

# MASSAGE THERAPY BOARD

2550 Cerrillo Road, Hearing Room #2  
Santa Fe, New Mexico  
July 2, 2004 – 9:00 a.m.

## MINUTES

**MEMBERS PRESENT:** Kathleen McCafferty, Chair  
Edward Kaul  
Quinn Lopez  
Randy Barnes

**MEMBERS ABSENT:** W.D."Peter" Lane, Vice-Chair

**OTHERS PRESENT:** Geraldine Mascarenas, Compliance Officer  
Carmen Payne, Board Administrator  
Mona Valicenti, Assistant AG, Civil

**GUESTS:** None

## CALL TO ORDER

Kathleen McCafferty called the meeting to order at 9:15 a.m., to consider the matter of Robert J. Bookwalter, License No. 403, Case No. 01-11-05. A quorum was present with at least one member being a public member.

## EXECUTIVE SESSION pursuant to § 10-15-1.H (1) and (3) of the Open Meetings Act

### A. Matters Related to the Issuance, Suspension, Renewal, or Revocation of Licenses:

#### 1. Robert J. Bookwalter, License No. 403, Case No. 01-11-05

MOTION was made by Edward Kaul, SECONDED by Kathleen McCafferty to enter into Executive Session pursuant to Sections 10-15-1.H (1) and (3) of the Open Meetings Act, to discuss: Matters Related to the Issuance, Suspension, Renewal, or Revocation of Licenses.

The vote was: Edward Kaul, yes; Kathleen McCafferty, yes; Randy Barnes, yes; and Quinn Lopez, yes.

MOTION CARRIED UNANIMOUSLY.

MOTION was made by Kathleen McCafferty, SECONDED by Edward Kaul, to reconvene back into Regular Session. The Board reconvened back into Regular Session at 10:00 a.m.

Quinn Lopez stated for the record that the item discussed in Executive Session was limited to the item listed in the motion for Executive Session.

## EXECUTIVE SESSION – ACTION ITEMS

### A. Matters Related to the Issuance, Suspension, Renewal, or Revocation of Licenses:

#### 1. Robert J. Bookwalter, License No. 403, Case No. 01-11-05

MOTION was made by Quinn Lopez, SECONDED by Kathleen McCafferty, to consider the Findings of Fact in the matter of Robert J. Bookwalter, License No. 403, Case No. 01-11-05. MOTION CARRIED UNANIMOUSLY.

**(a) Findings of Fact:**

“THIS MATTER having come before a special meeting of the New Mexico Massage Therapy Board (the Board) on July 2, 2004, in Santa Fe, New Mexico on a Notice of Contemplated Action issued on or about October 27, 2003; a hearing on the merits having been held on March 31, 2004 and May 14, 2004 at the New Mexico Real Estate Commission, 111 Lomas Blvd., NW, Suite 410, Albuquerque, New Mexico before Quinn Lopez, board member, as presiding officer, with board members Kathleen McCafferty, Chair, Randy Barnes and Edward Kaul also present; Mona Valicenti, Assistant Attorney General, was present to advise the hearing officer and the Board; the Board having reviewed all the evidence taken at the hearing, the Board hereby enters the following Findings of Fact, Conclusions of Law and Final Order.

**FINDINGS OF FACT:**

**A. Procedural History**

1. A Notice of Contemplated Action (“NCA”) was issued in this matter on or about October 27, 2003. [TRI State’s Ex. 1]<sup>1</sup>.
2. At all times material to the allegations contained in the NCA, Respondent Robert J. Bookwalter (Respondent) was a licensed Massage Therapist in New Mexico, holding License No. 403.
3. The Board licensed respondent in 1992. [TRI State’s Ex. 3].
4. Respondent timely requested a hearing concerning the Board’s allegations and the Board scheduled a hearing.
5. On March 31, 2004, and May 14, 2004, a hearing was conducted before Quinn Lopez, hearing officer, and the aforementioned board members at the New Mexico Real Estate Commission in Albuquerque, New Mexico.

