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**Before the
State of Wisconsin
Massage Therapy and Bodywork Therapy Affiliated Credentialing Board**

In the Matter of Disciplinary Proceedings Against
Hui Zhan, L.M.T., Respondent

FINAL DECISION AND ORDER

Order No. **ORDER 0006966**

Division of Legal Services and Compliance Case No. 17 MAB 017

The State of Wisconsin, Massage Therapy and Bodywork Therapy Affiliated Credentialing Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make 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, Massage Therapy and Bodywork Therapy Affiliated Credentialing Board.

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 at Madison, Wisconsin on the 1st day of September, 2020.



Member

Massage Therapy and Bodywork Therapy Affiliated

Credentialing Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Hui Zhan, L.M.T., Respondent

DHA Case No. SPS-19-0061
DLSC Case No. 17 MAB 017

PROPOSED DECISION AND ORDER

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Hui Zhan, LMT, by
Attorney Scott Connors
Law Office of Scott D. Connors
10125 West North Avenue
Milwaukee, WI 53226-2426

Wisconsin Massage Therapy and Bodywork Therapy Affiliated Credentialing Board
P.O. Box 8366
Madison, WI 53708-8366

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorney Joost Kap
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

These proceedings were initiated on October 25, 2019, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed and served a formal complaint against Respondent Hui Zhan, L.M.T. (Respondent). The complaint alleged that the Respondent engaged in unprofessional conduct as defined under Wis. Admin. Code § MTBT 5.02(1) and 5.02(15). Administrative Law Judge Kristin Fredrick was assigned to the matter and an initial prehearing conference was scheduled and held on December 5, 2019. Four additional prehearing conferences were scheduled and adjourned on December 11, 2019, January 8, 2020, January 28, 2020 and again to February 26, 2020. At the Division's request, a briefing schedule was set to address the Division's proposed motion for summary judgment. (Briefing Order dated March 2, 2020) The parties subsequently advised the administrative law judge that

they had agreed to allow the Respondent to file an Amended Answer and to extend the briefing schedule deadlines. An Amended Briefing Schedule Order was entered on April 3, 2020 that required the Division to file its motion for summary judgment and supporting brief by April 22, 2020; the Respondent to file her response brief by May 20, 2020; and the Division to file its reply brief, if any, by May 29, 2020.

On April 20, 2020 the Division requested and was granted additional time to file its brief due to office closure/delays caused by the COVID-19 pandemic. Additionally, the Division advised that based upon the petitioner's amended answer admitting to the violation, there was no longer any contested factual issue and the only issue to brief would be the Respondent's discipline. The "Division's Brief in Support of Judgement [sic] and Discipline" was received on April 24, 2020 and the Respondent's Brief was received on May 20, 2020. The Division did not file a reply brief. Because the parties agree that the matter no longer involves any disputed material issues of fact or law, the motion is not treated as a motion for summary judgment under Wis. Stat. §802.08; rather, the sole issue of discipline can be decided on the basis of the parties' respective briefs pursuant to Wis. Admin. Code § HA 1.11(3).

FINDINGS OF FACT¹

1. Respondent Hui Zhan, L.M.T., is licensed in the state of Wisconsin to practice massage therapy and bodywork therapy, having license number 14053-146, first issued on November 8, 2016, and current through February 28, 2021. (Complaint ¶1; Amended Answer ¶1)

2. The most recent address on file with the Department for Respondent is 1828 S. Wentworth Avenue, Apt .1B, Chicago, Illinois 60616. (Complaint ¶2; Amended Answer ¶2)

3. At all times relevant hereto, Respondent was employed as a massage therapist at a business in West Allis, Wisconsin (Facility). (Complaint ¶3; Amended Answer ¶3)

4. On August 11, 2017, the West Allis Police Department (WAPD) conducted an undercover investigation of the Facility related to suspected prostitution. (Complaint ¶4; Amended Answer ¶ 4)

5. A WAPD undercover officer received a massage from Respondent during which the Respondent made gestures and statements offering to massage the officer's genitals, allowing the officer to touch Respondent's breasts, and otherwise offering sexual gratification in exchange for money. (Complaint ¶ 5)

6. On August 11, 2017, WAPD cited Respondent for prostitution in the course of her work at the Facility (Citation # 1S804VWFKN) and she was subsequently found guilty. (Complaint ¶ 6-7; Amended Answer ¶ 7)

DISCUSSION

Burden of Proof

¹ The Respondent concurs in the Division's proposed Findings of Fact, which this Administrative Law Judge relied upon in making the Findings of Fact contained herein. (See Respondent's Brief, p. 1)

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3); *see also* Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is “more likely than not” that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

Violations

Wis. Admin. Code § MTBT 5.02 **Unprofessional conduct**. “Unprofessional conduct” includes the following, or aiding, abetting, or conspiring the same:

(1) Violating s. 460.14 (2) (a) to (j), Stats., or any provision of a board order.

