

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, Lawrence A. Pederson, regarding case number OAH 16-1446-MAS in the matter of H M K. The board decided to uphold its original decision to deny Ms. K'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)
)
H M K)
_____)

OAH No. 16-1446-MAS
Agency No. 2016-001431

[REJECTED PROPOSED] DECISION

I. Introduction

H M K applied for an Alaska license as a massage therapist. Ms. K has two prostitution convictions in California, both for incidents which occurred in 2011. Based upon those two convictions, the Alaska Board of Massage Therapists (Board) denied her application. Ms. K requested an evidentiary hearing to challenge that denial.

Ms. K’s hearing was held on February 9, 2017. Ms. K represented herself. Assistant Attorney General Harriet Milks represented the Division of Corporations, Business & Professional Licensing.

It is undisputed that Ms. K has two prostitution convictions. These are crimes involving moral turpitude, as defined by the Board’s licensing regulations. However, given Ms. K’s changed circumstances, she has demonstrated that she can practice the profession of Massage Therapy competently and safely. Regardless, given the fact that only five years have elapsed since her convictions, this is a case where it is appropriate to issue only a limited license, with Ms. K being placed on probation for two years.

II. Facts

Ms. K was born and raised in Korea. She came to the United States in 1988, when she was a teenager. She returned to Korea and then moved to the United States permanently in 2000, when she was approximately 27 years old. She worked as a waitress and in the import clothing field until 2010. She fell into dire financial straits and filed bankruptcy. In 2011, she was the sole support of her seven-person family, which included her two young children, was in desperate need of income, and was working in the massage field in Los Angeles.¹

While Ms. K was working as a massage therapist in Los Angeles, she was arrested twice for prostitution in 2011, once in July and again in October. Both of these arrests occurred while she was working at a massage business. She pleaded guilty to, and was convicted of, a

¹ Ms. K’s testimony.

misdemeanor charge of prostitution in both cases. She received a suspended imposition of sentence for the July incident on February 2, 2012, where she was placed on probation for 36 months. She received a suspended imposition of sentence for the October incident on August 28, 2012, where she was placed on probation for 36 months.² Ms. K does not have any subsequent criminal convictions.

Ms. K's circumstances have changed dramatically since 2011. She has a small boutique clothing store in Los Angeles, and she has also worked in Alaska since 2013 as a massage therapist. She holds a business license.³ She explained that she worked at several massage businesses, and that they required her to be a subcontractor with her own business license. She is engaged to be married to an Alaska resident and plans to move to Alaska full time. She intends to practice massage in Alaska. Ms. K has no intention of repeating her earlier mistakes.⁴ Ms. K's fiancée was present with her at the hearing, was supportive of her, and is aware of her history.

Ms. K appeared for her hearing in-person. It was possible to observe her reactions to questions and other persons' statements. While she could understand and follow the proceedings, it was clear that her English speaking and comprehension skills were limited. Ms. K, based upon an observation of her demeanor and her answers to questioning, was a credible witness.

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.⁵ 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.⁶ Accordingly, for an applicant with a prostitution conviction to receive a massage therapist's license, the Board must find that "the conviction does not affect the person's ability to practice competently and safely."⁷

² Record, pp. 13 – 22.

³ Record, pp. 4 – 7.

⁴ Ms. K's testimony.

⁵ Moral turpitude is generally defined as "[c]onduct that is contrary to justice, honesty, or morality." *Black's Law Dictionary* 1101 (9th Edition).

⁶ 12 AAC 79.910(11).

⁷ AS 08.61.030(9).

Ms. K has two prostitution convictions. As the applicant, it is her obligation to demonstrate that those convictions do not affect her “ability to practice competently and safely.”

The Massage Therapists Board’s licensing scheme does not limit how far the Board can look back when considering an applicant’s criminal convictions. The Board, however, has some informal guidelines, not adopted into regulation, which generally require that applicants who have a conviction within five years for petty crimes/misdemeanors, and specific other crimes, including harassment (five years), burglary (10 years), and assault (five years), be subject to investigation. Those same guidelines do not address prostitution convictions. Nor do they set a bright line rule for whether such applicants should have their applications denied.⁸

Colleen Kautz, the Division’s professional licensing program coordinator, supervises the massage 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. Ms. K’s two convictions, which were close together in time, suggested a pattern of behavior in her opinion. Ms. Kautz stated that the Board had not granted any applications where the applicant had a criminal conviction less than seven years old.⁹ However, she did not provide any context, such as whether the Board has ever considered an application from an applicant with a conviction less than seven years old.