**B. Substantive Findings**

6. On or about October 26, 2001, complainant, Kimberly Pierce, went to Indulgences Day Spa, having received a gift certificate for the spa. [TRI p. 49, l. 16-23].
7. Complainant testified that she had not received any massages before, and has not since. [TRI p. 49, l. 24-5; p. 50, l.1-3].
8. The first treatment Ms. Pierce received was an exfoliating treatment. After respondent was done with the skin treatment, Ms. Pierce showered to remove the product respondent had used. [TRI p. 51, l. 11-15].
9. Then respondent proceeded with the massage. Ms. Pierce testified that respondent told her to lay on her stomach. Respondent then massaged her legs and her back and “he seemed to go lower than maybe was appropriate on my breasts.” [TRI p. 51, l. 18-23].
10. Ms. Pierce further testified that when respondent was done with her back, he told Ms. Pierce to roll over. [TRI p. 51, l. 25; p. 52, l.1]. Respondent massaged Ms. Pierce’s legs again, then moved to her arms. Then “he came around behind me and ran his hands down between my breasts” doing that a couple of times. “Then he moved to the side of me, and that’s when he pulled the towel down that was over me. He ran his fingers over my breast as he had done on my arms.” [TRI p. 52, l.5-10].
11. Ms. Pierce also testified that “then he proceeded to touch my crotch, and that’s when I sat up on the table and he covered me back up. ... He commented on what a beautiful body I had.” [TRI p. 52, l.11-15].
12. Ms. Pierce testified that Respondent told her they were done and that he would meet her in the hall with her clothes bag. Ms. Pierce had a manicure scheduled following the massage. [TRI p. 52, l. 15-19].

13. After Ms. Pierce got dressed, respondent took her over to the manicurist who then asked Ms. Pierce how the massage went. That's when, Ms. Pierce told the manicurist what respondent had done and asked whether uncovering someone during a massage was appropriate. The manicurist went to get the manager, Lauren Nosbisch, and Ms. Pierce was taken, through a back door, to another office where she described what had happened. [TRI p. 52, l. 20-25; p. 53, l. 1-6].
14. Ms. Pierce testified that she felt awful after that. [TRI. 53, l. 17-21]. She testified that she would not get a massage today because "she couldn't handle being in that situation again." [TRI p. 53, l. 22-5; p. 54, l. 1-2]. She also demonstrated how respondent touched her inappropriately. [TRI p. 54, l. 3-25; p.55, l.1-15].
15. Ms. Pierce testified that respondent did not say anything, nor ask for her consent, when he undraped her, pulling the towel down to the middle of her thighs. [TRI p. 55, l. 16-25; p. 56, l. 1-10].
16. Ms. Pierce was undraped fully on her front down to the middle of her thighs. [TRI p. 56, l. 7-10]. Ms. Pierce testified that respondent touched her all over her breast, and between her legs, which caused her to feel terrified, and she just froze. [TRI p. 56, l. 20-25; p. 57, l. 1-18].
17. When questioned by board members, Ms. Pierce testified that respondent touched her nipples and as respondent was standing at her side, touched both breasts at the same time. [TRI p. 91, l. 6-10, 19-25; p. 92, l. 1-8].
18. Ms. Nosbisch testified by telephone, that she was the general manager at Indulgences Day Spa, in 2001, and was familiar with the incident concerning Ms. Kim Pierce. [TRI p. 118, l. 7-21]. She also testified that she was "not completely" surprised by Ms. Pierce's accusation [TRI p. 142, l. 20-2] because, another client who had received numerous massages had filed a complaint with Janet Sisneros, stating that a massage she had received from respondent was too sensual; she wouldn't elaborate. [TRI p. 143, l.14-25; p. 144, l. 1-4]. Ms. Nosbisch added that the Spa documented the client's report and notified respondent. [TRI p. 144, l. 5-8], Ex. 5.
19. When Ms. Nosbisch met Ms. Pierce, she asked her what was wrong, "because obviously something was very wrong. She was crying. Tears were flowing down her cheek. She seemed to be trembling, just very, very upset." [TRI p. 121, l. 15-25].
20. Ms. Pierce cried while testifying, even though the events occurred about two and a half years ago. [TRI p. 75, l. 18-22].
21. *Respondent testified that he took a six-week course to learn massage therapy at Crystal Mountain and he began performing massages at the same time in 1990. [TRII p. 42, l. 3-7]. He has not had any other formal training in massage therapy, nor received national board certification. [TRII p. 91, l. 13-25]. He was grandfathered into the Massage Therapy Board to get his license. [TRII p. 95, l. 14-25].*
22. Since 1990, respondent has only done between 1,000 to 2,000 chair and table massages. [TRII p. 44, l. 21-25; p.45, l. 1-4].
23. Respondent testified that he performed as a massage therapist at over six establishments while holding a private practice. [TRII p. 45, l.22-25; p. 46, l.1-7].
24. On October 26, 2001, respondent testified he had Ms. Pierce as a client for a two-hour session, a one-hour body hydration and a one-hour massage. [TRII p. 53, l. 21-25]. Respondent testified that he did not receive an intake form from Ms. Pierce before the session began. [TRII p. 49, l. 20-22]. He testified that she was a new client to the Spa but he didn't know whether she had ever had received a massage or body hydration before [TRII p. 97, l. 12-17].
25. Before ending Ms. Pierce's massage, respondent proceeded with lymphatic work, a procedure to drain lymph nodes. Respondent began training in lymphatic work in September 2000. [TRII p. 60, l. 21-5; p. 61, l.1-10]. He then completed the massage with general polarity and energy release. [TRII p. 65, l.11-3]. Respondent testified that he had received very little training in polarity. [ TRII p. 86, l. 14-19].

