

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF HEALTH, BOARD OF
MASSAGE THERAPY,

Petitioner,

Case No. 21-1721PL

vs.

ARAMIS SAVEDRA BARCELO, L.M.T.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, via Zoom video conference on November 12, 2021, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Harvey D. Rogers, Esquire
Harvey D. Rogers, P.A.
2655 Le Jeune Road, Suite 521
Coral Gables, Florida 33134

For Respondent: Elizabeth Tiernan, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Respondent engaged in sexual misconduct in the practice of massage therapy; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On March 29, 2021, Petitioner, Department of Health (Department or Petitioner), issued an Administrative Complaint against Respondent, Aramis Savedra Barcelo, a licensed massage therapist. The complaint charged Respondent with sexual misconduct in the practice of massage therapy, in violation of sections 480.046 and 480.0485, Florida Statutes. According to the complaint, the events that provide the basis for the instant dispute occurred on or about December 12, 2020. This proceeding is governed by the law in effect at the time of commission of the acts alleged to warrant discipline. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes, and related rules, are to Florida Statutes (2020), unless otherwise noted.

On or about April 15, 2021, Respondent, through counsel, served an Election of Rights in which he disputed material facts alleged in the Administrative Complaint and requested an administrative hearing. On May 28, 2021, the matter was referred to DOAH for a disputed fact hearing.

At the final hearing, Petitioner offered testimony from complainant K.G. and witnesses R.W. and J.G. Petitioner also offered rebuttal testimony from Richard Leon. Respondent testified on his own behalf, and did not call any additional witnesses to testify.

Joint Exhibits 1 through 8 were admitted into evidence. Petitioner's Exhibits 12 through 15 were also admitted into evidence. There were no exhibits admitted into evidence on behalf of Respondent. The parties filed a Joint Pre-hearing Stipulation that included several admitted and undisputed facts. Findings of Fact 1 through 15 set forth those stipulations and agreements in verbatim form, unless otherwise indicated.

A one-volume Transcript of the final hearing was filed with DOAH on January 4, 2022. On January 18, 2022, each party filed a proposed order, and the same have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state department charged with the regulation of the practice of massage therapy pursuant to [c]hapter 20.43, Florida Statutes; [c]hapter 456, Florida Statutes; and [c]hapter 480, Florida Statutes.

2. The factual allegation[s] contained in the Administrative Complaint, if proven by clear and convincing evidence, constitute sexual misconduct.

3. Respondent is Aramis Savedra Barcelo.

4. At all times material to this proceeding, Respondent was a licensed massage therapist within the State of Florida, having been issued license MA91462.

5. At all times material to Petitioner's Administrative Complaint, Respondent's address of record was 1185 Wildwood Lakes Boulevard, Apartment 107, Naples, Florida 34104.

6. At all times material to Petitioner's Administrative Complaint, [Respondent] practiced massage therapy at Massage Heights located at 4525 Thomasson Drive North, Naples, Florida 34112.

7. Massage Heights is a massage establishment.

8. At all times material to Petitioner's Administrative Complaint, [Respondent] w[as] in a massage therapist-client relationship with K.G.

9. On or about December 12, 2020, Respondent provided a massage to K.G. at Massage Heights.

10. At the beginning of the massage, K.G. disrobed and was covered with a draping.

11. Touching a patient's vaginal area is outside the scope of practice of massage therapy or the scope of generally accepted examination or treatment of the client.

12. During the course of the massage, Respondent did not obtain K.G.'s consent to touch her breasts.

13. Touching and/or twisting a female client's breast and/or nipple is outside the scope of practice of massage therapy or the scope of generally accepted examination or treatment of the client.

14. The allegations, which are not admitted by the Respondent, if true regarding the facts of this case, as contained in paragraphs 10, 14, 15, and 16 of the Administrative Complaint constitute sexual activity.

15. The allegations, which are not admitted by the Respondent, if true regarding the facts of this case, as contained in paragraphs 10, 14, 15, and 16 of the Administrative Complaint are outside the scope of massage therapy.

