

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

Case No. 21-0436PL

vs.

RAUL MESSIR CASTRO, L.M.T.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge (“ALJ”) Robert S. Cohen via Zoom video conference on May 4, 2021.

APPEARANCES

For Petitioner: Christina Arzillo Shideler, Esquire
Caitlin Rebekah Harden, Esquire
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Prosecution Services Unit
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For Respondent: Ramon de la Cabada, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether disciplinary action should be taken against Respondent’s license to practice massage therapy based on allegations that Respondent committed sexual misconduct in the practice of

massage therapy, therefore violating the provisions of section 480.0485, Florida Statutes (2014), and Florida Administrative Code Rule 64B7-26.010(1) and/or (3), as alleged in the First Amended Administrative Complaint (“Complaint”) in this proceeding.

PRELIMINARY STATEMENT

On March 11, 2020, Petitioner, Department of Health (“Department”), filed a Complaint seeking discipline against the massage therapist license of Respondent, Raul Messir Castro, L.M.T., in DOH Case No. 2016-22707. The two-count Complaint alleged that Respondent violated section 480.046(1)(p), through a violation of section 480.0485 and/or rule 64B7-26.010(1) and/or (3), by engaging in sexual misconduct with Patient M.C.R. and Patient E.V. Respondent disputed the material facts alleged in the Complaint and requested an administrative hearing involving disputed issues of fact. The case was referred to the Division of Administrative Hearings (“DOAH”) on February 8, 2021, and was assigned DOAH Case No. 21-0436PL.

Prior to the hearing, on April 21, 2021, the parties filed a Joint Pre-hearing Stipulation. Where relevant, those facts have been incorporated in this Recommended Order. The final hearing was held on May 4, 2021. Petitioner presented the live testimony of Patient M.C.R. Respondent testified on his own behalf and presented the live testimony of his expert witness, Dr. Jethro Toomer. Petitioner also recalled Patient M.C.R. for rebuttal. At the hearing, Petitioner moved to admit the transcript and video recording of Patient E.V.’s deposition in lieu of live testimony, and the deposition transcript of Dr. Wendy Gallego in lieu of live testimony, which were admitted as Petitioner’s Exhibits 1 and 2. Respondent moved to admit the curriculum vitae and case list of Dr. Toomer, which were admitted as Respondent’s Exhibits 1 and 2.

The Transcript of the proceeding was filed on June 8, 2021. The parties timely filed their proposed recommended orders on June 18, 2021, which have been given due consideration in the preparation of this Recommended Order. References to the Florida Statutes and Florida Administrative Code are to the versions in effect at the time the incidents complained of herein were allegedly committed.

FINDINGS OF FACT

1. At all times material to the allegations in the Complaint, Respondent was licensed as a massage therapist in the state of Florida, having been issued license number MA 67269.

2. Respondent's address of record is 1717 West 68th Street, Hialeah, Florida 33014.

3. At all times material to the allegations in the Complaint, Respondent was employed as a massage therapist at Shin Wellness ("Shin"), located at 4500 Biscayne Boulevard, Suite 202, Miami, Florida 33137.

4. Both E.V. and M.C.R., Respondent's massage clients, met Respondent when they worked at Shin together and received massages from Respondent during and/or after their employment at Shin.

5. Shin was owned by Wendy Gallego, M.D.

Patient M.C.R.

6. M.C.R. is well educated and has earned her degree in chiropractic medicine and a master's degree in clinical nutrition. She is well-versed in the mechanics of the human body as a chiropractor and currently teaches biology at West Georgia Technical College.

7. At all times material to the allegations in the Complaint, M.C.R. was a chiropractor at Shin.

8. M.C.R. and Respondent had a collegial relationship with no issues while working together at Shin.

9. M.C.R. sought massage therapy from Respondent for her left-side shoulder area, specifically the trapezius and neck, after sustaining injuries from a car accident. Respondent's massages assisted M.C.R. in regaining full range of motion and relieving tension and knots in her muscles.

10. M.C.R. found Respondent more helpful for relieving pain than the other male and female massage therapists she had seen.

