

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
ERIC R. DURHAM,	:	LS0507061MTB
RESPONDENT.	:	

The State of Wisconsin, Department of Regulation and Licensing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Department of Regulation and Licensing.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 23rd day of January, 2006.

Celia M. Jackson
Secretary
Department of Regulation and Licensing

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION & LICENSING

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	PROPOSED FINAL DECISION
	:	AND ORDER
	:	
ERIC R. DURHAM,	:	LS0507061MTB
RESPONDENT.	:	

(Division of Enforcement Case 02 MTB 002)

TO: Eric R. Durham
1117 N. Weber
Colorado Springs, CO 80903

John R. Zweg
Attorney for Complainant
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PROCEDURAL HISTORY

A hearing in the above-captioned matter was conducted on August 19, 2005 before Administrative Law Judge (ALJ) Colleen M. Baird. The Complainant, Division of Enforcement, appeared by Attorney John R. Zweg. Mr. Durham did not appear and failed to file an answer to the Complaint which was served upon the Respondent on July 6, 2005. A Notice of Motion for Default was submitted by the Complainant on August 2, 2005. Based upon the entire record in this case, the ALJ recommends that the Department of Regulation and Licensing adopt as its final decision and order in the matter the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Eric R. Durham, date of birth July 7, 1978, was registered by the Department of Regulation and Licensing as a massage therapist or bodyworker in the state of Wisconsin, pursuant to license number 2257, which was first granted February 22, 2002.
2. Mr. Durham's current address is 1117 N. Weber, Colorado Springs, CO 80903.
3. Mr. Durham's massage therapist or bodyworker credential expired on February 28, 2003.
4. Within five years following the expiration of his credential, Mr. Durham would be entitled to renew his credential by payment of a renewal fee and submission of proof of malpractice liability insurance, as specified in Wis. Adm. Code § RL 93.04(1).
5. Had Mr. Durham renewed his credential, a certificate to practice as a massage therapist or bodyworker would have been issued pursuant to §460.04(2)(a), Wis. Stat., which statutorily changed the credential from a registration to a certificate.
6. From February 8, 1999 until his resignation on April 5, 2002, Mr. Durham was employed at the Grand Geneva Resort & Spa (Spa) in Lake Geneva, Wisconsin as a massage therapist.
7. Ms. A, who was vacationing at the Spa with her spouse, made an appointment for a massage from Mr. Durham

on January 29, 2002. At that time, Ms. A had owned a massage therapy clinic and taught massage for several years. She had received full body massages, but had never received services from Mr. Durham.

8. Ms. A was unclothed and lying on her back on the massage table, covered by a sheet. When Mr. Durham began massaging Ms. A's chest area, he spent at least ten minutes massaging Ms. A's right pectoralis muscle. At first Mr. Durham reached under the sheet and then undraped Ms. A's breast so that the nipple was entirely exposed. Her breasts remained exposed until Ms. A redraped herself and held the sheet in.

9. Mr. Durham's conduct with Ms. A by failing to provide draping and treatment that ensure the safety and privacy of a client violates the standard of practice defined by § RL 94.01(10), Wis. Admin. Code and subjects Respondent to discipline pursuant to § 460.14(g), Wis. Stat.

10. On March 14, 2002, Ms. B, who was then 32 years of age, received various spa services at the Spa, including a full body massage performed by Mr. Durham.

11. During the massage, while Ms. B was on her back, unclothed but covered with a sheet, Mr. Durham moved his hands under the sheet and massaged both of her breasts, including the areola area. There was no reason for Mr. Durham to massage near Ms. B's breasts or areola area.

12. Mr. Durham did not file an Answer to the Complaint and did not appear at the hearing held in this matter.

CONCLUSIONS OF LAW

1. The Department of Regulation and Licensing has jurisdiction in this matter, pursuant to §440.03(1), Wis. Stat. and §460.14(2), Wis. Stat.
2. By failing to file an Answer as required by Wis. Admin. Code § RL 2.09, and by failing to appear at the hearing, Mr. Durham is in default under Wis. Admin. Code § RL 2.14, and the Department of Regulation and Licensing may make findings and enter an order on the basis of the Complaint and the evidence presented at the hearing.
3. By engaging in the conduct described in paragraphs #7 - #11 of the Findings of Fact, Mr. Durham has violated the standard of practice defined by the following subsections of Wis. Admin. Code § RL 94.01 and subjects Respondent to discipline pursuant to Wis. Stat. § 460.14(g):
 - a. Subsection (10), Failing to provide draping and treatment that ensure the safety and privacy of a client.
 - b. Subsection (11), Engaging in inappropriate sexual conduct, exposure or gratification, or other sexual behavior with or in the presence of a client.
 - c. Subsection (21), Practicing in a manner which substantially departs from the standard of care ordinarily exercised by a massage therapist or bodyworker.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that effective on the date of this Order, the registration of ERIC R. DURHAM, to practice as a massage therapist or bodyworker in the state of Wisconsin, pursuant to license number 2257, is REVOKED.

IT IS FURTHER ORDERED that Mr. Durham is ordered to pay the full costs of the Department in this matter, pursuant to §440.22(2), Wis. Stat. Payment shall be made payable to the Wisconsin Department of Regulation and Licensing and mailed to:

Department Monitor
Department of Regulation and Licensing

OPINION

Applicable Law

Wisconsin Statutes §440.14(2) provides in part:

Subject to the rules promulgated under 440.03(1), the Department may reprimand a certificate holder or deny, limit, suspend or revoke a certificate under this chapter if it finds that the applicant or certificate holder has done any of the following: (g) Engaged in unprofessional conduct in violation of the standards established in rules promulgated under §460.04(2)(a).