16. On December 12, 2020, K.G. presented to Massage Heights for a full-body massage. K.G.'s fiancé, R.W., also received a massage during the visit but was seen by a different massage therapist. At the time, Massage Heights was offering a special to add to the body massage either a foot scrub or hot stone massage. K.G. selected the foot scrub.

17. When K.G. arrived at Massage Heights, Respondent met K.G. in the lobby of the establishment and escorted her to a massage room.

18. Once in the massage room, Respondent instructed K.G. to undress. Spanish is Respondent's native language, and although he speaks and understands the English language, his English language skills are limited. Respondent informed K.G. of his limited language skills.

19. After instructing K.G. to undress, Respondent exited the room so as to allow K.G. to prepare herself for the massage. K.G. removed her bra and underwear, laid down on the massage table, and draped herself with a sheet.

20. Respondent reentered the room and began the massage. K.G. and Respondent were alone in the room for the duration of the massage.

21. During the massage, and while K.G. was lying on her back, Respondent positioned K.G.'s left leg into a "frog-like" position where her foot was placed against the knee of her right leg. This position exposed K.G.'s vaginal area.

22. While K.G. was in the "frog-like" position, Respondent, while massaging K.G.'s upper thigh, grazed K.G.'s vagina and clitoris with his hand. Respondent apologized to K.G. and continued with the massage. K.G. believed that Respondent's actions were inadvertent and thought that Respondent's hand slipped because of the "lotion or oil" that he was using. According to K.G., Respondent apologized and then continued with the massage.

23. Respondent did not repeat the "frog-like" position with K.G.'s right leg.

24. As the massage progressed, K.G., at one point, was laying on her back with her legs fully extended and in a relaxed position, which created a gap between her thighs.

25. Respondent briefly discontinued the massage and retrieved a hot stone. K.G. reminded Respondent that she did not request use of the hot stone as part of her massage. Respondent informed K.G. that he would incorporate the hot stone into her massage at no additional cost since a foot scrub was really not needed based on the condition of her feet.

26. The phrase "hot stone" is used solely to identify the stone type used, and is not an indication of the temperature of the stone. K.G. testified that the stone was lukewarm, not hot, and did not burn her when it came into contact with her skin.

27. Respondent initially placed the hot stone on K.G. lower abdomen area and continued with the massage.

28. While K.G. remained on her back, with her legs fully extended and in a relaxed position, Respondent, while positioned on the right side of K.G.'s body with his torso closest to K.G.'s hip, removed the hot stone from K.G.'s abdomen, and placed it on K.G.'s pubic mound.

29. At nearly the same instance, K.G. felt Respondent's mouth and saliva on her vagina, and also felt Respondent's hand squeezing her right breast and nipple. K.G. abruptly sat up, saw Respondent slouched over at her side with his face between her legs, and his protective mask dangling from his left ear. She immediately screamed "stop," and then again laid on her back. According to K.G., her "whole body shut down" and she "just froze" from shock.

30. Respondent apologized to K.G., briefly scrubbed her feet, and concluded the massage.

31. K.G. neither asked for nor gave Respondent permission to touch her vagina, clitoris, breast, or nipple.

32. While K.G. was still in the massage room, K.G.'s fiancé, R.W., paid for K.G.'s massage, which included a tip.

33. After K.G. exited the massage room, she met R.W. in the waiting area. As K.G. approached R.W., he asked K.G. how was her massage, to which K.G. repeatedly stated, "I need to leave." R.W. described K.G.'s demeanor as appearing "distraught."

34. K.G.'s testimony was clear, concise, compelling, and credible.

35. Respondent denies engaging in sexual misconduct with K.G.

36. Petitioner proved by clear and convincing evidence that Respondent engaged in sexual misconduct with K.G.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 480.046(4), 120.569, and 120.57(1), Fla. Stat.

38. Petitioner has authority to investigate and file administrative complaints charging violations of the laws governing licensed massage therapists. § 456.073, Fla. Stat.

39. Section 480.046(1)(p) provides that:

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

* * *

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

40. Respondent is charged with engaging in sexual misconduct in the practice of massage therapy, in violation of section 480.0485, which provides:

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.

