

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for the Petition for the
Early Termination or Modification of Probation of:

KWEON YOUNG YOO

Acupuncture License No. AC-6721

Case No. 1A-2002-132 & 1A-2002-139

OAH No. 2011010071

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby
adopted by the Acupuncture Board as its Decision in the above-entitled matter.

This Decision shall become effective APR 24 2011.

IT IS SO ORDERED.

Date: MAR 25 2011



ROBERT BREWER, Chair
Acupuncture Board
Department of Consumer Affairs
State of California

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for the Early
Termination or Modification of Probation of:

KWEON YOUNG YOO

Acupuncture License No. AC-6721

Petitioner.

Case Nos. 1A-2002-132 & 1 A-2002-139

OAH No. 2011010071

DECISION

On February 24, 2011, a quorum of the Acupuncture Board, Department of Consumer Affairs, State of California, heard the Petition of Kweon Young Yoo for the Early Termination of Probation or the Modification of Probation. Those present included Acupuncture Board President Robert Brewer, Board Members Charles Kim, George Wedemehyer, AnYork Lee, Paul Weisman, Nancy Carroll, and Frank He, and Administrative Law Judge James Ahler, Office of Administrative Hearings, State of California, who presided over the hearing on the petition.

Claire H. Kim, Attorney at Law, represented petitioner, Kweon Young Yoo, who was present throughout the hearing.

Lori J. Forcucci, Deputy Attorney General, Department of Justice, State of California, represented the Office of the Attorney General, State of California.

The matter was submitted on February 24, 2011.

FACTUAL FINDINGS

Background and License History

1. On June 1, 1999, the Acupuncture Board issued Acupuncture License No. AC-6721 to petitioner, Kweon Young Yoo.

2. On April 9, 2003, petitioner was convicted by a jury of four counts of violating Penal Code section 242 (Battery), a lesser included offense of Sexual Battery, in the Superior Court of California, County of Los Angeles, in Case No. 2CR02888.

On May 14, 2003, the Superior Court suspended imposition of sentence and placed petitioner on 24 months summary probation. Terms and conditions of petitioner's probation required him to pay a fine of \$1,000, not to annoy Kang Choy, to stay 100 yards away from and have no contact with Kang Choy, to pay \$100 restitution, and not to treat female patients without another female being present.

On April 25, 2005, the Superior Court found that petitioner fulfilled the terms of his criminal probation and granted his petition to expunge the conviction under Penal Code section 1203.4.

3. The Acupuncture Board's Executive Officer signed the Accusation in Case Nos. 1A-2002-132 and A-2002-139. The Accusation sought the suspension or revocation of petitioner's license. A four day disciplinary proceeding was conducted on November 1 and 2, 2006, and on February 14 and 15, 2007, before Administrative Law Judge H. Stuart Waxman, Office of Administrative Hearings, State of California.

4. On May 23, 2007, the Acupuncture Board adopted ALJ Waxman's Proposed Decision. The Board's Decision became effective on April 23, 2007.

The Decision stated in part:

Respondent's Background

3. Respondent has been practicing acupuncture for approximately 25 years having received his initial training in his native Korea. He estimates he has seen approximately 30,000 to 50,000 patients during the course of his career, 80-90 percent of whom were female.

Patient MJK

4. On March 20, 2002, female patient MJK presented at respondent's office. She complained of low back pain as a result of an automobile accident in which she had been involved several weeks earlier. Later during the visit, MJK also told respondent that she was suffering from stomach pain, nausea and vomiting. Respondent had been recommended to MJK by a man with whom she was romantically involved. MJK had met respondent during a few social occasions, and she had seen him for low back pain once before.

5. Respondent asked MJK to change from her blue jeans into loose fitting shorts with an elastic waist band, which were kept at the clinic for patients' use. After checking her leg length and flexion, respondent asked MJK to assume a prone position on the treatment table. He then "shook" her muscles, beginning with her toes and moving upward, in order to get the muscles to relax. During that process, he occasionally put manual pressure on them. He did not, at that time, touch any part of the patient's body between the thigh and hip areas. Respondent then asked MJK to turn over to the supine position. Once she was in that position, he massaged her neck and shoulders.

6. Respondent continued to massage MJK, moving below the clavicle and onto her breast. He asked MJK if she had breast implants and told her that he was massaging that area to relieve tension because the tension could turn into cancer. He also told her he had performed the same procedure on his daughter for the same reason. Respondent suggested that MJK remove her bra to get it out of the way of the massage, and MJK complied with that suggestion. Respondent's hand then descended close to MJK's nipple, but did not touch it. MJK closed her fists and held her arms close to her chest. At that point, she was confused as to whether respondent was "treating" her or "touching" her (MJK's term).

