

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MASSAGE THERAPY,)
)
Petitioner,)
) Case No. 12-3825PL
vs.)
)
GUIPING DIAMOND, L.M.T.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 6, 2013.

APPEARANCES

For Petitioner: Candace A. Rochester, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Edward Carhart, Esquire
5300 Southwest 76th Street
Miami, Florida 33143

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a massage therapist, obtained a license: (a) by means of fraudulent misrepresentations; (b) which she knew had been issued in error; and/or (c) without having completed a course of study at an

approved school, as Petitioner alleges. If so, it will be necessary to determine an appropriate penalty.

PRELIMINARY STATEMENT

On October 8, 2012, Petitioner Department of Health ("Department") issued an Administrative Complaint ("Complaint") against Respondent Guiping Diamond, L.M.T. ("Diamond"). The Department alleged, in three separate counts, that Diamond had obtained her license to practice massage therapy "through error of the Department of Health"; "by submitting a fraudulent transcript and fraudulent Certificates of Completion with her Application"; and "without completing a course of study at a Florida Board-approved massage school." Diamond timely requested a formal hearing, and on November 16, 2012, the Department filed the pleadings with the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

The final hearing took place on March 6, 2013, as scheduled, with both parties present. The Department called as its sole witness Melissa Wade, a managerial employee of the company which owns and operates the Florida College of Natural Health. In addition, Petitioner's Composite Exhibit 1, consisting of the documents comprising Diamond's application for licensure, was received in evidence.

Diamond testified on her own behalf and presented one additional witness: Anthony R. Jusevitch, the Executive Director of the Board of Massage Therapy. Respondent's Exhibits 1-11 and 15-18 were admitted.

The one-volume final hearing transcript was filed on March 14, 2013, and Proposed Recommended Orders were due on March 28, 2013. The parties' respective submissions have been considered.

FINDINGS OF FACT

1. On June 10, 2009, the Department issued Diamond license number MA 56376, which authorized her to practice massage therapy in the state of Florida.

2. The Department and the Board of Massage Therapy have regulatory jurisdiction over licensed massage therapists such as Diamond. The Department provides investigative services to the Board and is authorized to file and prosecute an administrative complaint, as it has done this instance, when cause exists to suspect that a licensee has committed a disciplinable offense.

3. The Florida College of Natural Health ("FCNH") is an incorporated nonpublic postsecondary educational entity. FCNH holds a license by means of accreditation that authorizes its operation in Florida as an independent college. The Florida Commission for Independent Education ("CIE"), which regulates nonpublic postsecondary institutions, issued the necessary

license to FCNH pursuant to section 1005.32, Florida Statutes (2012).¹ In addition to being duly licensed by the state, FCNH is accredited by the Accrediting Commission of Career Schools and Colleges and by the Commission on Massage Therapy.² Finally, FCNH is a "Board-approved massage school" within the meaning of that term as defined in section 480.033.³

4. At the times relevant to this proceeding, the minimum requirements for becoming and remaining a Board-approved massage school were set forth in Florida Administrative Code Rule 64B7-32.003 (Oct. 30, 2007), which provided in pertinent part as follows:

- (1) In order to receive and maintain Board of Massage Therapy approval, a massage school, and any satellite location of a previously approved school, must:
 - (a) Meet the requirements of and be licensed by the Department of Education pursuant to Chapter 1005, F.S., or the equivalent licensing authority of another state or county, or be within the public school system of the State of Florida; and
 - (b) Offer a course of study that includes, at a minimum, the 500 classroom hours listed below
 - (c) Apply directly to the Board of Massage Therapy and provide the following information:
 1. Sample transcript and diploma;
 2. Copy of curriculum, catalog or other course descriptions;
 3. Faculty credentials; and
 4. Proof of licensure by the Department of Education.

5. As an institution holding a license by means of accreditation, FCNH must comply with the fair consumer practices prescribed in section 1005.04 and in the rules of the CIE.⁴ Regarding these required practices, section 1005.04, Florida Statutes (2008), provided during the relevant time frame as follows:

- (1) Every institution that is under the jurisdiction of the commission or is exempt from the jurisdiction or purview of the commission pursuant to s. 1005.06(1)(c) or (f) and that either directly or indirectly solicits for enrollment any student shall:
 - (a) Disclose to each prospective student a statement of the purpose of such institution, its educational programs and curricula, a description of its physical facilities, its status regarding licensure, its fee schedule and policies regarding retaining student fees if a student withdraws, and a statement regarding the transferability of credits to and from other institutions. The institution shall make the required disclosures in writing at least 1 week prior to enrollment or collection of any tuition from the prospective student. The required disclosures may be made in the institution's current catalog;
 - (b) Use a reliable method to assess, before accepting a student into a program, the student's ability to complete successfully the course of study for which he or she has applied;
 - (c) Inform each student accurately about financial assistance and obligations for repayment of loans; describe any employment placement services provided and the limitations thereof; and refrain from promising or implying guaranteed placement, market availability, or salary amounts;
 - (d) Provide to prospective and enrolled students accurate information regarding the

relationship of its programs to state licensure requirements for practicing related occupations and professions in Florida;