...

(15) Engaging in sexually explicit conduct, sexual contact, exposure, gratification, or other sexual behavior with or in the presence of a client, a client's immediate family member, or a person responsible for the client's welfare. For purposes of this subsection, all of the following shall apply:

(a) Sexual nature of contact shall be determined from the totality of the circumstances and is presumed when the massage therapist or bodywork therapist has contact with a client's intimate parts without legitimate professional justification for doing so.

Wis. Stat. § 460.14 **Disciplinary proceedings and actions**.

(1) Subject to the rules promulgated under s. 440.03 (1), the affiliated credentialing board may make investigations and conduct hearings to determine whether a violation of this chapter or any rule promulgated under this chapter has occurred.

(2) Subject to the rules promulgated under s. 440.03 (1), the affiliated credentialing board may reprimand a license holder or deny, limit, suspend, or revoke a license under this chapter if it finds that the applicant or license holder has done any of the following:

...

(b) Subject to ss. 111.321, 111.322, and 111.335, been convicted of an offense the circumstances of which substantially relate to the practice of massage therapy or bodywork therapy.

The Department's Complaint in this matter alleged that during an undercover investigation the Respondent “made gestures and statements offering to massage [an] officer's genitals, allowing the officer to touch the Respondent's breasts, and otherwise offering sexual gratification in exchange for money.” (Finding of Fact #5 citing Complaint ¶ 5) In her response brief, the Respondent states that she concurs with the Department's proposed Findings of Fact. (Respondent

Brief, p. 1) Those facts supported a municipal citation for prostitution that the West Allis Police Department issued to the Respondent on August 11, 2017, which resulted in a finding and judgment of guilt against the Respondent. (Finding of Fact #6 citing Complaint ¶¶ 6 and 7; Amended Answer ¶ 7) Further, the Respondent does not dispute that she engaged in unprofessional conduct. (*Id.*)

Based upon the unrefuted facts, the Respondent engaged in unprofessional conduct as defined by Wis. Admin. Code § MTBT 5.02(1) by violating Wis. Stat. § 460.14(2)(b) by being convicted of an offense, i.e. prostitution, the circumstances of which substantially relate to the practice of massage therapy or bodywork therapy. (Complaint ¶ 7; Amended Answer ¶7) Therefore, she is subject to discipline under Wis. Stat. §460.14.

Discipline

As a result of her undisputed conduct and violation set forth above, Respondent admits that she is subject to discipline pursuant to Wis. Stat. § 460.14. (Complaint ¶ 9; Amended Answer ¶ 9; Respondent Brief) The Department seeks revocation of the Respondent's massage therapy and bodywork therapy license. The Respondent requests a suspension.

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976). "Protection of the public is the purpose of requiring a license." *State ex rel. Green v. Clark*, 235 Wis. 628, 631, 294 N.W. 25 (1940). When a license is granted to an individual, the Board is assuring the public that the licensed individual is competent in his or her profession. *Stringez v. Dep't of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 287, 307 N.W.2d 664 (1981). Thus, the primary purpose of assessing discipline is to "protect the public interest and assure the moral fitness and professional competency" of the license holder. See *State v. MacIntyre*, 41 Wis. 2d 481, 484, 164 N.W.2d 235 (1969).