11. M.C.R.'s massages with Respondent invariably started the same. M.C.R. would explain her specific issues to Respondent, which consistently included the left-side shoulder area, after which Respondent would leave the room for M.C.R. to remove all her clothing except her underwear. M.C.R. would then lay on the table under a sheet, and Respondent would reenter the room.

12. M.C.R. testified that, in addition to massaging her in the various areas she specified as needing special attention, Respondent would sometimes massage her sternum and surrounding ribcage area by instructing M.C.R. to place her hands over her breasts and move them outward so he would not inadvertently touch them. She said this would allow Respondent to use a flat hand under the sheet without making direct contact with her breasts.

13. M.C.R. testified that she never felt uncomfortable with Respondent massaging using this technique.

14. M.C.R. testified that, on February 2, 2015, her massage started the same as any other, with M.C.R. undressing to her underwear and lying face up on the massage table, under a sheet.

15. M.C.R. testified that Respondent massaged her sternum area, without first instructing her to place her hands over her breasts. While Respondent's hands were under the sheet, which covered M.C.R.'s sternum, he made an outward circular motion with his flat hands several times, grazing over M.C.R.'s bare breasts and nipples.

16. M.C.R. stated she felt uncomfortable, but did not say anything to Respondent at this time because she thought that Respondent might have touched her breasts and nipples by mistake.

17. Shortly after this, M.C.R. turned onto her stomach. M.C.R. did not place her head in a head rest, but laid her head to one side on the flat table.

18. While Respondent was massaging M.C.R.'s back, she testified she felt something hard brush against her arm. After first assuming it was Respondent's elbow or knee, she opened her eyes and saw Respondent's erect penis through his scrubs.

19. M.C.R. testified that she was shocked and froze.

20. M.C.R. further testified that, once the massage ended, Respondent left the room and M.C.R. got dressed. When Respondent returned to the room, M.C.R. said he told her that he had a dream about the two of them and he wanted to make it a reality. Though far from precise or explicit, M.C.R. took this to mean that Respondent was inquiring if she would engage in sex with him.

21. M.C.R. immediately expressed her disgust with this comment and left the room.

22. M.C.R. did not receive any future massages from Respondent.

23. Touching a patient's breast(s) and/or nipple(s), touching a patient's arm with an erect penis, and inquiring—even impliedly—if a patient would engage in sexual acts, are outside the scope of practice or generally accepted examination or treatment.

24. M.C.R. testified that she did not immediately report the incident because she was still in shock and needed to process what had happened. She had not previously experienced inappropriate sexual behavior from a massage therapist and did not know what to do about it.

25. Not long after the incident, M.C.R. testified that she first told her co-worker, Julio Dominguez, about what Respondent did to her. Mr. Dominguez

encouraged her to tell Dr. Wendy Gallego, the owner of Shin, about the incident.

26. M.C.R. next told Dr. Gallego about the incident with Respondent, but Dr. Gallego did not take any action against Respondent at this time.

27. Dr. Gallego's recollection of what M.C.R. told her is different from what M.C.R. testified to at hearing. Dr. Gallego testified that Respondent's asking her out or "a proposition kind of thing" was not in the context of a massage. Dr. Gallego tried to rehabilitate her testimony's inconsistencies with what M.C.R. had testified about by repeatedly saying the passage of time had affected her memory of details.

28. Respondent and M.C.R. continued to work together at Shin after the incident, until M.C.R. left for another job as a professor. However, M.C.R. avoided contact with Respondent during the remainder of her employment. This was possible because her office was on the opposite side of the building from the massage rooms.

29. M.C.R. decided not to file a complaint with the Department because she thought that Respondent's behavior was directed specifically toward her. At that time, M.C.R. was not aware of any other incidents of inappropriate behavior by Respondent.

30. M.C.R. became aware of the Department's case against Respondent only after she was contacted by the Department's attorney about testifying in this matter before DOAH.

31. M.C.R. decided to testify in this matter after she learned that another patient, E.V., had been victimized by Respondent. M.C.R. felt more comfortable speaking about the incident, knowing that she was not alone.

