STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MASSAGE THERAPY,

Petitioner,

vs. Case No. 21-0180PL

TERRENCE GRYWINSKI, L.M.T.,

Respondent.
_____/

DEPARTMENT OF HEALTH, BOARD OF MASSAGE THERAPY,

Petitioner,

vs. Case No. 21-0181

TERRENCE GRYWINSKI MASSAGE,

Respondent.
_____/

RECOMMENDED ORDER

On July 12 and 21, 2021, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing by Zoom technology.

APPEARANCES

For Petitioner: Dannie L. Hart, Esquire
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STATEMENT OF THE ISSUES

The issues to be resolved are whether Respondent committed the offenses charged in the Administrative Complaints and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

On October 28, 2020, Petitioner, Department of Health (Petitioner or the Department) filed Administrative Complaints against Terrence Grywinski, L.M.T., and Terrence Grywinski Massage, alleging that Terrence Grywinski had committed sexual misconduct in violation of sections 480.046(1)(p) and 480.0485, Florida Statutes, as defined by Florida Administrative Code Rule 64B7-26.010(4).[1] Mr. Grywinski filed Election of Rights forms for each of the Administrative Complaints disputing the allegations against him, and on January 15, 2021, the cases were referred to DOAH for the assignment of an administrative law judge.

On January 28, 2021, the cases were consolidated and the following day, a Notice of Hearing was issued scheduling them for hearing on April 6, 2021, by Zoom conference. Both parties requested continuances, based on good cause, and the hearing was rescheduled a number of times. Ultimately, the hearing commenced on July 12, 2021, and reconvened and finished on

[1] The Administrative Complaint in DOH Case No. 2019-39386 and docketed as DOAH Case No. 21-0180PL is against Mr. Grywinski's massage therapy license. The Administrative Complaint in DOH Case No. 2019-39761 and docketed as DOAH Case No. 21-0181 is against the premises permit for Terrence Grywinski Massage. The factual basis for both Administrative Complaints is the same, and for ease of reference, Respondents will be referred to in the singular, i.e., Mr. Grywinski or Respondent.

July 21, 2021. On July 6, 2021, the parties filed a Joint Pre-Hearing Stipulation in which they identified certain undisputed facts that would require no evidence at hearing. Those stipulated facts, where relevant, are included in the Findings of Fact below.

Joint Exhibits 1 and 2 were admitted into evidence. Patient M.M. and DOH Investigative Supervisor Marisol Allen testified on behalf of Petitioner, and Petitioner's Exhibits numbered 1 through 5 were admitted. Respondent, Kacee Lynn Homer, and Lisa Caller testified on behalf of Respondent, and Respondent's Exhibits numbered R-1 through R-3, Bates stamp pages 47-48 and 53 through 58 of R-4, R-5 through R-21, and R-23 through R-25 were admitted into evidence.

The three-volume Transcript of the proceedings was filed with DOAH on September 20, 2021. The deadline for filing proposed recommended orders was extended for good cause, and the Proposed Recommended Orders were timely filed. All references to the Florida Statutes are to the 2017 codification, unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of massage therapy practice pursuant to section 20.43 and chapters 456 and 480, Florida Statutes.

2. Respondent, Terrence Grywinski, is a licensed massage therapist in the State of Florida and holds license number MA 6049.

3. Respondent's mailing address is 6419 Meandering Way, Lakewood Ranch, Florida 34202.

4. Respondent, Terrence Grywinski Massage, is licensed as a massage establishment in the State of Florida and holds license number MM 18059.

5. The establishment's physical location is 1188 Tamiami Trail, Sarasota, Florida 34236, and this location is the location where all appointments relevant to the facts in this case were scheduled and conducted.

6. Respondent has been licensed to practice massage therapy in Florida since on or about July 9, 1985. The establishment was licensed as a massage establishment on or about March 20, 2006. Respondent is the sole owner and sole employee of the establishment, which conducts business as Advanced Craniosacral Therapy. No evidence was presented to indicate that either license has been previously disciplined by the Board.