Ms. K’s latest conviction occurred on August 28, 2012. She began working as a massage therapist in Alaska in 2013, without any subsequent criminal charges or convictions. Neither the licensing statutes nor the regulations provide any guidance to the Board in the exercise of its discretion, merely that it must determine whether Ms. K can practice the profession “competently and safely” despite her conviction. The Board’s informal policy on criminal convictions does not address prostitution convictions. 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, nor any details on the actual discipline except for “denied,” “surrendered,” and “probation.” This decision appears to be the first that addresses the impact of a misdemeanor criminal conviction for prostitution on an application for a license, after the

⁸ 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); also see 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).

⁹ Ms. Kautz’s testimony.

applicant has been provided a hearing.¹⁰ Accordingly, there is no precedent to assist the Board in making this decision.

After research, there are several out-of-state cases that provide information on how other jurisdictions have handled similar cases.¹¹ In a 2005 Arizona case, where a person already holding a massage license had a misdemeanor criminal conviction for prostitution in 2005, arising out of a 2004 incident, the Arizona State Massage Therapy Board exercised its discretionary authority and revoked the licensee's license for two years. That licensee, like Ms. K, was an immigrant who was the sole financial support for her family.¹² 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. That denial was upheld on appeal.¹³ In a Nevada case, a person with a 2007 prostitution-related conviction applied for massage licensure in 2014. The Massage Therapy Board approved her license, subject to two years' probation.¹⁴

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 conditions on the license, or impose probation. The Board "shall seek consistency in the application of disciplinary sanctions."¹⁵

The Board should take the following factors into account, when resolving this case:

1. Ms. K's criminal convictions arose out of incidents that occurred when she was working in a massage business – a matter of concern to this Board, since prostitution enterprises can and do masquerade as massage businesses.
2. Ms. K's convictions are five years old (February 2012) and approximately four and one-half years old (August 2012). The underlying incidents occurred more than five years ago.

¹⁰ The Massage Therapists Board is relatively new and has had very few cases in front of the Office of Administrative Hearings. While there are other Massage Therapists Board cases pending in front of the Office of Administrative Hearings, none have reached the point of a decision being issued.

¹¹ There was a dearth of available information online. Not all states have statewide massage licensing programs, merely local ones. Those that do, do not generally post their discipline actions online.

¹² *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).

¹³ *Stidwell v. Maryland State Bd. Of Chiropractic Examiners*, 799 A.2d 444 (MD Ct. of Special Appeals 2002).

¹⁴ 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).

¹⁵ AS 08.01.075(f).

3. Ms. K has not had any subsequent criminal convictions of any kind, despite continuing to work as a massage therapist. In addition, Ms. K's life has changed considerably since her convictions. She 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 five years, be investigated. It, however, has not adopted any explicit policies of the effect of those convictions.

Although Ms. Kautz testified that the Board has not granted any applications where the applicant had a criminal conviction less than seven years old, that practice should not be considered as dispositive in this case because the Board has yet to set consistent practices after applicants and licensees 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. K's convictions, the age of the underlying offenses, the lack of subsequent offenses, and the change in Ms. K's life, demonstrate, by a preponderance of the evidence, that Ms. K can practice the massage profession competently and safely. Regardless, her prostitution convictions leave some lingering uncertainty in this regard and provide a legitimate basis for concern on the Board's part. Because the underlying offenses occurred five years ago, granting a license with a two-year probationary period would assuage those concerns. The probation condition would be that an arrest for a crime involving moral turpitude, as defined by the Board's regulations, would be grounds for summary suspension, and that a conviction would be grounds for immediate revocation.

IV. Conclusion

Ms. K'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 two-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.

Dated this 6th day of April, 2017. By: Signed _____
Lawrence A. Pederson
Administrative Law Judge

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