7. Respondent removed his hand from the patient's breast and placed both hands on her abdomen, explaining that he was giving her his energy in the form of chi. While so doing, he placed one hand under her panties and touched MJK close to her vagina. MJK grabbed onto the shorts and said, "Doctor, why are you doing this?" Respondent suddenly grabbed MJK's arms, criss-crossed them across her chest, and placed his full weight onto her, holding her in place, against her will, while he called her princess and stated that she was pretty. He attempted to kiss her but she turned her head to avoid it. Respondent then rolled up MJK's t-shirt and sucked on her left breast. At that point, MJK managed to push respondent off, and asked him what he was doing. She quickly changed back into her own clothing and left the office.

8. Thereafter, MJK telephoned respondent approximately four times to discuss the matter. Except for the last conversation, in which he denied that he had acted inappropriately, he was evasive in his answers and told MJK to simply return to him for additional treatment and to abandon her "worthless words." (MJK's term.)

9. Respondent did not charge MJK for the March 20, 2002 office visit.

Patient YAC

10. On June 10, 2002, female patient YAC presented at respondent's office complaining of lower back pain. Respondent had YAC lie on floor mats in the prone position and he began to massage the patient's thighs with both hands. As his hand position ascended to the top of her thighs, respondent rubbed YAC's vagina under her shorts but on top of her underwear. YAC became alarmed but did nothing because she was not sure if respondent had acted intentionally and, because he was the "doctor," she assumed he "knew what he was doing."

11. Respondent then had YAC roll over to the supine position and massaged her lower back, descending to the coccyx area. While massaging that area, he placed one of his fingers into YAC's gluteal furrow. He repeated the process 5-7 times, occasionally touching the anus, before YAC clenched her gluteal muscles, ending that portion of the "treatment." Respondent then placed both of his hands under YAC's underwear and massaged her buttocks for several minutes.

12. On her way out, YAC encountered respondent in the parking lot where he was smoking a cigarette. Respondent positioned his face approximately one inch from YAC's face and told her she had to take care of her body. YAC interpreted respondent's words and body position as validation of her suspicion that she had been taken advantage of, and that respondent had touched her vagina, buttocks and anus for his own sexual gratification.

Credibility

13. Respondent denied attempting to kiss MJK, rolling up MJK's t-shirt and sucking on her breast, making comments about MJK's physical attractiveness, placing his hand inside MJK's panties, holding MJK down against her will, and being pushed away from MJK. However, he admitted that, during the course of a massage he could inadvertently touch an intimate part of a female patient's body. Respondent believes MJK left his office without incident, and that she did not appear to be angry when she left.

14. Respondent admitted touching YAC's buttocks, but claims he did so as a legitimate part of her treatment for low back pain. He denied inserting his finger into her anus. He admitted telling YAC to take care of her body, as he does to all of his patients, but he denied putting his face within one inch of hers.

15. The versions of MJK and YAC are deemed more credible than that of respondent for the following reasons:

a. The incidents involving MJK and YAC occurred within three months of each other. MJK and YAC did not know each other, yet their versions of what occurred are quite similar regarding the way respondent moved his hands to intimate areas of their bodies, the inappropriate touching, and his retreat and abandonment of the touching when the victims physically reacted to it.

b. At one point, respondent accused MJK of fabricating her story in order to obtain money from him. However, MJK did not sue respondent. (Neither did YAC.)

c. Absent a lawsuit, there was no motivation on the part of either victim to fabricate the story.

d. Respondent made statements to the police that he did not make during the criminal trial or the administrative hearing. For example, he told the investigating police officer that MJK invited him to touch her vaginal area but that he had declined to do so. He believed she had asked him to do so because he had

heard she was promiscuous and sexually active with many different men, and because she had recently separated from her boyfriend/spouse. He also told the investigating police officer that he did not immediately deny the allegations when MJK telephoned him because she suffered from mental problems, and he did not want to get her upset.

e. Respondent could have offered into evidence his patient records to bolster his version of the occurrences of March 20 and June 10, 2002, and to demonstrate the necessity and propriety of his actions, but he failed to do so. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.)

16. Although a significant amount of time was spent by respondent's counsel questioning the expert witnesses about the viability of acupuncture/acupressure point GV-1 as a source of low back pain relief, respondent did not testify that he attempted to access or utilize GV-1 in his treatment of either MJK or YAC.

The Conviction

17. Criminal charges were brought against respondent in connection with the incidents involving MJK and YAC. Respondent was charged with six counts of sexual battery (Pen. Code, § 243.4, subd. (d)), and six counts of sexual contact while holding oneself out as an acupuncturist (Bus & Prof. Code, § 729, subd. (a)).