26. After the massage was over, and Ms. Pierce got dressed, respondent took her to the manicurist so she would get her nails done. Then, respondent proceeded to clean up his room and leave as he was done for the day. [TRII p. 68, l. 1-8]. On his way home, he received a telephone call from his supervisor, Lauren Nosbisch, who fired him from Indulgences Day Spa because he had improperly worked on a client. [TRII p. 68, l.13-23].
27. Respondent denied improperly exposing, touching or commenting on Ms. Pierce's body at any time during the two-hour session. [TRII p. 97, l. 20-25; p. 98, l. 1-16].
28. In his letter to the Board, respondent stated that his "record has been free of incident reports until October 26, 2001." [TRI p. 97, l. 4-6], Ex.3.
29. Respondent also testified that the bottom statement on a report dated 6/19/01 was in his handwriting [TRI p. 99, l. 1-6]. The statement referred to a client's complaint about a massage he had given on that day. [TRI p. 97, l. 10-25], Ex.5.
30. Indulgences Day Spa filed a complaint against respondent with the Massage Therapy Board. [TRI p. 59 , l. 12-3 ; TRII p. 69, l. 12-21].
31. The Massage Therapy Board finds the complainant's testimony is credible based on the facts and circumstances surrounding the incident. Complainant had never had a massage prior to the incident. Despite this fact, complainant underwent a one hour exfoliation treatment immediately followed by a one hour massage therapy session that included lymphatic technique based on respondent's own judgment without complainant's informed consent. Complainant immediately reported the incident to the manicurist and the manager at the spa, as corroborated by the manager's testimony. The manager also testified that the complainant reacted by crying and being nervous after the incident, which is corroborated by complainant's own testimony and demeanor during the hearing. In addition, the Massage Therapy Board finds no bias or motive for complainant to be dishonest."

MOTION was made by Kathleen McCafferty, SECONDED by Edward Kaul, to accept the Findings of Fact, in the matter of Robert J. Bookwalter, License No. 403, Case No. 01-11-05, as read into the record.

The vote was: Kathleen McCafferty, yes; Edward Kaul; Randy Barnes, yes; and Quinn Lopez, yes, and the MOTION CARRIED UNANIMOUSLY.

**(b) Conclusions of Law:**

MOTION was made by Randy Barnes, SECONDED by Edward Kaul, to consider the Conclusions of Law in the matter of Robert J. Bookwalter, License No. 403, Case No. 01-11-05. MOTION CARRIED UNANIMOUSLY.

**“CONCLUSIONS OF LAW**

1. The Massage Therapy Board has jurisdiction over respondent and subject matter.
2. The Board has authority under the Uniform Licensing Act, Section 61-1-1 through 61-1-33 NMSA 1978 (“ULA”) and the Massage Therapy Practice Act, Section 61-12C-1 through 61-12C-28 NMSA 1978 to conduct hearings upon complaints concerning massage therapists.
3. The Board has complied with all notice and hearing requirements of the ULA and has afforded respondent all applicable due process rights.
4. By law, the Board has the responsibility to weigh the evidence and determine issues of credibility; the courts are not permitted to reweigh the evidence or substitute their own judgment for the Board's. Anaya v. New Mexico State Personnel Board, 107 N.M. 622 625, 762 P.2d 909, 912 (Ct. App.) cert. Denied, 107 N.M. 622, 762 P.2d 909 (1988); accord, Herman v. Miners Hospital, 111 N.M. 550, 552, 807 P.2d 734, 736 (1991)(“although the evidence may support inconsistent findings, we will not disturb the agency's findings if supported by substantial evidence on the record as a whole.”)