(e) Ensure that all advertisements are accurate and not misleading;

(f) Publish and follow an equitable prorated refund policy for all students, and follow both the federal refund guidelines for students receiving federal financial assistance and the minimum refund guidelines set by commission rule;

(g) Follow the requirements of state and federal laws that require annual reporting with respect to crime statistics and physical plant safety and make those reports available to the public; and

(h) Publish and follow procedures for handling student complaints, disciplinary actions, and appeals.

(2) In addition, institutions that are required to be licensed by the commission shall disclose to prospective students that additional information regarding the institution may be obtained by contacting the Commission for Independent Education, Department of Education, Tallahassee.

(emphasis added).

6. At the time of the events giving rise to this proceeding, the CIE's rule relating to fair consumer practices provided in relevant part as follows:

(1) This rule implements the provisions of Sections 1005.04 and 1005.34, F.S., and establishes the regulations and standards of the Commission relative to fair consumer practices and the operation of independent postsecondary education institutions in Florida.

(2) This rule applies to those institutions as specified in Section 1005.04(1), F.S. All such institutions and locations shall demonstrate compliance with fair consumer practices.

* * *

(6) Each prospective student shall be provided a written copy, or shall have access to an electronic copy, of the institution's catalog prior to enrollment or the collection of any tuition, fees or other charges. The catalog shall contain the following required disclosures, and catalogs of licensed institutions must also contain the information required in subsections 6E-2.004(11) and (12), F.A.C.:

* * *

(f) Transferability of credits: The institution shall disclose information to the student regarding transferability of credits to other institutions and from other institutions. The institution shall disclose that transferability of credit is at the discretion of the accepting institution, and that it is the student's responsibility to confirm whether or not credits will be accepted by another institution of the student's choice. If a licensed institution has entered into written articulation agreements with other institutions, a list of those other institutions may be provided to students, along with any conditions or limitations on the amount or kinds of credit that will be accepted. Such written agreements with other institutions must be valid and in effect at the time the information is disclosed to the student. The agreements shall be kept on file at all times and available for inspection by Commission representatives or students. Any change or termination of the agreements shall be disclosed promptly to all affected students. No representation shall be made by a licensed institution that its credits can be transferred to another specific institution, unless the institution has a current, valid articulation agreement on file. Units or credits applied toward the award of a

credential may be derived from a combination of any or all of the following:

1. Units or credits earned at and transferred from other postsecondary institutions, when congruent and applicable to the receiving institution's program and when validated and confirmed by the receiving institution.
2. Successful completion of challenge examinations or standardized tests demonstrating learning at the credential level in specific subject matter areas.
3. Prior learning, as validated, evaluated, and confirmed by qualified instructors at the receiving institution.

* * *

(11) An institution is responsible for ensuring compliance with this rule by any person or company contracted with or employed by the institution to act on its behalf in matters of advertising, recruiting, or otherwise making representations which may be accessed by prospective students, whether verbally, electronically, or by other means of communication.

Fla. Admin. Code R. 6E-1.0032 (July 23, 2007) (emphasis added).

7. As a duly licensed, accredited, Board-approved massage school, FCNH was, at all relevant times, authorized to evaluate the transferability of credits to FCNH from other massage schools, so that credits earned elsewhere—including from schools that were not Board-approved—could be applied toward the award of a diploma from FCNH. In making such an evaluation, FCNH was obligated to follow the standards for transfer of credit that the Board had established by rule.⁵ Further, when

exercising its discretion to accept transfer credits, FCNH was required to complete, sign, and attach to the student's transcript the Board's Transfer of Credit Form, by which the school's dean or registrar certified that the student's previously earned credits, to the extent specified, were acceptable in lieu of the student's taking courses at FCNH.

8. At all relevant times, FCNH's registrar was Glenda Johnson. As registrar, Ms. Johnson had actual authority to evaluate the transferability of credits and to execute the Transfer of Credit Form certifying to the Board that an applicant's previously earned credits were acceptable to FCNH.

9. Ms. Johnson had begun working for FCNH in 1996, starting as a receptionist. In 2007, an anonymous complaint was made to the Board accusing Ms. Johnson—by then the school's registrar—and another individual of engaging in some kind of inappropriate conduct involving massage therapists or massage students. The complaint was forwarded to the CIE, which evidently notified the school, for FCNH opened an investigation into the matter. Ms. Johnson denied any wrongdoing, and FCNH ultimately closed the investigation after finding no evidence to the contrary.