Respondent's illicit conduct in this matter was both unlawful and unprofessional and was only brought to light through an undercover police operation. The very nature of the conduct violates the public trust and confidence in a licensed professional. It is thus in the public interest that the petitioner face significant consequences for her conduct. A revocation of the petitioner's license not only protects the public but it sends a strong message to deter other licensed massage therapists from engaging in similar behavior. The Respondent's brief asserts, without benefit to any supported findings of fact that the Respondent was exploited by a shop owner due to an "inability to speak the language and navigate through the rules and customs" of this country. (Respondent Brief, p. 2) Yet, the Respondent was able to obtain a license to perform massage therapy and bodywork therapy. Therefore, she was responsible for knowing the rules of her profession. It goes without saying that a professional massage therapist should know that illicit sexual activity with a customer is not only contrary to the expectations and regulations of the profession, but also against the law. I am not persuaded that a suspension of the Respondent's license is a sufficient deterrent to prevent the Respondent or any other license holder from engaging in similar behavior in the future. Accordingly, I agree with the Department's recommendation for revocation of the Respondent's license in this matter,

Costs

The Division requests that Respondent be ordered to pay the full costs of this investigation and of these proceedings. The Respondent does not raise any argument contesting an imposition of costs in this matter. The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against the Respondent. See, Wis. Stat. § 440.22(2). Section 440.22(2) of the Wisconsin Statutes reads in part:

In any disciplinary proceeding against a holder of a credential in which the department or examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder...

Similarly, Wis. Stat. § 441.51 reads in part:

(5) Additional authorities invested in party state licensing boards.
(a)(6) If otherwise permitted by state law, recover from the affected nurse the costs of investigations and disposition of cases resulting from any adverse action taken against that nurse.

The above statutes do not require any particular analysis when determining whether to assess all or part of the costs in a proceeding against the Respondent. However, in exercising its discretion, the Board must look at aggravating and mitigating facts of the case; it may not assess costs against a licensee based solely on a "rigid rule or invocation of an omnipresent policy," such as preventing those costs from being passed on to others. *Noesenv. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, 30-32, 311 Wis. 2d. 237, 751 N.W.2d 385.

The Board has also, in previous orders, considered the following factors when determining if all or part of the costs should be assessed against the Respondent: 1) the number of counts charged, contested and proven; 2) the nature and seriousness of the misconduct; 3) the level of discipline sought by the prosecutor; 4) the Respondent's cooperation with the disciplinary process; 5) prior discipline, if any; 6) the fact that the Department is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct; and 7) any other relevant circumstances. See *In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, (LS0802183 CHI) (Aug. 14, 2008). It is within the Board's discretion as to which, if any, of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

The following facts are relevant to the instant case: First, the allegations raised in the Division's complaint were largely undisputed by the Respondent and the Respondent's amended answer admitted to having engaged in unprofessional conduct under Wis. Admin. Code § MTBT 5.02(1). This is not a case where the Division wasted resources or incurred additional costs by alleging multiple counts and then failing to prove those counts. Second, Respondent's conduct alleged in the Complaint is serious. Third, as a result of Respondent's serious conduct, the Division sought to revoke Respondent's license. The level of discipline sought is significant and recognizes the need to protect the public and deter other license holders. Fourth, the Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders.

As such, fairness weighs heavily in requiring Respondent to pay the costs of this proceeding which resulted in significant discipline, rather than spreading the costs among all Board licensees in Wisconsin. Finally, Respondent has failed to present any argument as to why full costs should not be assessed.

Accordingly, based upon the above, all of the costs of this proceeding should be assessed against Respondent in an amount to be determined pursuant to Wis. Admin. Code § SPS 2.18.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Wis. Stat. § 460.14.
2. Respondent was convicted of prostitution the circumstances of which substantially relate to the practice of massage therapy or bodywork therapy pursuant to Wis. Stat. § 460.14(2)(b)
3. Respondent engaged in unprofessional conduct as defined by Wis. Admin. Code § MTBT 5.02(1) by violating Wis. Stat. § 460.14(2)(b).
4. Based upon her conduct, the Respondent is subject to discipline, including revocation of her license, pursuant to Wis. Stat. § 460.14.
5. License revocation is necessary and appropriate.

ORDER

Accordingly, it is hereby ORDERED that the licensure privilege of Hui Zhan, L.M.T., (license number 14053-146), to practice as a massage therapist and bodywork therapist in the state of Wisconsin is hereby REVOKED effective on the date the final decision is signed by the Board.

IT IS FURTHER ORDERED that Respondent shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18.

After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

IT IS FURTHER ORDERED that the above-captioned matter is hereby closed as to Respondent Hui Zhan.

Dated at Madison, Wisconsin on June 30, 2020.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor North
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: 

Kristin P. Fredrick
Administrative Law Judge