18. The cases involving MJK and YAC were consolidated and the case proceeded to a jury trial. On April 9, 2003, the jury returned verdicts of not guilty to the sexual battery and the sexual exploitation counts. Guilty verdicts were returned on five counts of battery (Pen. Code, § 242), four of which were lesser included offenses to the sexual battery charges. The crimes of which respondent was convicted were substantially related to the qualifications, functions and duties of an acupuncturist.

19. Respondent was placed on summary probation for a period of 24 months under various terms and conditions including payment of a fine, restitution, and assessment totaling \$2,835, and a prohibition against treating female patients without another female present.

The Proposed Decision summarized the expert testimony and observed that the experts agreed that the kinds of conduct in which petitioner engaged with MJK and YAC was inappropriate. The Proposed Decision concluded that cause existed to impose discipline against petitioner's license (1) because petitioner was convicted of a crime that was substantially related to the qualifications, functions, and duties of an acupuncturist; and (2) because petitioner engaged in unprofessional conduct and was grossly negligent. The Proposed Decision concluded that petitioner's acts were egregious; however, since the incidents occurred within a three month period approximately five years before the hearing and because no evidence was offered to establish any other such incidents either before or after the ones involved in the disciplinary matter, it was concluded that it was not required that petitioner be entirely precluded from the practice of acupuncture/acupressure.

The Proposed Decision revoked petitioner's license, but stayed the order of revocation and placed petitioner's license on probation for a period of seven years. Terms and conditions of probation required petitioner to serve a 180 day actual suspension; complete an Ethics course; not have a solo practice; have a practice monitor; have a third party chaperone present whenever petitioner interacted with any female patient; maintain a log evidencing compliance with this condition of probation; complete a PACE professional boundaries program; obey all laws; file quarterly reports verifying compliance with the terms of probation; comply with the probation surveillance program; appear for and submit to interviews as required; not supervise or employ trainees; reimburse the Board for its costs of probation surveillance; and pay to the Board \$6,262 for its costs of enforcement.

5. The Board adopted the Proposed Decision in its entirety, even though the disciplinary outcome was far more lenient than the measure of discipline that might have been imposed now given the extremely serious nature of the offenses.

The Petition and Evidence of Rehabilitation

6. Petitioner filed a Petition for Penalty Relief on or about November 30, 2010, approximately three years, six months after probation was imposed. In his petition, petitioner represented that he had completed his period of criminal probation, that no criminal charges were pending against him, and that no civil malpractice actions had been filed. In his narrative statement, petitioner described his continuing professional education. He stated that he sought an early termination of probation or, in the alternative, removal of those conditions of probation requiring him to have a chaperone and a practice monitor. Petitioner represented that he worked with his daughter, who became a licensed acupuncturist on August 28, 2009, and did not engage in a solo practice. Petitioner stated that he wanted to do research in the field of oriental medicine, mental training and medicine, and that he planned to live in a sequestered village for a year to engage in mental training. Petitioner represented

that if he were called on to perform acupuncture in this setting, it would "be very difficult to have a chaperone or a practice monitor."

Petitioner represented that his practice monitor was extremely helpful and that he had completed courses in ethics and professional boundaries as required by the terms of his probation.

Petitioner provided letters of recommendation from Jae Gyoo Ryoo, LAc., Ph.D., Kap Pong Kim, LAc., Jong Kee Kim, LAc., DOM, Kweon Young Yoo, LAc., Mi Yoo, LAc., each of which described the author's relationship with petitioner and the author's belief that petitioner was an experienced professional of good moral character. Jong Kee Kim's letter advised of his observations of petitioner's practice in his role as petitioner's practice monitor. Mi Yoo's letter mentioned that Petitioner did not complain about being placed on probation.

In his presentation at this proceeding, petitioner agreed to answer any questions asked by the Acupuncture Board. Petitioner stated that he was sorry for his misconduct, that he was thankful for having been given the opportunity to continue his business, that he did all that was asked of him on probation, that he attended the community temple every Sunday and obtained counseling from the priest, that his attitude towards his patients had changed since he was placed on probation and he was now more considerate of their feelings. He expressed no remorse for the victims of his battery.

The Attorney General's Recommendation

7. The Attorney General's Office recommended that the petition be denied.

LEGAL CONCLUSIONS

Statutory Authority

1. Business and Professions Code section 4960.5 provides in part:

(a) A person whose license or registration has been revoked, suspended, or surrendered, or who has been placed on probation, may petition the board for reinstatement or modification of penalty, including modification or termination of probation, after a period of not less than the following minimum periods has elapsed from the effective date of the decision ordering that disciplinary action:

- (1) At least three years for reinstatement of a license revoked or surrendered.

- (2) At least two years for early termination of probation of three years or more. . . .