10. In December 2011, an individual with the National Certification Board for Therapeutic Massage and Bodywork ("NCB") placed a telephone call to Melissa Wade, a managerial employee

of FCNH, to report that the NCB had received a number of applications to sit for the National Certification Examination—which the NCB administers—from FCNH graduates whose transcripts seemed irregular. What these applicants had in common was that they had earned their massage therapy diplomas from Royal Irvin College in Monterey Park, California, and that the same member of FCNH's administration had accepted their transfer credits. The NCB sent copies of the suspicious credentials to FCNH.

11. Ms. Wade reviewed the materials and detected anomalies in them. She was unable to find records in the school's files confirming that the putative graduates in question had been enrolled as students. Ms. Wade confronted Ms. Johnson with the problematic transcripts and certificates. Ms. Johnson admitted that she had created and signed them, but she denied ever having taken money for doing so, explaining that she merely had been trying to help people. She claimed that she had acted alone. Ms. Johnson gave a written statement to FCNH describing what she had done.⁶ Shortly thereafter, in December 2011, FCNH terminated Ms. Johnson's employment.

12. In due course Ms. Wade notified the Board that some of FCNH's diplomates might not have fulfilled the requirements for graduation. This caused the Department to launch an investigation, with which FCNH fully cooperated. The

investigation uncovered some 200 graduates whose credentials FCNH could not confirm. One of them was Diamond.

13. Diamond was born in China and, at the times relevant to this case, was a citizen of China. In 2003, Diamond married an American citizen and immigrated to the United States, becoming a resident of Iowa. She later moved to Florida and after that to California, where—from July 30, 2008 to March 30, 2009—she attended Royal Irvin College. At the California school, Diamond successfully completed a 500-hour course of study in massage therapy. Soon after graduating from Royal Irvin College, Diamond took and passed the National Certification Examination for Therapeutic Massage and Bodywork.

14. Diamond returned to Florida intending to work as a massage therapist. She found a position with a provider called Royal Oriental Massage. Before she could begin working, however, Diamond needed to obtain a Florida license. This meant—because Royal Irvin College was not a Board-approved massage school—that she needed to complete either a course of study at an approved school or, alternatively, an apprenticeship program. Researching Board-approved schools, Diamond learned about FCNH.

15. On or about May 26, 2009, Diamond went to the Pompano campus of FCNH. A man whom Diamond identified only as her former boss accompanied her. At FCNH, where Diamond arrived

during regular business hours, she was introduced to Ms. Johnson, the registrar. Diamond had not asked to see Ms. Johnson and had not met her previously.

16. The evidence is wanting in completeness as to what happened next. Evidently Ms. Johnson advised Diamond that her Royal Irvin College credits could be transferred, one for one, to FCNH, and that such transfer credits, without more, would fulfill FCNH's conditions for the issuance of a diploma that would meet state licensure requirements; explained the process of applying for state licensure; and produced an application form, which Diamond's former boss filled out. Diamond signed the three-page application, which is dated May 26, 2009.

17. The application which Diamond executed states, truthfully, that Diamond obtained her massage therapy certificate in March 2009 from Royal Irvin College, completing a 500-hour course of study; that Royal Irvin College is not Board approved; and that she had not attended an apprenticeship program. The evidence does not establish that any statement in the application was untrue or incorrect.

18. Ms. Johnson took Diamond's application, together with Diamond's check, payable to the Department of Health, for the \$205.00 license application fee. In addition, Ms. Johnson collected \$418.98 in cash as the fee for handling the transfer of Diamond's credits. (Diamond did not have that much cash on

hand, so her boss paid Ms. Johnson. Diamond later wrote a check for \$418.98, payable to Royal Oriental Massage, to reimburse her boss.) Ms. Johnson signed a receipt for the \$418.98 payment and handed it to Diamond. The receipt states that the money was for "Transfer of Lic." Ms. Johnson told Diamond that she (Ms. Johnson) would submit Diamond's application to the Department.

19. Ms. Johnson did submit Diamond's application, as promised, along with other documents. The Department received the application on or about June 4, 2009. By letter dated June 10, 2009, the Department notified Diamond that her application was complete and that a license had been issued to her.

20. One of the documents that Ms. Johnson sent to the Department in connection with Diamond's application was the Transfer of Credit Form. This form states that FCNH has evaluated and agreed to accept Diamond's 500 hours of credit from Royal Irvin College; it is signed by Ms. Johnson, as registrar, who certified "that the transcript credit for the . . . courses [applicant previously attended for credit] is acceptable credit from . . . Royal Irvin College." Ms. Johnson prepared and submitted this document on her own, without showing it to Diamond.