41. Florida Administrative Code Rule 64B7-26.010, entitled “Sexual Activity Prohibited,” provides, in part, that:

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

* * *

(3) No licensed massage therapist shall use the therapist-client relationship to engage in sexual activity with any client or to make arrangements to engage in sexual activity with any client.

(4) As used in this rule, “sexual activity” means any direct or indirect physical contact by any person or between persons which is intended to erotically stimulate either person or both or which is likely to

cause such stimulation and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. For purposes of this subsection, masturbation means the manipulation of any body tissue with the intent to cause sexual arousal. As used herein, sexual activity can involve the use of any device or object and is not dependent on whether penetration, orgasm, or ejaculation has occurred. Nothing herein shall be interpreted to prohibit a licensed massage therapist, duly qualified under Rule 64B7-31.001, F.A.C, from practicing colonic irrigation.

42. The Department bears the burden of proving the specific allegations that support the charges alleged in the Administrative Complaint by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Fox v. Dep't of Health*, 994 So. 2d 416 (Fla. 1st DCA 2008); *Pou v. Dep't of Ins. & Treasurer*, 707 So. 2d 941 (Fla. 3d DCA 1998).

43. Clear and convincing evidence “requires more proof than a ‘preponderance of the evidence’ but less than ‘beyond and to the exclusion of a reasonable doubt.’” *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence standard of proof:

[E]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

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 Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting, with approval, *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); *see also In re Henson*, 913 So. 2d 579, 590 (Fla. 2005). “Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous.” *Westinghouse Electric Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

44. 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 provisions of law upon which this disciplinary action has been brought are penal in nature, and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning and words used by the Legislature may not be expanded to broaden the application of such statutes. *Elmariah v. Dep’t of Prof’l Reg., Bd. of Med.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); *see also Cadet v. Dep’t of Health*, 255 So. 3d 386, 388 (Fla. 4th DCA 2018).

45. A hearing involving disputed issues of material fact under section 120.57(1) is a *de novo* hearing, designed to formulate, rather than review, agency action. § 120.57(1)(k), Fla. Stat.; *Moore v. Dep’t of HRS*, 596 So. 2d 759, 761 (Fla. 1st DCA 1992).

46. The allegations of fact set forth in the Administrative Complaint are the grounds upon which this proceeding is predicated. *Trevisani v. Dep’t of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); *see also Cottrill v. Dep’t of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner in the Administrative Complaint. *M.H. v. Dep’t of Child. & Fam. Servs.*, 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

47. Section 480.0485 and rule 64B7-26.010 provide for an absolute prohibition of sexual activity, regardless of whether the parties consent.

48. Petitioner proved by clear and convincing evidence that Respondent violated the massage therapist-patient relationship by engaging in sexual activity with K.G.

49. Penalties in a licensure discipline case may not exceed those in effect at the time a violation was committed. *Willner v. Dep't of Prof'l Reg., Bd. of Med.*, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), *rev. denied*, 576 So. 2d 295 (Fla. 1991).

50. Section 456.079 requires the Board of Massage Therapy to adopt disciplinary guidelines for specific offenses. Penalties imposed must be consistent with any disciplinary guidelines prescribed by rule. *See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg.*, 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

51. The Board of Massage Therapy has adopted rule 64B7-30.002, which provides the penalties for violations of the practice act.

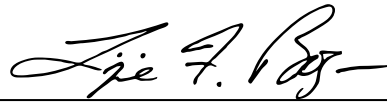
52. Rule 64B7-30.002(2)(p)2. provides that the discipline for a violation of section 480.0485 is license revocation and a \$2,500.00 administrative fine.

53. Section 456.072(4) provides that in addition to any other discipline imposed for violation of a practice act, the board shall assess costs related to the investigation and prosecution of the case.

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: (1) finding that Respondent, Aramis Savedra Barcelo, L.M.T., violated section 480.0485, which constitutes a violation of section 480.046(1)(p); (2) revoking his license to practice massage therapy; (3) assessing an administrative fine of \$2,500.00; and (4) assessing the cost of investigating and prosecuting the Department's case against Respondent.

DONE AND ENTERED this 4th day of February, 2022, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
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this 4th day of February, 2022.

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.