

Non-Adoption Options

D. The Board of Massage Therapists, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

In a motion duly made by Traci Gilmour and seconded by Jill Motz, with a roll call vote, it was:

Resolved to reject the recommendation of His Honor, Administrative Law Judge, Andrew M. Lebo, regarding case number OAH 16-1213-MAS in the matter of Y K Y. The board decided to uphold its original decision to deny Ms. Y's application for licensure due to her conviction of prostitution; which is a violation of the professional standards and moral turpitude as laid out in 12 AAC 79.900 and 12 AAC 79.910(11). The applicant was also unable to demonstrate that she can practice competently and safely as required in Sec. 08.61.030(9).

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10 day of August, 2017.

By: Signed
Signature
David Edwards-Smith
Name
Board Chair
Title

[This document has been modified to conform to the technical standards for publication.]

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE BOARD OF MASSAGE THERAPISTS**

In the Matter of)	
)	
Y K Y)	OAH No. 16-1213-MAS
_____)	Agency No. 2016-000971

[REJECTED PROPOSED] DECISION

I. Introduction

Y K Y applied for an Alaska license as a massage therapist. Ms. Y has a prostitution conviction in Alaska, for an incident which occurred in 2011. Based upon that conviction, and apparently also the fact that Ms. Y failed to disclose the conviction on her application, the Alaska Board of Massage Therapists (Board) denied her application. Ms. Y requested an evidentiary hearing to challenge that denial.

Ms. Y’s hearing was held on March 31, 2017. Ms. Y was represented by attorney Rex Butler, and she testified on her own behalf, along with her friend C Y.¹ Assistant Attorney General Harriet Milks represented the Division of Corporations, Business & Professional Licensing (Division), and professional licensing coordinator Colleen Kautz testified on behalf of the Division.

It is undisputed that Ms. Y has a prostitution conviction and that she failed to disclose the conviction on her application for a license. Prostitution is a crime involving moral turpitude, as defined by the Board’s licensing regulations. However, Ms. Y received a suspended imposition of sentence (SIS) under which her conviction was “set aside,” and due to language barriers she did not understand that she was required to disclose the conviction on her application. Given Ms. Y’s changed circumstances, she has demonstrated that she can practice the profession of Massage Therapy competently and safely. However, given the fact that only about five years have elapsed since her convictions, this is a case where it is appropriate to issue only a limited license, with Ms. Y being placed on probation for three years.

II. Facts

Ms. Y was born and raised in Korea. Although no evidence was presented regarding how long she has lived in the United States, she has worked as a massage practitioner in the United

¹ During the hearing, C Y also acted as translator for Ms. Y, who is not fluent in English. The Division did not object to C Y acting as translator.

States since at least 1996. Despite living and working in the United States for at least 20 years, however, she is not fluent in English and requires the assistance of a translator in conducting business in English.²

In July 2011, Ms. Y was convicted of prostitution under AS 11.66.100(A)(1), a class B misdemeanor.³ The underlying incident took place in January 2011, while she was providing massage therapy services to an undercover officer.⁴ Although the details of the sentence imposed on her as a result of the conviction were not established on the record in this hearing, it is undisputed that she received a “suspended imposition of sentence,” and in February 2013 her conviction was “set aside.”⁵

Ms. Y testified credibly that since the 2011 incident and conviction, she has had no incidents of wrongdoing, that she has followed the letter of law in running her massage business since that time, and that she ensures that her employees also follow the law in conducting business. The Division presented no evidence of any problems in this regard since 2011.⁶

The Division’s application form requires an applicant to answer the following question:

Have you ever been convicted of a crime or are you currently charged with committing a crime? For purposes of this question, “crime” includes a misdemeanor, felony, or a military offense, including a conviction involving driving under the influence (DUI) or driving while intoxicated (DWI), driving without a license, reckless driving, or driving with a suspended or revoked license. “Convicted” includes having been found guilty by verdict of a judge or jury, having entered a plea of guilty, nolo contendere or no contest, or having been given probation, **a suspended imposition of sentence**, or a fine.[⁷]

Ms. Y answered this question by checking the box for No.

