that was intended to, or likely to, erotically stimulate himself or S.B.

CONCLUSIONS OF LAW

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). The Department therefore bears the burden of proving 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. 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)). This burden of proof may be met where the evidence is in conflict; however, “it seems to preclude evidence that is ambiguous.” *Westinghouse Elec. Corp. v. Shuler Bros.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

21. 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); *McClung v. Crim. Just. Stds. & Training Comm’n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984).

22. A licensed massage therapist can be disciplined in Florida for violating any provision of chapter 480, or rules adopted pursuant thereto. § 480.046(1)(p), Fla. Stat. Here, the Department charged Respondent with committing sexual misconduct in violation of section 480.0485 and rule 64B7-26.010.

23. Section 480.0485 prohibits massage therapists from engaging or attempting to engage the massage therapy client in sexual activity:

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.

24. Rule 64B7-26.010 reiterates the statute’s prohibition against sexual activity during massage therapy and defines—in detail—what constitutes “sexual activity” in this context:

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

(2) No massage establishment owner shall engage in or permit any person or persons to engage in sexual activity in such owner's massage establishment or use such establishment to make arrangements to engage in sexual activity in any other place.

(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.

25. The evidence here falls short of establishing that Respondent engaged in “sexual activity” with M.S. or S.B., as the term is defined by rule. This is primarily because the testimony from M.S. and S.B. was imprecise and lacked the certainty that the clear and convincing burden of proof requires. But even so, most of the touching Respondent was accused of performing—on

clients who remained fully clothed during all sessions—does not constitute sexual activity, because the touching was not a sexual act enumerated in the rule or touching that was otherwise intended to erotically stimulate.

26. Based upon the weight of the credible evidence, the Department failed to prove by clear and convincing evidence that Respondent engaged S.B. or M.S. in sexual activity while performing massage therapy on them.

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 dismissing the Administrative Complaints.

DONE AND ENTERED this 26th day of May, 2021, in Tallahassee, Leon County, Florida.



BRIAN A. NEWMAN
Administrative Law Judge
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Filed with the Clerk of the
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this 26th day of May, 2021.

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.