32. M.C.R. never filed any criminal or civil complaints against Respondent relating to this incident.

33. M.C.R.'s testimony regarding Respondent's conduct during her massage was clear, distinctly remembered, direct and weighty, and lacking in confusion as to the facts at issue. As will be discussed below, however, there

are some serious inconsistencies between her testimony and that offered by Respondent which demand further discussion.

34. While some of the specific details described by M.C.R. varied somewhat when cross-examined, the passage of time, four years from the 2015 date of the alleged incident until she became involved in this case in 2019, her description of the alleged incident remained essentially the same.

35. Prior to the alleged incident at issue, Respondent and M.C.R. had a friendly relationship as coworkers at Shin. No bias or improper motive for M.C.R.'s testimony was established by Respondent.

36. Following what she described as an inappropriate massage, believing it to be an isolated incident involving Respondent's desires toward her in particular, M.C.R. merely sought to distance herself from Respondent. M.C.R. did not seek Respondent's termination from Shin, pursue criminal prosecution, nor did she seek to obtain monetary compensation from Respondent. M.C.R. only came forward to testify against Respondent when she learned that she may not have been Respondent's only victim. M.C.R. left her employment from Shin and retired from the practice of chiropractic medicine in 2015.

Patient E.V.

37. E.V. and Respondent first met as coworkers at Shin. Respondent had already been employed at Shin when E.V. began her employment at Shin as a receptionist.

38. During her employment at Shin, E.V. described her relationship with Respondent as collegial and friendly.

39. At all times material to the allegations in the Complaint, E.V. was no longer employed at Shin, but was receiving services from Shin.

40. E.V. received multiple massages from Respondent at Shin, and she recalled that Respondent provided her approximately three massages, which she pre-scheduled.

41. Interestingly, Respondent recalled having given E.V. massages “over 30, over 20 times.” Based upon testimony from both E.V. and Dr. Gallego, both by deposition, E.V. recalls only three massages from Respondent, which, Dr. Gallego testified, were borne out by Shin records of appointments confirmed by Dr. Gallego. Respondent testified that he was “superconfident” that E.V. had been a massage client of his 20 or 30 times. When confronted with the number being three as reflected in the Shin records, according to Dr. Gallego, he responded that she may have only been counting the times when E.V. was an employee of Shin.

42. E.V. testified that she did not exclusively prefer male or female massage therapists and had received many massages prior to seeing Respondent.

43. On May 13, 2015, E.V. presented to Respondent at Shin for a massage, complaining of lower back and neck pain.

44. E.V. testified that the massage began normally. E.V. notified Respondent of her issues, Respondent left the room so E.V. could disrobe and lay under the sheets on the massage table, and Respondent reentered the room to begin the massage.

45. E.V. began the massage face down, with her head in the head rest and her arms over her head resting on the head rest. While in this position, about halfway through the massage, E.V. testified that she was in a state of total relaxation. This suggests that E.V. was comfortable and trusting of Respondent, despite being disrobed and alone with Respondent in a vulnerable position.

46. E.V. testified that it was at this point in the massage she felt Respondent’s erect penis, through his scrubs, rub against her left forearm and then her right forearm.

47. Upon feeling this, E.V. testified she was “in disbelief” and attempted to determine whether the rubbing she felt was something different, like a lotion bottle. However, E.V. knew that Respondent did not wear a lotion

bottle around his waist, and both of Respondent's hands were on her back administering her massage at that point.

48. E.V. did not actually see Respondent's erect penis, because she was lying down with her face in the headrest, but testified she knew what an erect penis feels like, based upon, she testified, childhood experiences of abuse, so she assumed that was what she was experiencing during the massage.

49. Once the massage was complete, E.V. dressed and left the massage room. She did not report the incident to anyone at Shin on the day of this massage. She testified that she did not remember anything else that happened that day because her "memory kind of shut down or shut it out."

50. Having previously resigned from Shin after the alleged incident, in late summer of 2015, E.V. was rehired by Shin to perform marketing duties. She had not told a single person at Shin about her alleged massage with Respondent from May of that year. She learned that day, after checking the schedule, that Respondent was not scheduled to be in the office. She later learned, from "Karen," a coworker, that Respondent had been "fired for being inappropriate with female patients."