7. As a licensed massage therapist, Respondent is subject to the state of Florida laws and rules governing licensed massage therapists, and the establishment that he owns is likewise subject to the laws and rules governing massage establishments.

8. Respondent does not practice traditional massage therapy and has not done so since approximately 1995. He was trained in a modality called craniosacral therapy (CST) in 1995, and has performed that modality exclusively since that time.

9. According to Respondent, trauma of any kind, whether emotional or physical, causes a tremendous force of energy to come into the body, and the body tries to protect itself by "shortening" and isolating the energy. This isolation of the energy created by trauma is what creates areas of tension within the body.

10. The theory behind CST is that the body will correct itself when it feels "safe." CST works with the fascia connective tissue that attaches muscles to the bone, and encases a person's organs, brain, and spinal cord. CST uses very gentle holds to create a safe space for the body, which will help the body slip into a corrective reorganizational healing mode. When a person undergoes CST, the fascia will start to release and the person will feel a "letting go" or release in the tissue. CST does not involve manipulation of the tissue, but rather, a series of holds that may last in any one place for five to

ten minutes. The amount of pressure applied is "whatever pressure the body tells you it needs," but generally no more than five grams of pressure. According to Faith Buhler, who testified by deposition as an expert for the Department, when there is a release, there is a different pulse in the body.

11. Respondent trained in CST through the Upledger Institute, which was established by John Upledger. Respondent has received extensive continuing education in CST and the majority of his statutorily required continuing education deals with the performance of this modality.

12. Typically, Respondent's first-time clients make an appointment for CST and are given a code to enter the second floor of the building where Respondent's office is located. He greets patients in a common waiting room and takes them to the one-room office where therapy takes place. The office contains two chairs, a massage table, a small side table where a "cupping" machine is stored, and a bookshelf.

13. New clients are asked to fill out an intake sheet that requests some basic information about the client and his or her reason for seeking CST. Respondent uses the information on the intake sheet to speak with the client about his or her needs, and places it in a manila folder that he uses to take notes. The notes are on the manila folder itself, as opposed to paper contained in the folder. If additional space is needed for subsequent visits, he simply gets another manila folder and, hopefully, keeps the folders about a particular client together. Respondent admits he is not very organized, and maintaining his files is not his specialty. Most clients have three to six sessions with Respondent, so it is conceivable that for most clients, a single folder would be sufficient.

14. After Respondent speaks with the client, the client lies down on a table during the therapy, fully clothed, facing up. Typically, Respondent is the only person in the room during CST sessions, and the sessions last approximately an hour and a half. He will assess a client by lifting each leg to compare length and will rotate the legs to assess range of motion through the

hips. After assessing a client, Respondent goes through a series of gentle holds, generally using the same protocol each time, with some variation depending on the need of the client. He testified that he will tell clients what he is going to do and where he is going to place his hands, and advises clients that if at any time they feel uncomfortable with what he is doing or where he is placing his hands, the client should feel free to tell him.

15. Respondent will review the notes he made from prior visits at the beginning of each session and will discuss any changes that have taken place since the last session. Many times, the notes that Respondent keeps will include sensitive personal information related by a client if that information may reveal a source of trauma.

16. During the time period relevant to these proceedings, Respondent advertised his practice in an alternative medicine magazine called "Natural Awakenings." M.M. is the managing editor of Natural Awakenings. As part of her job, she writes articles and conducts interviews of professionals who advertise in the magazine.

17. M.M.'s supervisor, Janet Lindsay, assigned her the task of interviewing and writing an article about Respondent and his practice. M.M. was told that Respondent practiced CST.