Wisconsin Statutes §460.04(2)(a) provides in part:

Standards that govern the professional conduct of certificate holders in practicing massage therapy or bodywork. The standards shall prohibit a certificate holder from having sexual contact or sexual intercourse with a client.

The evidence submitted at the hearing shows that the Notice of Hearing and Complaint was duly served upon Mr. Durham on July 5, 2005. (Exhibit 1) Mr. Durham's signature appears on the certified return receipt card, acknowledging receipt of the notice and complaint on July 19, 2005. (Exhibit 2) Mr. Durham did not file an answer or defense to the Complaint. On August 2, 2005, the Complainant filed a Notice of Motion and Motion for Default. The Notice provided that the motion would be heard on August 19, 2005.

Mr. Durham faxed a letter to the ALJ on August 12, 2005, indicating that he had received the Motion for Default, but that he was not in default because he had not been served with the Complaint and Notice of Hearing. He further indicated that he was in the process of obtaining legal counsel and that he needed an extension of time in which to file his answer to the Complaint.

A telephonic prehearing conference was held on August 18, 2005. Mr. Durham appeared on his own behalf and with his minister from his church. He indicated that he was represented by Attorney Michael Papalia who was licensed in multiple states, including New York and Wisconsin. Respondent provided a telephone number for his attorney. Attempts to reach Mr. Durham's attorney by calling the phone number which he provided were unsuccessful; a recorded message stated that the number was not working. When informed that his attorney could not be reached, Mr. Durham provided a different telephone number, which was also not accurate. A review of the attorney licensing authorities' database for the states of New York and Wisconsin confirmed that the person identified by Mr. Durham as his attorney was not licensed to practice law in either state.

Mr. Durham was informed at the prehearing conference that the hearing on the Motion for Default would proceed as scheduled and that, if he was represented, his attorney would need to file an Entry of Appearance and an Answer to the Complaint as soon as possible. Mr. Durham indicated that he or his attorney would appear at the hearing by telephone. Mr. Durham provided a telephone number where he could be reached at the time of the motion hearing.

The hearing on the Motion for Default was heard the following day on August 19, 2005. Mr. Durham could not be reached at the telephone numbers which he had provided. The ALJ placed a call to Mr. Durham's last known place of employment. A recorded voice mail message at his work number stated that Mr. Durham was no longer employed there, but he could be reached at his home. Mr. Durham's home number was called; the phone rang numerous times, but was not answered. Respondent did not have an answering machine. There was also no contact, communication or entry of appearance by any attorney on behalf of Mr. Durham.

Section RL 2.14 of the Wisconsin Administrative Code provides that a respondent who fails to answer a complaint or

fails to appear at a hearing is in default. If found to be in default, the disciplinary authority may make findings and enter an order based upon the averments in the complaint. Mr. Durham did not file an answer to the Complaint or appear at the hearing in this matter. The Complainant introduced evidence which established that Mr. Durham was properly served with the Complaint and Notice of Hearing and with the Notice of Motion for Default. The Complainant also introduced nine (9) exhibits in support of service of the Complaint and Notice of Motion for Default. Based upon Mr. Durham's failure to file an answer to the Complaint, and his failure to appear at the hearing, the allegations in the Complaint have been effectively admitted. Those allegations can be summarized as follows: Mr. Durham engaged in inappropriate sexual conduct with two clients during the course of providing massage services at Grand Geneva Resort and Spa, Lake Geneva, Wisconsin, in 2002. Inappropriate sexual conduct by a certified massage therapist during the course of providing a massage constitutes unprofessional conduct and violates the standard of practice.

Since the allegations in the Complaint are deemed admitted, the only question remaining is the appropriate discipline for this conduct. The Complainant has requested revocation of Mr. Durham's right to renew his certification as a massage therapist or bodyworker. Based upon the evidence of his misconduct and the lack of any mitigating evidence, the recommendation for revocation is appropriate. In fact, there is nothing in the record to suggest that imposing anything short of revocation would have a rehabilitative effect. Mr. Durham's conduct in response to these proceedings suggests that he has little, if any, respect for this disciplinary authority and indifference to the standards of his profession. Not only did Mr. Durham fail to provide a timely answer to the allegations of the Complaint; he made a series of disingenuous and misleading remarks during the prehearing proceedings about his legal representation.

Imposing anything less than revocation would also not aid in deterrence of others, but may instead wrongly encourage others to engage in similar conduct. Accordingly, revocation is the only appropriate way to safeguard the public. It is well established that the objective of professional discipline includes the protection of the public and the deterrence of other licensee from engaging in similar conduct. State v. Aldrich, 70 Wis. 2d 206, 209(1976).

The imposition of full costs in this proceeding is reasonable and appropriate. The imposition of costs against a disciplined professional is authorized by §440.22(2), Wis. Stats. and §RL 2.18, Wis. Admin. Code. The Department has the discretion to impose all, some, or none of the costs of the proceeding. As a "program revenue" agency, the Department operations are funded by the revenue received from its licensees and those fees are calculated based upon costs attributable to the regulation of each of the licensed professions. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession upon the members of the profession who abide by the law. Since Mr. Durham is found to have engaged in unprofessional conduct, he alone should be held responsible for the full costs of this proceeding.

Based upon the substantial evidence of record, it is recommended that the Department adopt as its final decision in this matter, the Proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

The rights of a party aggrieved by this Decision to petition the Department for a rehearing and to petition for judicial review are set forth in the attached "Notice of Appeal" information.

Dated this 9th day of December, 2005.

Colleen M. Baird
Administrative Law Judge