Ms. Y was assisted in filling out the Division’s application form by her friend C Y. Both Ms. Y and C Y testified regarding the process of answering the questions on the application covering prior criminal convictions. Ms. Y testified that at the time she filled out the application, she did not fully understand the question regarding prior convictions, although she does

² Ms. Y’s testimony; C Y testimony.

³ Administrative Record (AR) p. 64. Pursuant to 2 AAC 64.300, the undersigned administrative law judge (ALJ) takes official notice of Courtview records indicating that Ms. Y was convicted after pleading guilty to the prostitution charge on July 26, 2011.

⁴ AR p. 60.

⁵ AR p. 78.

⁶ In an apparent attempt to impugn Ms. Y’s character, the Division mentioned during the hearing that she had also been arrested on a prostitution charge in California in 2002. However, because Ms. Y was not convicted of this charge, and no substantive evidence was presented regarding the underlying incident, the undersigned ALJ accords no weight to this allegation.

⁷ AR p. 3 (emphasis added).

understand it now. However, she did not understand then what a “suspended imposition of sentence” is, and it appeared at the hearing that she still does not fully understand the meaning of that term. She also did not understand what the term “conviction – set aside” means.

The Division became aware of Ms. Y’s 2011 prostitution conviction when it performed a background check on her in the course of evaluating her application. As a result of the conviction, and Ms. Y’s failure to disclose the conviction on her application form, the Division denied her application through a series of three letters sent to her in October, 2016.⁸ The final letter described the basis for denial of her application as follows:

After careful consideration, the Board has denied your application in accordance with Alaska Statute AS 08.61.060(1) and 12 AAC 79.910(11) due to your conviction involving moral turpitude. Specifically, your conviction-set aside of “prostitution” in 2011 [sic]⁹

The letter went on to describe Ms. Y’s appeal rights under the Administrative Procedure Act, adding the following comment: “Please consider this letter as a Statement of Issues as required by AS 44.62.370.”¹⁰

Ms. Y requested a hearing on October 17, 2016. The Division subsequently submitted an “Amended Statement of Issues,” which described the history pertinent to Ms. Y’s application and restated the grounds for denial as follows:

6. The Board considered Ms. Y’s application and the supporting documentation carefully and determined to deny her application for licensure because of her conviction for a crime of moral turpitude, i.e. prostitution. The Board found this crime would affect Ms. Y’s ability to practice competently and safely.

7. In addition, the Board may deny Ms. Y’s application under AS 08.61.060 because she attempted to obtain licensure by deceit, specifically by certifying that her application was true and complete when she purposely withheld reference to her 2011 prostitution conviction.¹¹

⁸ Due to a series of clerical errors, the Division sent Ms. Y three separate letters informing her that her application had been denied. Two of the letters were dated October 7, 2016, and the third was dated October 17, 2016. AR pp. 74-75, 76-77, and 78-79. During the hearing, there was some confusion regarding whether the third letter had been sent and, if so, whether it had been included in the record of this matter; in fact, the third letter, numbered AR 78-79 and dated October 17, 2016, was submitted by the Division in a supplement to the record dated November 17, 2016.

⁹ AR p. 78. Although the letter specifically refers to only the conviction itself, it also references AS 08.61.060(1), a statutory provision that states that the Board “may” impose disciplinary sanctions on an already-licensed person if the Board finds the person “secured a license through deceit, fraud, or intentional misrepresentation.”

¹⁰ AR p. 78.

¹¹ November 17, 2016 Amended Statement of Issues.

The certificate of service on the Amended Statement of Issues indicates that it was served on Ms. Y's attorney via email and U.S. mail on November 17, 2016.

The hearing was held on March 31, 2017, and Ms. Y appeared in-person. It was possible for the ALJ to observe her reactions to questions and other persons' statements. Ms. Y, based upon observation of her demeanor and her responses to questioning, was a credible witness. However, while she could understand and follow the proceedings with the interpretation assistance of C Y, it was clear that her English speaking and comprehension skills were quite limited.