18. On May 1, 2017, M.M. emailed Respondent and told him that Natural Awakenings wanted to feature him in an article for the June issue, and sent him a series of questions to answer, along with her telephone number. Respondent did not immediately respond, so on May 8, 2017, M.M. emailed him again to make sure he received the first email. Respondent called M.M. the next day and suggested that M.M. come in and receive a CST treatment at no charge, so that she would have a better understanding of the modality when writing the article. M.M. accepted the offer and made an appointment to see Respondent on May 12, 2017.

19. During this first session, M.M. interviewed Respondent for the article, filled out an intake sheet, and provided a medical history. Respondent asked

her some questions, then directed her to remove her shoes and lie on the table, fully clothed. Respondent explained what he was doing and where he would place his hands as he performed the various holds.

20. M.M.'s description of the first session is consistent with Respondent's description of how he conducts all CST sessions. There is no allegation that any improper or unprofessional conduct took place at the May 12, 2017, session.

21. At the end of the session, Respondent offered to continue providing free sessions to M.M. in exchange for M.M. writing additional articles for the magazine about his practice. M.M. agreed to the arrangement. She testified that these kinds of arrangements are not the norm, but that it was not the first time it had occurred.

22. M.M. testified that she felt better after having the CST session, in that her chronic pain was better, her body less tense, and her breathing easier, especially when running. These benefits, however, were temporary.

23. M.M. wrote an article about the first session, which she provided to Respondent for review and approval before it was published. Respondent appreciated the article, felt that it was well written, and benefited his practice.

24. On May 18, 2017, M.M. provided the final copy of the article for publishing. There was no indication from the evidence presented that the parties' interaction at the initial visit or the exchanges regarding the article in the week following the visit were anything but professional.

25. M.M. saw Respondent for additional sessions on June 9, 2017; September 26, 2017; November 3, 2017; and November 30, 2017. M.M. did not find anything about these visits to be unprofessional or out of the ordinary, with the exception of the last visit on November 30, 2017.

26. M.M. and Respondent's accounts of the November 30, 2017, visit are not reconcilable. Respondent testified that the visit was much like previous

visits, while M.M. contends the visit involved unwanted and inappropriate touching and inappropriate commentary about her body.

27. Leading up to the final visit, M.M. testified that Respondent's behavior seemed more familiar and personal than the behavior of a health care provider. She claimed that he started calling and emailing her late at night, and referred to her as his "muse." She specifically indicated that one call came on a weekend, and she chose not to answer it because she was with her sister and did not want to interject work issues into her weekend.

28. Phone records from the providers for both M.M. and Respondent's phone numbers reveal only one call made from Respondent to M.M., and that call took place May 9, 2017, before her first appointment with him.

29. The Department did not produce any of the emails M.M. claimed that Respondent made to her. Respondent produced most, but not all, of the emails between the two. He testified that he provided to the Department all of the emails he found at the time he responded to the complaint, and that any omissions were unintentional. It is noted that the subpoena issued to Respondent requests patient records, but does not request emails. The request for production issued by the Department to Respondent, which is on the docket for this case, does not specifically request emails, but instead requests documents to be used at hearing. None of the emails in evidence contain any improper statements. All of them involve either questions about Respondent's practice, or review of the articles that M.M. wrote about his practice.[2]

[2] During hearing, the Department showed Respondent a copy of an email he provided in response to the Department's request for production. The email appears, from the portions read at hearing, to involve an article that Respondent wrote about his practice. The Department did not offer the email into evidence, but asked Respondent to read where the email apparently stated, "both of you are my angels." Respondent responded by saying, "Yes, I said that, but I never called her an angel in any session. I was complimentary. Both Lindsay – or Janet Lindsay and Ms. M.M. were very helpful in my professional life, and I see nothing wrong with referring them to angels who are helping me in my profession. And if I said I never called anybody an angel, I couldn't remember that email until you brought it up now."