21. Ms. Johnson also prepared, signed, and submitted to the Department an FCNH transcript showing that Diamond had

completed a 500-hour program titled "Therapeutic Massage Training Program (Transfer of Licensure)." Ms. Johnson did not show this document to Diamond.

22. Finally, Ms. Johnson prepared, signed, and submitted to the Department two Certificates of Completion reflecting Diamond's completion of: "12 Hours of Therapeutic Massage Training Program" and "2 Hours Prevention of Medical Errors." Ms. Johnson did not show these certificates to Diamond.

23. Collectively, the credit transfer form, the transcript, and the certificates "signify satisfactory completion of the requirements of an educational or career program of study or training or course of study" and constitute a "diploma" within the meaning of that term as defined in section 1005.02(8). The several documents comprising Diamond's FCNH diploma will be referred to hereafter, collectively, as the "Diploma."

24. Diamond testified credibly (and the undersigned finds) that she never saw the Transfer of Credit Form, FCNH transcript, or the certificates before the instant dispute arose. Diamond's testimony in this regard was corroborated by the Board's executive director, whose testimony, which the undersigned credits, revealed that applicants do not typically submit documents of this kind, which are, instead, usually sent directly from the schools.

25. The evidence does not support a finding that Diamond misrepresented her educational attainments when she met with Ms. Johnson. The evidence does not support a finding that Diamond knew or should have known that Ms. Johnson's evaluation of her credits was anything but routine and in accordance with FCNH's academic policies. The evidence does not support a finding that Diamond knew or should have known that FCNH, as the transferee school accepting her Royal Irvin College courses, would award her academic credit or credentials which she had not legitimately earned.

26. To sum up Diamond's transaction with FCNH, she went to the Board-approved, state-licensed massage school on May 26, 2009, where she met with the registrar, Ms. Johnson, a member of the school's administration whom she had no reason to believe would deceive her. At the time, Diamond had been living in the United States for only about six years, and even at present, nearly four years later, she possesses relatively limited English language skills. It was reasonable under the circumstances for Diamond to rely upon Ms. Johnson, and she was entitled under the law to receive accurate information from the registrar regarding, among other things, the transferability of credits to FCNH, and the relationship between FCNH's academic program and the state's licensure requirements for massage therapists.

27. Moreover, Ms. Johnson, who at all times was acting within the course and scope of her employment as the school's registrar, had actual authority to evaluate transfer credits on behalf of FCNH. The evidence does not establish that Diamond was or should have been aware of any limitations on Ms. Johnson's authority, nor does the evidence show that Diamond gave Ms. Johnson false information. From Diamond's perspective, Ms. Johnson had apparent authority, at least, to accept Diamond's credits from Royal Irvin College and to prepare, execute, and issue such transcripts and certificates as would be appropriate to the situation.

28. Diamond has not surrendered her Diploma or otherwise acceded to the allegation that the credentials FCNH conferred upon her are invalid. Although Ms. Wade testified at hearing that Ms. Johnson should not have awarded Diamond an FCNH Diploma based on Diamond's Royal Irvin College credits, FCNH has not initiated a legal proceeding to revoke or withdraw Diamond's Diploma. At present, therefore, there is no legally binding or enforceable determination that the Diploma is void or that Diamond is without rights and privileges thereunder.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

30. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Diamond by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

31. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) (citation omitted).

32. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929 (Fla. 1st DCA 2011) (statutes imposing a penalty must never be extended by construction).

33. Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. See § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action"); see also Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) ("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992) ("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

34. In Count I of the Complaint, the Department charged Diamond under section 456.072(1)(h), Florida Statutes (2008), which states that the act of "obtaining . . . a license . . . by bribery, by fraudulent misrepresentation, or through an error of the department" constitutes grounds for discipline. The Department alleged that Diamond committed a disciplinable offense "by obtaining her license to practice massage therapy

. . . through error of the Department of Health or by fraudulent misrepresentation by submitting a fraudulent transcript and fraudulent Certificates of Completion with her Application."

35. The Department takes the position that Diamond's license can be revoked based on the Department's unilateral mistake. Thus, the Department contends that because its staff failed to notice—when reviewing Diamond's application—that Diamond's FCNH transcript did not show her grades, Diamond herself committed a disciplinable offense. This argument is rejected.

36. To begin, the Department's "unilateral error" theory is inconsistent with the general procedure for licensing as set forth in section 120.60, which provides in pertinent part as follows:

(1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period.

Given that the law unambiguously prohibits an agency from "deny[ing] a license for failure to correct an error or omission or to supply additional information unless the agency timely

notified the applicant" of the particular deficiency within 30 days after receiving the application, to allow the agency later to revoke a license pursuant to section 456.072(1)(h) based solely on a purported deficiency in the licensee's application of which the agency failed to give timely notice under section 120.60 not only would erode the protection that the latter statute affords specific licensees, but also would undermine the integrity of licenses in general.