51. E.V. "learned" about M.C.R.'s claim of an "inappropriate proposition" through the rumor mill at Shin. She never spoke with "C.R." (M.C.R.), "a chiropractor that worked at Shin," after learning that she was another alleged victim of inappropriate behavior by Respondent.

Jethro W. Toomer, Ph.D.

52. Dr. Jethro W. Toomer earned his bachelor's, master's, and doctoral degrees in psychology. He is a Diplomate of the American Board of Professional Psychology and has practiced in the field of psychology since 1976. He has served as a professor, as a clinical and forensic psychologist, and as a consulting psychologist throughout his career. He has written, presented, and had his papers published on countless occasions. He is clearly an expert in post-traumatic stress disorder ("PTSD"), through his work with

veterans, professional athletes, and individuals suffering the long-term effects of childhood or other past stress or traumatic events. He has testified in judicial proceedings as an expert in PTSD dozens of times. He is accepted as an expert in PTSD in this case.

53. Dr. Toomer did not personally evaluate E.V. and, therefore, relied entirely on E.V.'s deposition testimony offered in this case, and his interpretation of the therapy notes made by Dr. Sylvia Galvis-Lundstrom, whom E.V. consulted for mental health therapy. Dr. Galvis-Lundstrom did not testify at hearing.

54. From Dr. Galvis-Lundstrom's notes, Dr. Toomer learned that E.V. had suffered from two incidents of childhood trauma. The nature of the trauma was that she had been touched inappropriately on two separate occasions by two different neighbors, known to her, when she was aged six and eleven, more than 40 years prior to the alleged incident with Respondent. The more specific nature of the childhood abuse was that she had been touched and rubbed on her arms with an erect penis on the two occasions she described to her therapist.

55. Dr. Toomer noted that E.V. sought therapy after she lost her parents, another traumatic event, in 2016. She filed her complaint that gave rise to these proceedings on April 6, 2016, after she began therapy with Dr. Galvis-Lundstrom. She testified she filed the complaint "as part of dealing with my past childhood abuses, and for closure for this incident with [Respondent]."

56. Dr. Toomer testified that Dr. Galvis-Lundstrom's notes made clear that she and E.V., moving forward, were not going to delve back into her early childhood abuses, but were going to focus on personal growth, taking responsibility, self-development, and goal achievement, among other self-help focuses.

57. There is no reference in the therapy notes from Dr. Galvis-Lundstrom that E.V. ever mentioned the alleged incident involving Respondent from the time of the massage on May 13, 2015, until September 3, 2015, after she had

returned to work at Shin and learned that Respondent no longer worked there.

58. After reviewing E.V.'s testimony and the notes from her therapy sessions with Dr. Galvis-Lundstrom, and based upon his education, knowledge, and experience, Dr. Toomer reached an opinion concerning E.V. He opined that, with "reasonable psychological certainty," meaning sufficient information to form an opinion, "there is sufficient data, sufficient information to suggest that the recall of EV at that time [the May 13, 2015, massage] was adversely impacted by longstanding trauma that was unresolved."

59. Dr. Toomer was unable to provide an opinion as to how E.V.'s prior trauma actually affected her recall of the May 13 massage, or to what degree the recollection was impacted.

Respondent, Raoul M. Castro, L.M.T.

60. Respondent testified that he practiced massage therapy in Russia and Cuba without ever having disciplinary charges or complaints brought against him. This was neither refuted nor corroborated by competent evidence.

61. Respondent has had an active license in Florida since 2012 and, other than the 2015 incidents referred to in the Complaint, has never had disciplinary action taken against his license. There have been no incidents reported since the two complained of here in 2015.

62. Prior to beginning work at Shin in 2013 or 2014, Respondent was employed as a massage therapist at Massage Envy for a year, without incident.

63. Respondent testified that, in his career as a massage therapist, he has performed hundreds or thousands of massages on hundreds or thousands of clients without incident or complaint, other than the two incidents from the Complaint giving rise to these proceedings. Over his years as a massage therapist, his ratio of men to women clients was between 50/50 and 60/40. Those statements were unrefuted.