5. The Board may utilize its experience, technical competence and specialized knowledge in evaluating the evidence and resolving disputed questions of fact. Section 61-1-11(C) NMSA 1978; Gonzales v. New Mexico Board of Chiropractic Examiners, 125 N.M. 418, 962 P.2d 1253 (1998)(Boards are not required to use expert testimony to determine standard of professional care in disciplinary proceedings.)
6. Respondent failed to obtain his client's "prior informed consent" regarding treatment, in violation of the Board's Code of Professional Conduct, 16 NMAC 7.2.8 (C)(2).
7. Respondent's contact with Complainant's breasts and crotch constituted unprofessional conduct in violation of section 61-12C-24(B)(6) NMSA 1978.
8. Respondent's contact with Complainant's breasts and crotch area constituted gross negligence or incompetent conduct in violation of Section 61-12C-24(B)(10) NMSA 1978.
9. The Massage Therapy Board finds that respondent lacked competence, knowledge and proper techniques in massage therapy pursuant to 16 NMAC 7.2.8(A)(1).
10. Respondent violated applicable statutes and administrative regulations governing the practice of massage therapy. 16 NMAC 7.2.8(F).
11. Pursuant to section 61-12C-24, the Board is vested with authority to suspend or revoke a license where the licensee is guilty of unprofessional conduct, or is grossly negligent.
12. Pursuant to Section 61-12C-24(E) NMSA 1978 and 61-1-4(G), the Board may impose all costs of the disciplinary proceedings on licensee."

MOTION was made by Edward Kaul, SECONDED by Kathleen McCafferty, to accept the Conclusions of Law, in the matter of Robert J. Bookwalter, License No. 403, Case No. 01-11-05, as read into the record.

The vote was: Kathleen McCafferty, yes; Edward Kaul; Randy Barnes, yes; and Quinn Lopez, yes, and the MOTION CARRIED UNANIMOUSLY.

**(c) Order:**

MOTION was made by Kathleen McCafferty, SECONDED by Edward Kaul, to consider the Order in the matter of Robert J. Bookwalter, License No. 403, Case No. 01-11-05. MOTION CARRIED UNANIMOUSLY.

**"ORDER**

A quorum of the board familiar with the record, hereby renders the following decision and order based on the hearing, findings of fact and conclusions of law. IT IS ORDERED THAT:

1. Respondent's license to practice massage therapy in New Mexico is suspended for a period of six months. Within thirty days (30) of receipt of this Order, Respondent shall surrender his license to the Board in person or by Certified Mail and shall cease all activities requiring a license for said six months.
2. During the period of suspension, Respondent shall complete and pass the National Certification Examination for Therapeutic Massage and Bodywork, which will include ethics, boundaries and draping.
3. This action is a disciplinary action and is a public record pursuant to the Inspection of Public Records Act, and shall be reported to the National Practitioner Data Bank, Healthcare Integrity and Protection Data Bank and any other appropriate entities.
4. Respondent shall pay all costs of this proceeding in the amount of \$4,855.00 as shown by attached AFFIDAVIT of Geraldine Mascarenas, Board Administrator. Costs shall be paid within sixty (60) days of the date of this Order."

MOTION was made by Kathleen McCafferty, SECONDED by Edward Kaul, to accept the Order, in the matter of Robert J. Bookwalter, License No. 403, Case No. 01-11-05, as read into the record.

The vote was: Kathleen McCafferty, yes; Edward Kaul; Randy Barnes, yes; and Quinn Lopez, yes, and the MOTION CARRIED UNANIMOUSLY.

**ADJOURNMENT**

There being no further business before the Board Quinn Lopez adjourned the meeting at 11:00 a.m.

**Submitted by Geraldine Mascarenas, Program Manager  
Approved by the Board on August 20, 2004  
Accepted by the Board Chair, Kathleen M. McCafferty on August 20, 2004**