III. Discussion

The Massage Therapists Board's licensing statute provides the Board with the discretion to grant or deny a license application when an applicant has a criminal conviction involving moral turpitude. Moral turpitude is an imprecise term, which has multiple and conflicting interpretations.¹² However, the Board's regulations avoid the ambiguity inherent in the term "moral turpitude" by explicitly listing those matters that the Board considers to be crimes involving moral turpitude. Prostitution is one of those listed crimes.¹³ If an applicant has a conviction for such a crime, the Board has the discretion to grant a massage therapist's license if the Board finds that "the conviction does not affect the person's ability to practice competently and safely."¹⁴ Before reaching that question as to Ms. Y, however, we must address an objection raised by Ms. Y's counsel at the hearing.

A. The Division's amended statement of issues

During the hearing, Ms. Y's counsel objected to the Division's assertion that Ms. Y's failure to disclose her prostitution conviction in her license application was a ground for the Board's denial of the application. Counsel argued that the Division specifically cited only the conviction itself in the letter giving Ms. Y notice of the denial, and did not formally give notice that the failure to disclose was a separate basis for denial until it submitted the Amended Statement of Issues in mid-November, 2016. Ms. Y's counsel described this sequence of events as the Division or its counsel adding an "additional basis" for denial after the fact of the Board's

¹² Moral turpitude is generally defined as "[c]onduct that is contrary to justice, honesty, or morality." *Black's Law Dictionary* 1101 (9th Edition).

¹³ 12 AAC 79.910(11).

¹⁴ AS 08.61.030(9).

initial decision, arguing that only the conviction itself could be properly presented for hearing as a basis for denial.

Ms. Y's argument fails for two reasons. First, this hearing is governed by the Administrative Procedure Act (APA). Two provisions of the APA, AS 44.62.400 and AS 44.62.490, explicitly authorize amendment of an "accusation" at any time up to "submission of the case for decision," as long as a party that might be prejudiced by the amendment is given an opportunity to argue that the record should be reopened for the introduction of additional evidence. An accusation is the procedural tool used under the APA to seek revocation of a license that has already been granted, and is directly analogous to the "statement of issues" used in this case to deny Ms. Y's license application.¹⁵ The APA's authorization for amendment of an accusation applies by analogy to authorize the amendment of a statement of issues. In addition, the Division's Amended Statement of Issues was served on Ms. Y's counsel long before the hearing was held in this matter, thus minimizing any prejudice that Ms. Y might have suffered as a result of the amendment.

Second, Ms. Y and her counsel were put on notice by the October 17, 2016 letter (the actual statement of issues) that the failure to disclose the conviction was a second basis for denial of her application. Although the letter describes the ground for denial as "[s]pecifically, your conviction-set aside of 'prostitution' in 2011," it also states that the application was denied "in accordance with ... AS 08.61.060(1)..."¹⁶ As noted above, this provision of the massage therapy licensing statutes provides that the Board "may" impose disciplinary sanctions on an already-licensed person if the Board finds the person "secured a license through deceit, fraud, or intentional misrepresentation." Although this case does not involve sanctions on an already-licensed massage therapist, the reference in the statute to "deceit, fraud, or intentional misrepresentation" put Ms. Y and her counsel on notice that the issue of failure to disclose played a role in the determination to deny her license application.¹⁷ Under these circumstances, Ms. Y would be hard-pressed to demonstrate that she was prejudiced by the consideration of the failure to disclose issue at the hearing.

¹⁵ See AS 44.62.360 ("Accusation") and AS 44.62.370 ("Statement of issues").

¹⁶ AR p. 78.

¹⁷ Even if AS 08.61.060(1) were construed to not provide grounds for denial of an application, as distinguished from sanctions on an already-licensed person, the Board could still consider the failure to disclose as effecting the applicant's ability to practice competently and safely.

Counsel also argued that the Amended Statement of Issues is ambiguous, in that it states that “the Board **may** deny Ms. Y’s application under AS 08.61.060” because she withheld reference to her prostitution conviction.¹⁸ The reason for the Division’s use of this terminology was not made clear at the hearing. The Division’s professional licensing coordinator, Ms. Kautz, testified emphatically that the Board actually considered the failure to disclose issue in denying Ms. Y’s application, although she did not make clear how she had knowledge of their deliberations. In any event, there is nothing inaccurate or misleading in the statement that the Board “may deny” the application due to the failure to disclose issue. The Division may simply have intended to put Ms. Y on notice that, regardless of whether the Board had taken that issue into account in its initial denial decision, the Board would likely take it into account in reviewing the case after the hearing.