64. Respondent has a partner of 14 years and two children with her.

65. Respondent testified that Dr. Gallego fired him at Shin after accusing him of taking clients from Shin for massages he performed outside the office. He denied the accusation that he ever poached patients from Shin.

66. Respondent testified that Dr. Gallego did not tell him he was fired for two incidents of sexual misconduct.

67. Respondent employs a specific routine when performing therapeutic massages. Using the same routine allows him to gauge the levels of muscular tension and pain in the various areas of the body undergoing massage. With repeat patients, by employing this technique, he learns when to apply less pressure to the same areas as they improve from repeated visits.

68. Respondent's routine generally begins with the client lying face down on the table with the client's arms at his or her side, under the sheet, which is tucked in. When the client is face up, men generally place their hands over their abdomens while women generally place their hands over their breasts.

69. During the facedown part of the massage, E.V. testified that her arms were straight out over her head like a person would hold her arms if he or she were being robbed. E.V. testified that this was the position her arms were in when she felt his erect penis rubbing against first one, then the other, arm.

70. Respondent testified that in his 15 years of performing massages, he has never asked a client to place his or her arms straight over his or her head as suggested by E.V. That would be an inappropriate way to massage the neck and back because the muscles would be tensed rather than relaxed. Respondent's testimony on this point is credited.

71. Respondent testified that he never had an erect penis during any massage at any time, whether in the case of E.V. or M.C.R. or any former or subsequent clients. He never learned about the complaints of E.V. and M.C.R. until he received the Complaint from the Department in 2016.

72. Respondent testified that he was at a high point in his life personally, with his partner pregnant with their second child and his massage practice

going so well, when he received the news of the complaint from E.V. He did not learn about the complaint from M.C.R. until the time of his first deposition in 2019.

73. Respondent gave at least 30 massages to M.C.R. while the two of them worked together at Shin. She had chronic issues, especially on her left side, and she was quite satisfied with the therapy given to her aches and pains by Respondent. He described their relationship as a “co-worker relationship.” In addition to receiving massages from Respondent, M.C.R. advised him on how to go about trying to revalidate his chiropractic license in Florida.

74. Respondent denied ever starting his massages with M.C.R. with her lying face up, because that was not his practice. Moreover, he never massaged any client’s sternum, because he worked only on her upper chest and neck, not below there, on or around the sternum. His practice was not to remove the sheet that covered his female clients’ breasts. He testified that the only way he could work on her as she described would have been to reach under the sheets, then reach between her breasts, without observing what he was doing, to rub the area around her sternum. He testified “this would be exposing the breasts and that cannot be done. You can’t do that.”

75. Respondent forcefully denied that he ever grazed or rubbed M.C.R.’s nipples or rubbed his erect penis against her.

76. Respondent admitted that he told M.C.R., after a massage when she was fully dressed, that he had a dream about her leaving the center (Shin) to establish her own chiropractic practice and thereby realizing her dreams. He told her he also dreamed of getting his own license and of her helping him revalidate his license. He denies ever asking her to have an affair or to fulfill a sex dream of some sort.

77. Respondent testified that he became a massage therapist because, as an athlete, he had suffered injuries, and wanted to help others who had suffered similar sports-related injuries to recover.

78. Respondent testified he has suffered emotionally, economically, and in his interaction with his clients from the allegations against him. He has stopped the process of trying to revalidate his chiropractic license because of these proceedings hanging over him.

79. Respondent agrees that the massage therapist-client relationship requires trust.

80. No criminal proceedings were initiated by a law enforcement agency nor were any civil actions brought by M.C.R. or E.V. against Respondent.

CONCLUSIONS OF LAW

81. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

82. This is a proceeding whereby the Department seeks to revoke Respondent's license to practice massage therapy. Petitioner has the burden of proving the allegations in its Complaint by clear and convincing evidence. *Reich v. Dep't of Health*, 973 So. 2d 1233, 1235 (Fla. 4th DCA 2008) (citing *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932, 933 (Fla. 1996)); and *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida:

[C]lear 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 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).