30. Phone records between M.M. and Respondent do indicate that Respondent contacted M.M. either by email or by text, late on some evenings. However, up until March of 2018, well after the final appointment, these contacts were in response to emails sent by M.M. to Respondent. The telephone records reference emails sent by Respondent to M.M. on January 17 and 23, 2018, a few months after M.M.'s last visit. However, neither Respondent nor M.M. were asked about these emails by date, and the record contains no information regarding their contents.

31. The weekend before the November 30, 2017, visit was Thanksgiving weekend, and M.M. and her husband had a lengthy car ride returning from Atlanta where they spent Thanksgiving. For whatever reason, M.M. had a panic attack during the car ride, and remained especially tense at her appointment with Respondent. She recalled that the discussion portion of the visit seemed shorter, and that Respondent used a pendulum to detect energy before commencing with the CST.[3] He noticed that her chest area was more closed then usual and asked her if there was some reason why she had tightness there.

32. M.M. testified that she explained to Respondent that she had always had body image issues, specifically with her chest. She stated that Respondent offered to address the tension with a modality called "cupping," which would also make her breasts look "perkier."

33. Cupping is a modality that Respondent acknowledges using on occasion. He has cupping equipment that has a variety of cup sizes and is

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The Department also contends in its Proposed Recommended Order that "Grywinski has no explanation for why he did not provide the January 2018 emails." However, the record does not reflect that the Department ever specifically asked Mr. Grywinski a question about those emails, either at hearing or in his deposition, so as to require an explanation about them.

[3] The use of the pendulum is a technique that Respondent developed himself. It supposedly detects energy in the body, or an absence thereof, and he also used this technique in a prior session.

made so that one can use one or two cups at a time, although he generally uses only one. The machine has tubing that attaches to both the machine and the cup(s), and the amount of pressure to create suction can be changed using a dial on the machine.

34. M.M. testified that she was familiar with the concept of cupping, both from research she had performed for articles, and from the then-recent 2016 Olympics where there were stories about Michael Phelps using the technique. She agreed to the cupping, and she testified that Respondent directed her to completely disrobe. According to her testimony, Respondent remained in the room while she disrobed, and did not offer her a drape of any kind. There was no testimony about what Respondent was doing while M.M. disrobed: i.e., whether he turned his back, set up the equipment, or watched her. M.M. testified that she did as Respondent asked because she had seen a number of health care providers for a variety of reasons all of her life, and trusted them.

35. M.M. stated that Respondent instructed her to lay face up on the table and rolled a cart with the cupping machine over to the table.[4] According to her, Respondent explained that while "one breast was being suctioned, he was performing what he called lymphatic drainage on the other breast, which basically involved finger motions on my skin that were kind of applied in a – in a rhythmic upward motion with both hands. And the idea behind it was to stimulate blood flow and circulation in the lymph nodes of that region."

36. M.M. stated that after the cupping of the first breast was completed, Respondent moved the cup to the other breast and duplicated the process. He then explained that he would continue to perform lymphatic drainage on the remainder of her body, and began working his way down her body, performing the same circular motions, including her stomach, hips, and pelvis; down to her pubic area and groin, and eventually her genital area,

[4] Respondent testified that there is not a rolling cart in the room, because the room is too small to accommodate one. According to him, the cupping machine sits on the table against the wall, but has lengthy tubing.

which she testified could have been either accidental or purposeful contact. M.M. testified that he grazed her buttocks and called them "buns of steel," as well as referring to himself as a "horny old man."

37. M.M. also testified that while performing the lymphatic drainage, he touched her genitals with his fingertips. Following the lymphatic drainage, Respondent told M.M. that the session was over, and she could dress. M.M. stated that he asked not to include the last portion of the visit in her article because he was afraid of losing his license. She redressed, with Respondent remaining in the room, and after doing so, they exchanged pleasantries and she left the office.