For all of the above reasons, Ms. Y’s failure to disclose her conviction on her application was an appropriate issue for hearing.

B. Ms. Y’s failure to disclose her conviction is not a bar to licensure

Although it would be reasonable to expect a person with Ms. Y’s level of English fluency to understand what a criminal conviction is, it is also reasonable to not expect such a person to understand the more nuanced terms “suspended imposition of sentence” or “conviction-set aside.”¹⁹ In fact, Ms. Y simply did not understand these terms, and she did not understand that her conviction that had been set aside after the suspension period required an affirmative response to the question on the application regarding criminal convictions. Notwithstanding the Division’s allegation in the Amended Statement of Issues that Ms. Y “**purposely** withheld reference to her 2011 prostitution conviction” in her licensing application, no evidence was presented to support the assertion that she purposely or intentionally withheld that information. Nor did the Division adduce any evidence that Ms. Y’s lack of understanding of English was feigned or exaggerated. Ms. Y’s testimony to the effect that she did not understand that her conviction had to be disclosed was credible. Under these circumstances, the Board should not give any weight to Ms. Y’s failure to disclose the conviction on her application.

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¹⁸ November 17, 2016 Amended Statement of Issues (emphasis added).

¹⁹ In particular, the latter term, which appears in Ms. Y’s criminal case in Courtview, implies that the conviction ceases to exist, and could easily lead a person to believe that the conviction need not be disclosed.

C. Ms. Y's ability to practice competently and safely as a massage therapist

As previously noted, the Board can grant an application to a person who has been convicted of a prostitution offense if the Board finds that “the conviction does not affect the person’s ability to practice competently and safely.”²⁰ This provision clearly puts the burden on Ms. Y to demonstrate that her conviction does not affect her “ability to practice competently and safely.”

Ms. Y established that she has practiced massage therapy within the bounds of the law since her 2011 conviction, and that she has taken steps to ensure that her employees have done so as well. Ms. Y demonstrated that she has had only one criminal conviction over the course of over 20 years of practicing massage therapy, and she established that she has no intention of repeating her past mistake and breaking the law again. The Division presented no evidence to counter Ms. Y’s showing that she has practiced since 2011 without any subsequent criminal charges or convictions.

Ms. Kautz, the Division’s professional licensing program coordinator, supervises the massage licensing program and staff. She testified that prostitution convictions raise a red flag because of the potential for a massage practice being a front for prostitution. Presumably this is a concern that the Board considered in formulating its regulations and in exercising its discretion in addressing license applications.

However, neither the licensing statutes nor the regulations provide any guidance to the Board in the exercise of its discretion in this context; they merely provide that the Board must determine whether Ms. Y can practice the profession “competently and safely,” despite her conviction. The Board has discussed informal policies regarding how it will treat certain criminal convictions, but those policies do not address prostitution convictions, nor do they set a bright line rule for whether such applicants should have their licenses denied.²¹ While the Board has disciplinary actions listed on its website, that list does not contain any information regarding the factual basis for the discipline imposed in those cases, nor any details on the actual discipline except for “denied,” “surrendered,” and “probation.” It is important to note that this decision appears to be one of the first in Alaska to address the impact of a misdemeanor criminal

²⁰ AS 08.61.030(9).

²¹ See Board Minutes from November 5-6, 2015, p. 6 (available online at https://www.commerce.alaska.gov/web/Portals/5/pub/MAS_Minutes_11.5.15.pdf); see also draft Board Minutes from March 6-7, 2015, pp. 7 – 8 (available online at https://www.commerce.alaska.gov/web/Portals/5/pub/MAS_Minutes_2017-03.pdf).

conviction for prostitution on an application for a license, after the applicant has been provided a hearing.²² Accordingly, there is no precedent to assist the Board in making this decision.