83. Because the regulation of health professions and occupations, section 456.072(1)(v), Florida Statutes, authorizes suspension or revocation of a professional license, it is penal in nature and must be strictly construed in favor of the licensed professional. *Breesmen v. Dep’t of Prof’l Reg., Bd. of Med.*, 567 So. 2d 469, 471 (Fla. 1st DCA 1990); *Munch v. Dep’t of Prof’l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

84. A hearing involving disputed issues of material fact under section 120.57(1) is a de novo hearing, and Petitioner’s initial action carries no presumption of correctness. § 120.57(1)(k), Fla. Stat.; *Moore v. Dep’t of HRS*, 596 So. 2d 759 (Fla. 1st DCA 1992).

85. The grounds proving Petitioner’s assertion that Respondent’s license should be disciplined must be those specifically alleged in the Complaint. *See, e.g., Trevisani v. Dep’t of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005); *Kinney v. Dep’t of State*, 501 So. 2d 129 (Fla. 5th DCA 1987); and *Hunter v. Dep’t of Prof’l Reg.*, 458 So. 2d 842 (Fla. 2d DCA 1984).

86. Due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. *See Shore Vill. Prop. Owners’ Ass’n v. Dep’t of Envtl. Prot.*, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and *Delk v. Dep’t of Prof’l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

87. Section 480.046(1)(p) provides that a massage therapist is subject to discipline for violating any provision of chapter 480 or chapter 456, or the rules adopted pursuant thereto.

88. Section 480.0485 prohibits sexual misconduct in the practice of massage therapy and states, in relevant part:

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.

89. Rule 64B7-26.010(1) and/or (3) 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.”

90. Rule 64B7-26.010(4) defines sexual activity as:

[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.

91. There are several discrepancies between the testimony of E.V. and Respondent. First, E.V. testified, when lying face down on the massage table with her face in the “donut,” her hands were up in the air as if she were being robbed at gunpoint. Respondent testified that he never massaged an individual whose hands were in that position, because their neck and upper back muscles would be tensed which renders massage impossible to perform and makes a therapeutic result difficult. Next, E.V. said she felt Respondent’s erect penis rub against first one arm, then the other, as he moved around the table while she was face down, yet she was unable to observe that what she

felt was, indeed, Respondent's penis. She testified that she relied on her memory of childhood abuses at the hands of male neighbors who rubbed their penises against her arms more than 40 years previously as her recollection of what such rubbing felt like. Respondent strenuously denied having an erection or inappropriately rubbing against E.V. in any manner. Moreover, E.V. (and her boss at Shin, Dr. Gallego through records not produced as hearing exhibits) recalled having only two to three massages by Respondent, with the final one being when he allegedly improperly rubbed against her. Respondent testified he was "superconfident" that he massaged E.V. 20 to 30 times. Finally, and equally inexplicable, was the fact that E.V. went back to work at Shin, the place where she testified she had been sexually abused by Respondent. When she returned to work there, she was not aware that Respondent had been let go by Dr. Gallego, whether it was for poaching clients or due to M.C.R.'s alleged incident. If she was so traumatized by Respondent's actions, why would she want to work where, as far as she knew, he was still on staff as a massage therapist? That question remains unanswered and creates doubt in the undersigned as to the accuracy of E.V.'s recollections.

92. The discrepancies in E.V.'s and Respondent's testimony concerning the behavior of each are so great as to render the entire alleged incident as having occurred in parallel universes. Dr. Toomer's explanation that E.V. never dealt with her childhood abuse by two males as a "triggering event" for her PTSD flashback further calls the evidence offered by E.V. against Respondent into question. The result in the eyes of the undersigned is that the Department failed to prove, by clear and convincing evidence, that Respondent acted inappropriately when massaging E.V.

93. M.C.R., on the contrary, was a more compelling witness for the Department's case. She was articulate, confident in her testimony, and, because she was a chiropractor, exhibited an understanding of the body and how it responds to massage at an expert level. However, significant

discrepancies also arose between her testimony and that given by Respondent.