38. Respondent emphatically denies M.M.'s allegations. He acknowledges that he performed cupping on M.M but denied that he performed it on her breasts. According to Respondent, he performed cupping on her abdomen to relieve constipation. His records for November 30 state in part, "sm + lg. intestines & ileocecal inflamed. – complained about constipation -- cup abdomen?" When M.M. was asked whether Respondent performed cupping of her abdomen for constipation, she could not remember if she mentioned constipation to Respondent, but it was possible, and did not remember if he cupped her abdomen.

39. Respondent testified that he explained cupping to her and told her both about uses for cupping in China, which include cupping of the breast and of the face, but also explained it is used for different purposes in the United States. In his written response to the allegations that he provided to the Department during the investigation, he stated:

> Because of her interest in health, (she has her own health blog) and a possible future article, I demonstrated the cupping process for her and went into a lot of detail on how it worked and what it was used for in China and the protocols that cupping I had been trained in through Ace Cupping.

> With cupping, the therapist is able to bring new blood and enhance circulation and lymph flow and drainage in congested and tight muscles or area of the body.
>
> * * *
>
> I also shared that the Chinese used the machine to cup women's breasts and they claimed that if a woman breast was cupped everyday for 30 days, it would enhance circulation and lymphatic drainage and that would bring about healthier breasts or uplift them. In no way was I suggesting that we cup her breasts and I did not do so.

40. Respondent also indicated in the investigative response that M.M. seemed uncomfortable with the cupping procedure and that he cut it short. Although his response stated that she seemed uncomfortable with the cupping, it also stated that she did not state that she was uncomfortable with any procedure he employed throughout all of the craniosacral sessions, including the November 30 session.

41. Respondent testified that he did not ask her to undress, but rather, asked her to raise her shirt to the bottom of her ribcage, and to lower her shorts to the top of her hips, so that only that strip of skin was exposed. He placed oil on her skin, used a cup approximately two inches in diameter, and moved the cup in the same direction as the digestive system in a circular motion. M.M., by contrast, testified that no oil was used. Respondent did not perform lymphatic drainage: while he is aware of the technique, he has not been trained in it. A review of his continuing education records do not reveal any classes in lymphatic drainage.

42. Respondent further testified that only a small portion of skin was showing while he performed the cupping, and Respondent did not provide M.M. a drape (although it is unclear that one would be necessary), and did not leave the room while she readjusted her clothing once the procedure was finished.

43. Respondent also denies that he asked M.M. not to include the final portion of the visit in her article because he was afraid he would lose his license. At the time of the visit, there was no article in process. M.M. had already produced two articles about Respondent's practice, and although M.M. believed she wrote three, no third article was produced, and there are no emails or texts addressing a third article, like there were for the first and second ones M.M. wrote.

44. M.M. claimed that the third article was supposed to be a question/answer column with Respondent and a local chiropractor, Eric Winder, who Respondent says he does not know. It does not appear from the investigative report that Eric Winder was interviewed, and he was not called as a witness at hearing. Respondent likewise denies telling M.M. that she has "buns of steel," or referring to himself as a "horny old man."

45. There was no further contact between M.M. and Respondent for several months. The phone logs for AT&T indicate that there were three emails sent by Respondent to M.M. in January, but as noted previously, those emails are not in evidence. On March 11, 2018, Respondent reached out to M.M. by email, asking for permission to use an edited version of one of her articles in some advertising for his practice. M.M. responded by saying, "[y]es that's fine. Feel free to use the edited version."

46. On April 14, 2018, Respondent emailed M.M. again, and stated,

> Dear [M.M.]
>
> Hope all is well with you. I want to thank you for allowing me to use your articles in my ads. Very effective and have brought me a number of new clients. I would like to send you a check for $200, a $100 each for the 2 articles in appreciation. Could you send me your address so I can send you the check. As my practice slows down for the summer, I should be able to get you back in for more sessions.
> With great appreciation,
> Terry

To which M.M. replied,

> That's kind of you to offer, but not necessary but appreciated. If you feel compelled to send a check (again, not necessary), you can mail it to [M.M.'s home address]. However, I will tell you that I'm unable to come in for sessions, as I recently moved to the other side of town, and the drive is no longer conducive with my weekly schedule. But you are free to continue to use the articles I've written about your practice in any capacity you choose.