37. Further, to impose discipline under section 456.072(1) requires a culpable "act" on the part of the licensee. Id. ("The following acts shall constitute grounds for" discipline) (emphasis added). The disciplinable acts specified in section 456.072(1)(h) are the use of a bribe, fraudulent misrepresentation, or "error of the department" to obtain a license. Because a unilateral agency error does not involve any wrongful act on the licensee's part, such an event cannot constitute a basis for discipline. For a disciplinable act to occur, the applicant must somehow use or take advantage of an agency error to obtain her license.

38. To take advantage of an agency error, the applicant must know about it. Thus, to commit the disciplinable act of obtaining a license through an error of the agency, the applicant must knowingly use the agency's error to her advantage. Properly understood, then, section 456.072(1)(h)

imposes a duty on an applicant to speak up if she learns that the agency is about to issue, or has issued, her a license in error.

39. Finally, Diamond's application was supported by proof of graduation from a Board-approved massage school in the form of an official transcript signed by FCNH's registrar and two certificates of completion also bearing the official signature of the school's registrar. These documents constituted evidence of Diamond's successful completion of an approved course of study. See Fla. Admin. Code R. 64B7-32.002 (Feb. 21, 1996). The Department's acknowledging of Diamond as a graduate of a Board-approved massage school would have been a mistake only if Diamond did not possess the legally cognizable rights and privileges appertaining to her FCNH Diploma, but she did—and does.

40. The Department failed to prove that Diamond knowingly took advantage of an agency error in obtaining her license, or even that the Department made a mistake. Therefore, Diamond is not subject to discipline in consequence of a unilateral agency error.

41. Regarding the allegation that Diamond obtained her license by submitting fraudulent credentials, it is useful to recall that, in the context of a civil suit, the essential elements of a fraud claim are: (1) a false statement concerning

a material fact, including a nondisclosure when under a duty to disclose; (2) made with knowledge that the representation (or omission) is false and with the intention of inducing another's reliance thereon; and (3) consequent injury to the other party acting in reliance on the false representation. See, e.g., Cohen v. Kravit Estate Buyers, Inc., 843 So. 2d 989, 991 (Fla. 4th DCA 2003). In an administrative proceeding such as this, where an applicant is alleged to have used fraudulent means in an attempt to obtain a license, it is not necessary for the agency to prove actual injury, but the rest of the common law definition of fraudulent conduct is relevant and applicable in evaluating the charge.

42. "[F]raudulent intent usually must be proved by circumstantial evidence and such circumstances may, by their number and joint consideration, be sufficient to constitute proof." Nally v. Olsson, 134 So. 2d 265, 267 (Fla. 2d DCA 1961). Therefore, as proof of fraud, "one may show 'a series of distinct acts, each of which may be a badge of fraud and when taken together as a whole, constitute fraud.'" Dep't of Rev. v. Rudd, 545 So. 2d 369, 372 (Fla. 1st DCA 1989) (quoting Allen v. Tatham, 56 So. 2d 337, 339 (Fla. 1952)). Further, "[s]cianter, or guilty knowledge, [which] is an element of intentional misconduct [such as fraud], . . . can be established by showing actual knowledge, or that the defendant was reckless or careless

as to the truth of the matter asserted." Ocean Bank of Miami v. INV-UNI Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992).

43. In this case, the Department failed to prove that Diamond knowingly, and with the intent to deceive the Department, made any false statement of material fact in, or in connection with, her application. Therefore, Diamond is not guilty of obtaining a license by fraudulent misrepresentation.

44. In Count II of the Complaint, the Department charged Diamond under section 456.072(1)(w), Florida Statutes (2008), which states that the act of "making misleading, untrue, deceptive, or fraudulent representations on a[n] . . . initial . . . licensure application" constitutes grounds for discipline. The Department alleged that Diamond committed a disciplinable offense "by submitting a fraudulent transcript and fraudulent Certificates of Completion with her Application."

45. The Department failed to prove that Diamond knowingly, and with the intent to deceive the Department, made any false statement of material fact in, or in connection with, her application. Therefore, Diamond is not guilty of making fraudulent representations in her application.

46. In Count III of the Complaint, the Department charged Diamond under section 480.046(1)(o), Florida Statutes (2008), which subjects a licensee to discipline for the act of violating any provision of chapter 480 or chapter 456. The Department

alleged that because Diamond has not "completed a course of study at a board-approved massage school," she has "violated" a provision of chapter 480, namely section 480.041(1)(b), which makes completion of such a course of study (or, alternatively, an apprenticeship program) a qualification for licensure as a massage therapist.