Regulatory Authority

2. Title 16, California Code of Regulations, section 1399.469 sets forth the regulatory authority for the Acupuncture Board's disciplinary guidelines and directs that in "reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Acupuncture Board shall consider the disciplinary guidelines entitled "Department of Consumer Affairs, Acupuncture Board 'Disciplinary Guidelines' 1996" which are hereby incorporated by reference."

The Disciplinary Guidelines Related To Modification or Termination of Probation

3. That portion of the disciplinary guidelines that applies to petitions to modify or terminate probation states in part:

The primary concerns of the Board at reinstatement or penalty relief hearings are that the evidence presented by the petitioner of his/her rehabilitation. The Board is not interested in retrying the original revocation or probation case.

The Board will consider the following criteria of rehabilitation:

1. Nature and severity of the act(s) or offense(s)
2. Total criminal record
3. The time that has elapsed since commission of the act(s) or offense(s)
4. Whether the licensee has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person
5. If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.
6. Evidence, if any, of rehabilitation submitted by the licensee or registration holder.

In the Petition Decision, the Board would appreciate a summary of the offense and the specific codes violated which resulted in the revocation, surrender or probation of the license.

The Board requests that comprehensive information be elicited from the petitioner regarding his/her rehabilitation. The petitioner should provide details which include:

- A. Continuing education pertaining to the offense and its effect on the practice of acupuncture.
- B. Specifics of rehabilitative efforts and results which should include programs, psychotherapy, medical treatment, etc., and the duration of such efforts.
- C. If applicable, copies of court documents pertinent to conviction, including documents specifying conviction and sanctions, and proof of completion of sanctions.
- D. If applicable, copy of Certificate of Rehabilitation or evidence of expungement proceedings.
- E. If applicable, evidence of compliance with and completion of terms of probation, parole, restitution, or any other sanctions.
- F. A culpability or exculpability statement.

If the Board should deny a request for reinstatement of licensure or penalty relief, the Board requests that the Administrative Law Judge provide technical assistance in the formulation of language clearly setting forth the reasons for denial. Such language would include methodologies or approaches which would demonstrate rehabilitation.

The Burden and Standard of Proof

4. In a proceeding seeking restoration of a revoked license, the burden at all times rests on the petitioner to prove that he has rehabilitated himself and that he is entitled to have his license restored. The most clear and convincing proof of reform must be shown. A petitioner's actions since his misconduct are the essential criterion to judge whether he has so rehabilitated himself as to compel his unrestricted readmission. (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315-317.)

Relevant Factors in Determining Rehabilitation

5. Rehabilitation is a state of mind. The law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.) (Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented when an application for readmission to a professional practice can demonstrate by sustained conduct over an extended period of time that he or she is once again fit to practice. (*In re Menna* (1995) 11 Cal.4th 975, 991.) Since persons under the direct supervision of judicial or correctional authorities must behave in exemplary fashion, little weight is generally placed on the fact that such an individual did not commit additional crimes or continue inappropriate behavior while under supervision. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

Cause Does Not Exist to Grant the Petition

6. Cause does not exist under Business and Professions Code section 4960.5, under Title 16, California Code of Regulations, section 1399.469, and under the Acupuncture Board's disciplinary guidelines to terminate probation or modify the conditions of probation.

The conduct giving rise to the discipline in this matter was extremely serious and it resulted in petitioner's four misdemeanor convictions in April 2003. Petitioner remained on probation to the Superior Court as a result of those convictions until April 2005, when he completed his probation and the convictions were dismissed. Petitioner was not required to undergo any counseling or psychotherapy during the period he was on criminal probation and he evidently did not do so. He was precluded from seeing female patients without a female chaperone being present.

Petitioner was off criminal probation for about two years while disciplinary charges were pending. Petitioner contested the validity of the disciplinary charges. During the disciplinary hearing, petitioner expressed no remorse for the victims of his battery. He denied any wrongdoing. Petitioner's version of the events was found to be less credible than the accounts of his victims. Petitioner's own expert agreed that petitioner engaged in inappropriate conduct.

The Acupuncture Board placed petitioner's license on probation following the contested hearing that found the disciplinary allegations to be true. Since then, petitioner has done all that was required of him by the Acupuncture Board, but not much more. He did not express remorse for his victims in this proceeding, but instead made a general representation, "I recognize my wrongdoing. . . ."

His oral statements to the Acupuncture Board in this proceeding were similarly without substance, and the only regret petitioner expressed was his loss of reputation and the freedom to do whatever he wanted. Petitioner did not provide any evidence that he voluntarily participated in rehabilitative programs, such as psychotherapy or counseling, that were appropriate to his offenses. Quite simply, it cannot be concluded on this record that petitioner's petition should be granted.

ORDER

Kweon Young Yoo's petition for the early termination or modification of his probation is denied.

DATED: MAR 25 2011



ROBERT BREWER, Chair
Acupuncture Board
Department of Consumer Affairs
State of California