47. M.M. testified that she told a friend about the November 30 session about a week after it happened, and it was her friend's reaction that alerted her that what happened was not appropriate. Notes from her therapist indicate that she stated that she did not tell anyone for several months.[5] She did not tell her husband for approximately four months after the incident. Neither her husband nor the friend that M.M. stated she told about the incident testified at hearing.

48. There are other date discrepancies in the therapist's notes as compared to other events in this case. For example, the September 5, 2019, entry refers to hearing from the Sarasota Police Department regarding the incident, which is, as found below, prior to the time she even reported the incident to the Department of Health, who in turn contacted law enforcement. It may be that even if the dates for the sessions in the notes are incorrect, the inconsistencies are enough to raise concerns. This is especially so given that the subpoena sent to the therapist requests ALL patient records, and the ones provided only covered the time period from August 8,

[5] M.M.'s therapist's records were subpoenaed by the Department. Statements made for the purpose of diagnosis and treatment by a person seeking the diagnosis or treatment which describe medical history, past or present symptoms, pains, sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment, are an exception to the hearsay rule. § 90.803(4), Fla. Stat. While the statements attributed to M.M. in her therapists' notes may not be hearsay, they are not considered in this case for the truth of the matter asserted, but simply to show that there are differing statements regarding when M.M. shared her story with others.

2019, through September 10, 2019, a period of time that is much shorter than M.M. testified that she saw her therapist.[6]

49. In April 2018, M.M. emailed her employer and told her about the incident. In the emails, she states in part that he "ended our session by asking me to omit this portion of the treatment from my article, as he could lose his license. I did not report the incident, and I wrote the article as he requested, highlighting the benefits of his practice." As noted above, there was no article after the November 30 session. She also wrote in a follow-up email that "Over the next couple of months, he tried calling/texting me in a friendly way that suggested he viewed us as more than professional acquaintances." The telephone records do not support M.M.'s statement. M.M.'s employer responded by terminating M.M.'s advertising with Natural Awakenings and providing M.M. with the contact information for an attorney.

50. M.M. filed her complaint with the Department on September 11, 2019, nearly two years after the incident. She did not file a complaint with law enforcement, but upon receiving her complaint, the Department investigator notified the Sarasota Police Department on September 26, 2019. Ultimately, no criminal charges were filed, but the decision of the State Attorney's Office has no bearing on whether or not there is a basis for discipline in this case.

51. Both M.M. and Respondent had some inconsistencies in their stories. Respondent's, in large part, appear to be based on the fact that his records for the sessions he had with M.M. were not together, and he did not find the records for the earlier session (i.e., his first manila folder) until after his deposition. As noted previously, clients typically have three to six sessions, so it was not unreasonable for Respondent to assume that he only had one folder for M.M., especially given that the records were requested two years after his

[6] It may be that notes related to couple's counseling were not provided because those notes were not just about M.M. but M.M. and her husband. That does not, however, address the inconsistencies in the timeframes reflected in the notes.

last session with M.M. His counsel turned those records over to the Department, but not when requested in discovery, and some of those records were not admitted as a result.[7]

52. The Department takes issue with a statement Respondent made about M.M. telling him that she was sexually assaulted in college, stating that there is "no mention of sexual assault, or assault of any kind, in either set of Patient M.M.'s treatment notes." (Petitioner's Proposed Recommended Order at 15, ¶ 111). However, given that Petitioner successfully objected to some of Respondent's records regarding M.M. being admitted into evidence, what is in evidence does not reflect all of the records regarding M.M.'s sessions with Respondent. There can be no finding that the records contain no mention of sexual assault when, as the result of Petitioner's objections, not all of Respondent's records are in evidence.