47. As a preliminary matter, the undersigned notes that section 480.041(1) does not by its terms require compliant behavior, either by prescribing minimum standards of conduct or forbidding conduct deemed wrongful. Rather, this statute merely describes the qualifications that a person must possess to be licensed as a massage therapist. A person who lacks one or more of the statutory requirements is unqualified, but being unqualified is not the same as being a lawbreaker. Because section 480.041(1) is not violable as that term is ordinarily understood, the undersigned is skeptical that any person can be punished for "violating" section 480.041(1).

48. Assuming for argument's sake, however, that a licensee can be disciplined for having "violated" section 480.041(1)(b), the Department failed to prove that Diamond did not complete a course of study at a Board-approved massage school, for the reasons set forth below.

49. At the time Diamond submitted her initial application, Florida Administrative Code Rule 64B7-32.002 (Feb. 21, 1996) provided as follows:

In order to be acknowledged as a graduate of a Board approved massage school as referred to in subsection 480.033(9), F.S., the Board's administrative office must receive an official transcript documenting the applicant's training. Such transcript must document to the satisfaction of the Board that the applicant has successfully completed a course of study in massage which met the minimum standards for training and curriculum as delineated in this rule chapter. A transcript indicating passing grades in all courses, and including dates of attendance, and stating the date of successful completion of the entire course of study, is evidence of successful completion. If the transcript does not specifically state that the student successfully completed the entire course of study, the transcript must be accompanied by a diploma or certificate of completion indicating the dates of attendance and completion.

50. Diamond's application included a Diploma issued by FCNH, a Board-approved massage school. After reviewing Diamond's application, the Department determined that the Diploma sufficed to prove Diamond's successful completion of a course of study in massage meeting the minimum standards. The Diploma never changed; it continues to be exactly what it was in June of 2009: evidence of successful completion of a course of study at a Board-approved massage school.⁷ To get around this reality, the Department argues that the Diploma is "fraudulent"

and that Diamond did not take the courses required for completion of an approved course of study in massage therapy. The Department does not explicitly contend, but apparently assumes, that the Diploma can be effectively rescinded in this proceeding—and Diamond's rights under that credential terminated—owing to Diamond's alleged deceitfulness.

51. If Diamond had knowingly deceived the Department, e.g., by making a fraudulent misrepresentation in her application, then Diamond would be subject to discipline for such misconduct, which of itself is a sufficient basis— independent of any educational credential—for taking punitive measures. As discussed above, however, the Department failed to prove that Diamond made fraudulent misrepresentations to the Department. Consequently, there was no fraud in the transaction between Diamond and the Department.

52. Asserting that Diamond did not take courses at FCNH, which she should have known were required for licensure, the Department tacitly contends that Diamond fraudulently obtained her FCNH Diploma. In this regard, the Department accepts as credible Ms. Wade's ex post facto testimony that FCNH should not have accepted Diamond's credits from Royal Irvin College and, based on such transfer credits, awarded Diamond a Diploma.

53. There are multiple problems with the Department's theory. First, that Diamond never attended classes at FCNH is

not suggestive of wrongdoing on her part because FCNH, as a duly licensed postsecondary institution, (a) had the discretion to accept or decline to accept Diamond's Royal Irvin College credits and (b) had the duty to disclose to Diamond all relevant information regarding transferability of credits. See § 1005.04, Fla. Stat. (2008); Fla. Admin. Code R.

6E-1.0032(6)(f). As FCNH's registrar, Ms. Johnson had actual (and certainly apparent) authority to evaluate and accept Diamond's Royal Irvin College credits and apply them toward the award of an FCNH credential. Diamond's reliance on Ms. Johnson's decision regarding the transferability of credits was reasonable under the circumstances; believing, as she evidently was told, that her Royal Irvin College credits were acceptable to FCNH in lieu of taking additional courses, Diamond had no reason to be concerned about not attending classes at FCNH.⁸

54. Second, regardless of whether Diamond knew or should have known which courses were required for licensure, she was entitled to receive accurate information from FCNH regarding the relationship of the school's massage therapy program to state licensure requirements. See § 1005.04(1)(d), Fla. Stat. Diamond's reliance on Ms. Johnson's advice that no additional coursework at FCNH would be necessary to qualify for a Florida massage therapy license was therefore reasonable under the circumstances. That is, Diamond reasonably believed that the

courses she had completed at Royal Irvin College, which FCNH accepted toward the award of its credentials, were all that she needed to have taken.