There are several out-of-state cases that provide information on how other jurisdictions have handled similar scenarios.²³ In a 2005 Arizona case, where a person already holding a massage license had pled no contest to a misdemeanor criminal charge for prostitution in 2005, arising out of a 2004 incident, and had failed to advise the Arizona State Massage Therapy Board of that charge, the Board exercised its discretionary authority and revoked the licensee's license for two years. That licensee was an immigrant, like Ms. Y, and was the sole financial support for her family.²⁴ In a Maryland case, an April 2000 applicant for a massage therapy license had a 1999 prostitution conviction. The Maryland Board exercised its discretion to deny her application, and the denial was upheld on appeal.²⁵ In a Nevada case, a person with a 2007 prostitution-related criminal citation applied for a massage license in 2014 without disclosing the citation. The Massage Therapy Board approved her license, subject to two years of probation.²⁶

The Board has several options available to it, which are set out in AS 08.01.075: it can grant the license, deny the license, impose a fine, place limitations or conditions on the license, or impose probation. The Board "shall seek consistency in the application of disciplinary sanctions."²⁷

The Board should take the following factors into account when reviewing Ms. Y's appeal:

1. Ms. Y's criminal conviction arose out of an incident that occurred when she was working in a massage business – a matter of serious concern to this Board, based on the common linkage between massage businesses and prostitution enterprises.

²² The Board of Massage Therapists is relatively new and has had very few cases in front of the Office of Administrative Hearings. Only one case referred by the Board to the Office of Administrative Hearings has reached the point of a proposed decision being issued, and the Board has not yet had an opportunity to address that decision.

²³ There was very little information available online. Many states merely have local massage licensing programs rather than statewide programs; and most of the statewide programs that do exist do not post their discipline actions online.

²⁴ *In the Matter of Le*, Arizona Office of Administrative Hearings Case No. 05A-005-MTB (Arizona Massage Therapy Board 2006). That decision is available online at <https://portal.azoah.com/search1400/Default.aspx> (enter the case no. at the search page).

²⁵ *Stidwell v. Maryland State Bd. Of Chiropractic Examiners*, 799 A.2d 444 (MD Ct. of Special Appeals 2002).

²⁶ See Nevada State Board of Massage Therapists minutes of February 6, 2015 meeting, pp. 12 – 13. (http://massagetherapy.nv.gov/uploadedFiles/massagetherapy.nv.gov/content/About/Board_Meetings/2015-02-06%20Minutes%20NSBMT.pdf).

²⁷ AS 08.01.075(f).

2. Ms. Y's conviction is now nearly six years old (July 2011), and the underlying incidents occurred six and a half years ago (January 2011).

3. Ms. Y has not had any subsequent criminal charges or convictions of any kind, despite continuing to work as a massage therapist. In addition, Ms. Y credibly presented herself as determined not to repeat her earlier mistakes.

4. The Board has an informal adopted policy that provides that applicants with criminal convictions for personal offenses such as harassment and assault, within the past five years, be investigated. However, it has not adopted any explicit policies on the effect of such convictions on licensure.

The Board has yet to set consistent practices applicable to applicants and licensees who have presented their cases through the administrative hearing process. This case provides the Board with the opportunity to begin establishing consistent discipline practices.

The facts, specifically the passage of time since Ms. Y's conviction, the age of the underlying offense, the lack of subsequent offenses, and Ms. Y's commitment to practice within the bounds of the law, demonstrate, by a preponderance of the evidence, that Ms. Y can practice the massage profession competently and safely. However, her prostitution conviction leaves some lingering uncertainty in this regard and provides a legitimate basis for concern on the Board's part. Because the underlying offense occurred over six years ago, granting a license with a three-year probationary period would assuage those concerns. The probation conditions should be that an arrest for a crime involving moral turpitude, as defined by the Board's regulations, would be grounds for summary suspension, that a conviction would be grounds for immediate revocation, and that Ms. Y must regularly report to the Board regarding her compliance with the probation conditions, as contemplated in AS 08.01.075(a)(7).

IV. Conclusion

Ms. Y's license application is approved. However, her license is placed on a probation status, subject to the condition that she neither be arrested or convicted for any crime involving moral turpitude as it is defined in the Board's regulations for a three-year period from the date of adoption of this decision. Upon arrest for such a crime during the probationary period, her license shall be immediately suspended without further action by the Board, subject to a right to a hearing under AS 08.01.075(c). Upon conviction of such a crime for conduct occurring during

the probationary period, her license shall be revoked. Ms. Y shall regularly report to the Board regarding her compliance with these probation conditions.

Dated this 10th day of May, 2017.

By: Signed
Andrew M. Lebo
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]