53. The Department also finds Respondent's records to be untrustworthy because their physical appearance is somewhat different. As noted previously, Respondent writes his notes on manila folders and writes from edge to edge. He testified that when he tried to copy the manila folders for the Department, some of the notes were cut off, so he rewrote what was on the notes and provided them to the Department. There are some minor differences in the notes and in a few places, he wrote the dates as 2019 as opposed to 2017. Given that the records were requested in 2019, such an error is not significant. While the copies of the records are not exact, the differences are extremely minor. Furthermore, the Department points to no statute or rule that requires a massage therapist to have patient records at all, much less one that dictates a format to which they must conform. Most importantly, the Department does not point to any discrepancy that

[7] The Department also appears to question Respondent's and Respondent's counsel's good faith regarding these records, stating that Respondent testified that he found the records two to three weeks before the hearing, and yet counsel for Respondent was able to use these records in questioning M.M. in her deposition June 22, 2021. A specific date for when Respondent gave the records to his attorney is not in the record.

materially affects Respondent's account of what happened on November 30, 2017.

54. There are other concerns with M.M.'s account of the incident in addition to those issues listed with respect to the telephone records, discrepancies in dates, and references to an article that was not written. For example, M.M. testified that she has had a great deal of medical procedures performed on her, and she is accustomed to doing what medical professionals ask of her. Kacee Homer and Lisa Caller are character witnesses who testified on behalf of Respondent. Both are healthcare professionals who testified that when a patient is asked to disrobe, they generally do. Ms. Homer, a nurse, said that generally when a patient is asked to disrobe, she leaves the room while the patient is undressing, and if possible, the patient is draped.

55. Here, M.M. testified that Respondent asked her to disrobe, and stood there while she did so. It seems odd that M.M., who writes articles about healthcare, and by her own admission has had several medical procedures in her life and is fairly knowledgeable regarding the medical field, would not at least ask for a drape, or wait for Respondent to leave the room before undressing.

56. M.M.'s description of the cupping and lymphatic drainage also raises more questions than it answers. She testified that while the cup was placed on one breast, Respondent massaged the other with both hands. That means the cup had to remain in place based solely on the suction or pressure provided by the cupping machine. It seems that it would be difficult for the cupping machine to provide enough suction for the cup to remain in place on her breast without causing discomfort or pain, and possibly bruising, but there was no testimony that she found the experience physically painful or it left any discernible marks.

57. Finally, the undersigned is troubled that M.M. would willingly give her home address to a man that she claimed sexually assaulted her. It does

not seem plausible that she would so easily provide this type of information to Respondent when it could enable him to make further contact with her.

58. After careful consideration of all of the evidence presented, the undersigned finds that there is not clear and convincing evidence to support a finding that Respondent asked M.M. to disrobe in front of him without providing a drape.

59. There is not clear and convincing evidence that Respondent massaged M.M.'s breasts, buttocks, and groin area, and touched her vagina with his fingertips, all without a valid medical reason. Likewise, there is not clear and convincing evidence that Respondent told M.M. that she had "buns of steel" or that he was a "horny old man."

60. The evidence failed to establish that Respondent's conduct toward M.M. constituted sexual activity outside the scope of practice, or an attempt to engage or induce M.M. to engage in such activity.

CONCLUSIONS OF LAW

61. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

62. The Department is the agency of the State of Florida charged with the licensing and regulation of the practice of dentistry pursuant to section 20.43 and chapters 456 and 480.

63. The Department seeks to revoke Respondent's license to practice massage therapy, as well as the establishment's license. Therefore, the Department must prove the allegations in the Administrative Complaints by clear and convincing evidence. *Dep't of Banking and Fin. v. Osborne Stern and Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 595 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

> 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

> lacking in confusion as to the facts at issue. The evidence must be of such a 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,* 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where, as here, 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).