55. Finally, the questions which the Department has raised implicating the Diploma's validity, namely whether FCNH should have issued Diamond a Diploma and—to the point—whether the Diploma is operative as a legal instrument under which Diamond has certain rights and privileges, are not amenable to adjudication in this administrative proceeding. Neither the Department nor the Board has the authority to revoke or rescind the Diploma, rendering it a nullity, any more than either agency could revoke a degree from, say, Harvard University or Tallahassee Community College. Diplomas, degrees, and other educational credentials confer rights and privileges in which their holders have a property interest. The power to revoke or withdraw such a valuable credential, once conferred, belongs to the issuing institution, not a third-party state agency, and such action, to be enforceable, must be undertaken in accordance with a legal process ensuring that the rights and interests of the degree holder are protected.

56. As the Supreme Court of Ohio explained:

We consider it self-evident that a college or university acting through its board of trustees does have the inherent authority to revoke an improperly awarded degree where (1) good cause such as fraud, deceit, or

error is shown, and (2) the degree-holder is afforded a fair hearing at which he can present evidence and protect his interest. Academic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards. To hold that a university may never withdraw a degree, effectively requires the university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified. Such a holding would undermine public confidence in the integrity of degrees, call academic standards into question, and harm those who rely on the certification which the degree represents.

Waliga v. Board of Trustees, 488 N.E.2d 850, 852 (Ohio 1986).

The authority to revoke degrees for cause, in short, is a "necessary corollary" to the power to confer degrees, Hand v. Matchett, 957 F.2d 791, 794-95 (10th Cir. 1992)—necessary because "upon the grant of a degree, the university certifies to the world that the recipient has fulfilled the university's requirements, and this certification continues until the degree is revoked." Crook v. Baker, 813 F.2d 88, 93 (6th Cir. 1987).

57. As the court made clear in Waliga, however, the issuing institution cannot revoke a degree—in which the holder possesses a property right—except according to constitutionally adequate procedures providing due process. 488 N.E.2d at 853. This does not mean that the school necessarily must go to court to revoke a degree previously conferred. See Crook, 813 F.2d at

94. An administrative proceeding—to which the issuing institution and the degree holder are parties—may suffice. See Faulkner v. Univ. of Tenn., 1994 Tenn. App. LEXIS 651 (Tenn. Ct. App. Nov. 16, 1994). But it does mean that the former student must be afforded adequate notice, a fair opportunity to be heard, and an impartial forum. As one judge observed:

Educational institutions are uniquely situated to make determinations regarding academic qualifications or the lack thereof. Establishing degree requirements and granting degrees are within the province of universities, not courts; so the rescission of degrees of former students is within the province of universities, not courts. Courts, when their jurisdiction is quickened, must assure that degrees are not rescinded by universities until the former student has had all of the process due him—adequate notice, a fair opportunity to defend, and an impartial forum.

Faulkner v. The Univ. of Tenn., 627 So. 2d 362, 367 (Ala. 1992) (Houston, J., dissenting).⁹

58. Diamond's FCNH Diploma certifies to the world that she has completed a course of study at a Board-approved massage school. Because of this certification, which the Diploma represents, the Department's allegation that Diamond has not completed such a course of study is true only if the Diploma is a nullity, a worthless piece of paper signifying nothing. The Diploma is not a nullity, however, unless and until it is revoked.

59. FCNH has persuaded the Department that the Diploma is invalid. But the Department, which did not confer the Diploma, is powerless to revoke this academic credential. Only FCNH has the authority to revoke the Diploma, provided it does so in accordance with due process of law, and it has not yet taken such action, as far as the evidence in this case shows. The upshot is that, in arguing that Diamond is academically unqualified for licensure as a massage therapist, the Department is attempting to steal a base, taking for granted that the Diploma is void or, alternatively, voidable in this proceeding. Because the Diploma is neither void nor voidable in this forum, the Department's argument is rejected.

60. As a final observation, this case in particular points up the impropriety of using an administrative disciplinary proceeding in place of the fair hearing to which a degree holder is entitled when the issuing institution seeks to revoke his degree. The evidence presented at the final hearing suggests that, in the transaction between FCNH and Diamond, FCNH might have gotten its hands dirty. Its registrar, Ms. Johnson, who was acting in the course and scope of her employment when she met with Diamond, seems to have misled the former student—assuming, as FCNH now maintains, that Diamond's Royal Irvin College credits were not, in fact, a sufficient basis upon which to confer credentials representing the completion of a course of study

conforming to state licensure requirements. Assuming further that, like the Department, FCNH were unable to prove that Diamond acted in concert with Ms. Johnson, FCNH could conceivably be found liable to Diamond for the wrongful acts of its agent. E.g., Phillips Petroleum Co. v. Royster, 256 So. 2d 559, 560-61 (Fla. 1st DCA 1972). In a judicial proceeding by FCNH to rescind the Diploma, Diamond could assert such claims. In this administrative case, however, Diamond was precluded by jurisdictional limitations from making claims against nonparty FCNH, even as FCNH's Ms. Wade testified on the Department's behalf, advancing FCNH's position that the Diploma should be given no force and effect.¹⁰