94. M.C.R. described Respondent as an “excellent” massage therapist who was well-educated and understood the human body well enough to give her relief from her chronic issues. She never felt uncomfortable with her massages with Respondent until the day of the alleged incident, February 2, 2015. Here is where the discrepancies in the testimony of M.C.R. and Respondent come into play. M.C.R. said that the massage started with her face up. Respondent said he started the massage, as was his practice, with her lying face down. M.C.R. said Respondent put his hands under the sheet while she was face down to massage around her sternum and rib cage, while Respondent said he never reached under the sheets to massage an area with her or any other client. M.C.R. said Respondent rubbed his hands across her nipple area, something he had never done before, and he completely denied this ever happened at any time. Then, she testified, he asked her to flip over while he held up the sheets slightly for her privacy. After she had turned over is when M.C.R. said Respondent rubbed something hard against her arm while working on her back. She testified that she then looked, thinking it might have been his elbow rubbing against her. This is where she said she saw Respondent had an erection, which she could see through his scrubs. She further testified he then rubbed or brushed against her. He then finished the massage, she said, and left the room so she could get dressed. Respondent denied both that he had an erection or that he ever rubbed against M.C.R. in any inappropriate way.

95. After she was dressed, Respondent came back into the massage room where she said “he kind of propositioned me for an affair.” This quote, in and of itself, creates substantial doubt for the undersigned. She testified that Respondent said he “had a dream about us and I would like to make it a reality.” She said she told him they each had spouses and she was not interested. His version of the exchange was that he had a dream about the

two of them realizing their dreams, hers being opening her own chiropractic office and his being revalidating his chiropractic license. She testified that Respondent acted “very unprofessionally,” “but he never blocked the exit.” She got around him and just left the office. She reported this, first, to Julio Dominguez, then to Dr. Gallego, but could not recall how soon after the massage she said anything. The credible evidence is that no action was taken against Respondent by his employer, the Department, or anyone else at that time, as a result of the reported incident by M.C.R. She never heard anything from the Department about an action against Respondent until 2019, after the incident involving E.V. was reported. In her deposition offered in lieu of live testimony at hearing, Dr. Gallego’s recollection of M.C.R.’s incident was that she was told Respondent wanted to meet her outside the office “to go to a hotel or something like this.” She could not recall if this happened in the course of a massage or elsewhere in the office. When asked about the inappropriate touching during massage, she stated that she thought M.C.R. had received massages at Shin, but was not aware of any specifics, and specifically had no recollection of having been advised of any inappropriate touching. She also testified at her deposition in 2019 that she could not recall much in the way of details about the incident involving M.C.R., or even whether M.C.R. had regularly received massages from Respondent. Her lack of memory in 2019, along with the fact she was not even called upon to testify at hearing in 2021, substantially reduce her credibility as a witness in support of M.C.R.’s testimony.

96. The lack of corroborating evidence from Dr. Gallego, who had supposedly been told of the incident by M.C.R., due to her memory fails at the time of her deposition, compounded by the discrepancies in how M.C.R. described, versus how Respondent described, his manner of performing massages on her, make the evidence against Respondent less than clear and convincing. Therefore, the Department has failed to meet its burden of proving that Respondent violated his duty as a massage therapist. His telling

M.C.R. about his dream of her may have made her feel uncomfortable so closely following a massage, and may have been poor judgment on his part by bringing it up at a time and in a place so near to the massage therapist-client relationship of a massage that had just ended. However, his version regarding the two of them following their separate dreams versus her interpretation of his dream as seeking a sexual liaison create a degree of doubt that takes any discussion of the dream as a request for sex well beyond the clear and convincing standard required to prove any wrongdoing by Respondent. While having a discussion with a client about a dream involving the client is inadvisable for any professional who engages in as intimate a form of therapy as massage, the Department has failed to meet its burden, by clear and convincing evidence, that a violation of the above-cited statutes and rules has occurred.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Health, Board of Medicine, finding that there is no clear and convincing proof of violations by Respondent and, consequently, that Respondent be allowed to continue as a licensed massage therapist.

DONE AND ENTERED this 4th day of August, 2021, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of August, 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.