64. A proceeding to discipline a license is penal in nature, and penal statutes must be construed in terms of their literal meaning. Words used by the Legislature cannot be expanded to broaden the application of such statutes. As a result, the provisions of law upon which this disciplinary action is based must be strictly construed, with any ambiguity construed against the Department. *Elmariah v. Dep't of Prof'l Reg.,* 574 So. 2d 165 (Fla. 1st DCA 1990); *see also Griffis v. Fish & Wildlife Conserv. Comm'n,* 57 So. 3d 929, 931 (Fla. 1st DCA 2011); *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008).

65. The Administrative Complaint in DOAH Case No. 21-0180PL contains the following charging provisions:

> 17. Section 480.046(1)(p), Florida Statutes (2018), provides that a massage therapist is subject to discipline for violating any provision of this Chapter or Chapter 456, or any rules adopted pursuant thereto.
>
> 18. Section 480.0485, Florida Statutes (2018), prohibits sexual misconduct in the practice of massage and specifically provides that:
>
> > 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.

19. Rule 64B7-26.010, (1) and (3) of the Florida Administrative Code (2018), absolutely prohibits sexual activity by any person or persons in a massage establishment, and provides that 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. Rule 64B7-26.010(4), defines "sexual activity", [in] pertinent part as:

> (4) [A]ny 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.

20. Respondent engaged in sexual misconduct in the practice of massage by using the massage therapist – patient relationship to induce or attempt to induce, or to engage or attempt to engage Patient M.M. in sexual activity outside the scope of practice in one or more of the following ways:

a. By remaining in the room while Patient M.M. disrobed;

b. By massaging Patient M.M.'s breasts;

c. By massaging Patient M.M.'s buttocks;

d. By massaging Patient M.M.'s groin;

e. By commenting on Patient M.M.'s body; and/or

f. By referring to himself as a "horny old man."

21. Based on the foregoing, Respondent violated Section 480.046(1)(p), Florida Statutes (2018), through a violation of Section 480.0485, Florida Statutes (2018), and/or Rule 64B7-26.010(1) and/or (3), Florida Administrative Code.

66. While the Administrative Complaint in Case No. 20-0180PL references the 2018 codification of the Florida Statutes, disciplinary proceedings should charge the statute in effect at the time of the alleged prohibited conduct. *McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2003).

67. The allegations in the Administrative Complaint in DOAH Case No. 21-0181 are identical in all material respects, except that it references those responsibilities and prohibitions applicable to a message establishment as opposed to a massage therapist.

68. Rule 64B7-26.010, referenced in both Administrative Complaints, provides in paragraphs (1) through (3):

(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.

69. As previously stated, the clear and convincing standard by which a disciplinary proceeding must be measured is a high standard. When the standard requires that the evidence be such 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," that evidence cannot leave the trier of fact with more questions than answers.

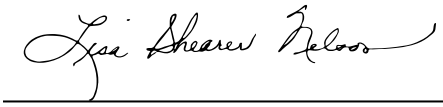
70. Section 120.81(4)(a) provides that in a proceeding against a licensed professional or in a proceeding for licensure of an applicant for professional licensure which involves allegations of sexual misconduct, the testimony of the victim need not be corroborated. With respect to this case, there is no requirement that there be testimony by someone other than M.M. to corroborate her story. By the same token, where other evidence in the record contradicts her version of the events, that information may and should still be considered.

71. As discussed in the Findings of Fact, there were several instances where M.M.'s testimony was contradicted by other compelling and persuasive evidence. The evidence presented in support of the allegations against Respondent simply did not rise to the clear and convincing standard.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administrative Complaints against Terrence Grywinksi, L.M.T., and Terrence Grywinski Massage, be dismissed.

DONE AND ENTERED this 5th day of November, 2021, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of November, 2021.

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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.