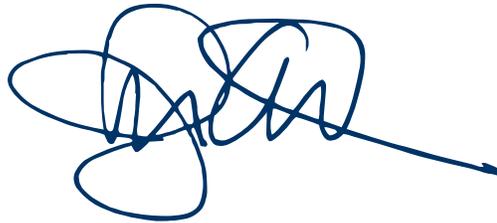
61. Indeed, whether the Diploma should be revoked—a question which, as explained, cannot be decided here—is perhaps less clear than the Department and FCNH would have it. This is because Diamond might have equitable defenses to rescission, such as waiver and estoppel, which could preclude FCNH from relying on so-called irregularities to deny the validity of the credentials that Ms. Johnson issued Diamond in her capacity as FCNH's registrar and agent. See, e.g., Russell v. Eckert, 195 So. 2d 617, 622 (Fla. 2d DCA 1967). Obviously such equitable defenses were useless to Diamond here, which is why this proceeding is no substitute for the fair hearing to which she is entitled in the event FCNH seeks to revoke her Diploma.

62. Because FCNH has not revoked the Diploma, the Diploma continues to certify that Diamond completed a course of study in massage therapy at a Board-approved school.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order finding Diamond not guilty of the offenses charged in the Complaint.

DONE AND ENTERED this 9th day of April, 2013, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of April, 2013.

ENDNOTES

¹ The undersigned takes official recognition of the public record of the Florida Department of Education concerning FCNH's licensure status, which is available online at <http://app1.fldoe.org/cie/SearchSchools/detail.aspx?schoolid=2217> (last visited Mar. 31, 2013).

² Id.

³ Section 480.033(9) provides:

"Board-approved massage school" means a facility which meets minimum standards for training and curriculum as determined by rule of the board and which is licensed by the Department of Education pursuant to chapter 1005 or the equivalent licensing authority of another state or is within the public school system of this state.

⁴ See § 1005.32(5), Fla. Stat.

⁵ See Fla. Admin. Code R. 64B7-32.004 (Feb. 27, 2006).

⁶ Both parties elicited testimony from Ms. Wade regarding Ms. Johnson's inculpatory out-of-court statements, which plainly are hearsay to the extent offered to prove the truth of the matters asserted. Had either party laid a proper foundation, however, Ms. Johnson's statements almost certainly could have been received as "statements against interest," which are admissible pursuant to an exception to the hearsay rule when the declarant is unavailable as a witness—as Ms. Johnson likely would have been, if present at the hearing, after invoking her right against self-incrimination. See § 90.804, Fla. Stat. In view of all that, the undersigned has considered the hearsay, which in any event is not outcome determinative. See Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 1st DCA 2001) (ALJ erred in declining to consider hearsay that had been admitted without objection—and not offered under an exception—because the record contained sufficient evidence to establish the business records exception, which the proponent of the evidence had not invoked). The undersigned notes with interest that Ms. Johnson apparently did not implicate any students in her confession; the Department presumably would have sought to introduce her written statement if she had.

⁷ If the Department believed that Diamond's official transcript from FCNH and the other certificates comprising her Diploma failed to conform to the requirements of rule 64B7-32.002, then it should have denied her application on that basis, which would have given Diamond the right, in 2009, to request a hearing to determine the sufficiency of the Diploma. In any event, it should be noted that the Department is not asserting in this case that Diamond's FCNH Diploma is insufficient evidence of successful completion of an approved course of study pursuant to rule 64B7-32.002; the Department argues instead that the Diploma was fraudulently obtained and thus is a nullity, which is a different theory.

⁸ If the Board determines that FCNH failed to comply with the standards for transfer of credit set forth in rule 64B7-32.004, then the Board can withdraw its approval of FCNH pursuant to rule 64B7-32.003(3). In addition, or alternatively, if so inclined, the Department or the Board may make a complaint about FCNH to the CIE, which is authorized to investigate suspected misconduct on the part of licensed nonpublic postsecondary schools, and to impose discipline on violators. See § 1005.38, Fla. Stat. The Department has not alleged, in any event, that Diamond should be disciplined because the transfer standards were not met.

⁹ The dissenting justice concluded, contrary to the court's majority, that the plaintiff had failed to exhaust his administrative remedies. The entire court agreed, however, that the plaintiff's degree could not be revoked except through a proceeding affording him due process of law.

¹⁰ Diamond was similarly precluded from asserting in this administrative proceeding other legal claims she might have against FCNH, such as breach of contract. See, e.g., Sharik v. Southeastern Univ. of the Health Sciences, Inc., 780 So. 2d 136 (Fla. 3d DCA 2000), reh'g en banc denied, 780 So. 2d 142 (Fla. 3d DCA 2001).

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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.