

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Application of:

SUSAN W. SHAO,

Respondent.

No. 1A-2010-173

OAH No. 2011070385

PROPOSED DECISION

Administrative Law Judge Hannah H. Rose, State of California, Office of Administrative Hearings, heard this matter on October 18, November 29, and December 13, 2011, in Oakland, California.

Senior Legal Analyst Catherine E. Santillan represented complainant Janelle Wedge, Executive Officer, Acupuncture Board, Department of Consumer Affairs.

Jenelle Smith, Attorney at Law, represented respondent Susan W. Shao. Mandarin language interpreters were provided.

The matter was submitted on December 13, 2011.

FACTUAL FINDINGS

1. On June 20, 2010, complainant made and filed the Statement of Issues in her official capacity. Respondent timely requested a hearing with the Acupuncture Board (Board).

2. On March 30, 2010, respondent Susan W. Shao submitted to the Board an application to take the examination for an acupuncture license. On September 18, 2010, respondent submitted to the Board an application for an acupuncture license.

3. Question 17 on the Application for Examination stated: "Have you ever been convicted of, or pled nolo contendere to any offense, misdemeanor or felony in any state, the United States, or a foreign country? . . . If yes, please explain on a separate sheet of paper and include dates, charge/violation, location and penalty or disposition." Respondent checked the "No" box. She did not disclose or explain the 2009 conviction described in Finding 5. When respondent signed the application, she certified, under penalty of perjury,

“all statements made herein are true in every respect, and that misstatements, or omissions of material facts may be cause for denial of this application, or for suspension or revocation of a license.”

4. Question 9 on the Application for License stated: “Have you ever been convicted of, or pled nolo contendere to any offense, misdemeanor or felony in any state, the United States, or a foreign country? . . . If yes, please explain on a separate sheet of paper and include dates, charge/violation, location and penalty or disposition.” Respondent checked the “Yes” box. Respondent attached to the application a one-page letter in which she listed five charged administrative violations of the San Jose Municipal Code. She indicated that two of the charges were dismissed at an administrative hearing and that she paid a \$3000 fine.¹ Respondent did not discuss her misdemeanor conviction for practicing massage without a license. (Finding 5.)

In a subsequent letter, received at the Board on November 1, 2010, respondent explained that in December 2007, she received two “tickets” at the same time. One ticket was a criminal citation for violations of Penal Code section 647(b), solicitation or agreement to engage in act of prostitution, and section 315, maintaining a place for prostitution. The other ticket was for the administrative violations previously explained in the letter attached to her application for a license. In the second letter, respondent stated that the Penal Code violations were dismissed in 2009. She explained, “The reason I wasn’t explain the prostitution part because I thought the case was dismissed it may not necessary and the 5 charges appeared more important. Another reason is I am 61 years old, I feel disgusting to talk about the prostitution, although it was dismissed.” Respondent did not discuss her misdemeanor conviction in this letter either.

5. On October 28, 2009, respondent was convicted, on her plea of nolo contendere, of violating San Jose Municipal Code section 6.44.110, massage therapy license required, a misdemeanor. She was sentenced to one year of court probation, with a condition that she not perform any massage during that time, and fined \$170.

6. The facts and circumstances of the conviction occurred in October 2007 at Willow Glen Acupuncture (Willow Glen) in San Jose, California. At the time, the San Jose Police Department (SJPD) vice squad was investigating Willow Glen for suspected prostitution activity and an illegal massage business. On October 18, 2007, SJPD Detective Chan, posing as a customer, called and made an appointment for a massage that day. When he arrived at Willow Glen, he spoke to respondent, who said her name was “Mary.” She told

¹ On January 17, 2008, in a Decision following an Administrative Citation Hearing, it was found that respondent violated San Jose Municipal Code sections 6.44.090 (requirement to have a massage permit), 6.44.100 (required to have a massage ownership license), and 6.44.230(A) (required to maintain records of clients that had visited the establishment). Two other charged violations were dismissed. Respondent was fined \$3000, payable in six installments.

him the cost for "a half hour" would be \$40, and Detective Chan paid her with a \$100 pre-recorded bill. She directed him to a room where he undressed and laid face down on the massage table, with a towel covering his buttocks. Respondent was not wearing a city-issued massage therapist identification card. Respondent gave the detective three \$20 bills in change.

Respondent began the massage by removing the towel covering the detective's buttocks and massaging his upper and lower back area. She then moved to the detective's buttocks, and attempted to reach his groin. At this time, respondent, speaking quietly into his ear, asked Detective Chan if the friend who had recommended him had explained that he needed to tip her, and he nodded his head affirmatively. She told him to turn over onto his back, and he did. Detective Chan then asked respondent if they could "fuck," and she replied, "No, we don't do that here. We only do hand jobs." She then raised her right hand, with four fingers raised, indicating to the officer that the price was \$40 for her to masturbate him. Respondent again reached for the detective's groin, but he turned over, and stalled for time until the half hour was over. As the detective left, respondent asked for her tip, and Detective Chan gave her the three \$20 bills that she had earlier given him for change.

On November 17, 2007, Detective Chan made another appointment for a massage at Willow Glen. This time he received a massage, and was solicited for another act of prostitution, from someone other than respondent. When his massage was finished, other officers from the vice squad entered the establishment, at which time respondent was observed to be giving a massage to another customer. Respondent told the lead officer, Sergeant Brasil, that she was not the manager of the business, but acknowledged that she had been the manager at the time of Sergeant Brasil's previous investigation of the business in November 2006. (See Finding 21, below.)

Respondent was cited at this time for violations of Penal Code section 647(b) and section 315. She was also separately cited for several administrative violations of the San Jose Municipal Code relating to requirements for proper licenses, permits and records needed when conducting massages in the City of San Jose.²

Respondent's Testimony

7. Respondent's testimony with regard to her work and job responsibilities at Willow Glen was conflicting. She first testified that she began work at Willow Glen in August 2007. She worked part-time, as a receptionist at the front desk, booking appointments and answering the phone, and as an "observer/intern," observing the "boss," Dr. Grace Chan, who was a licensed acupuncturist. Respondent later admitted that she had worked at Willow Glen in 2006 as well.

Respondent initially denied ever working as a massage therapist at Willow Glen. Later, respondent admitted that beginning September 2007, she "sometimes" worked as a

² See footnote 1.

massage therapist, but only if the boss asked her to perform a massage because there were too many clients waiting, because her boss did not want to lose the business. Respondent testified that she did not perform more than a total of three or four massages between September and November 2007. After rebuttal testimony was given regarding events involving respondent at Willow Glen in 2006 (Findings 20 and 21), respondent admitted that she also sometimes worked as a massage therapist in 2006. After business began to pick up in 2006, she performed massage more regularly, although some customers did not want her to massage them because she was older and they were "picky." She explained that she had first denied performing massage at Willow Glen because this was not her original job there and because she only "occasionally" gave massages in 2006.

Respondent also denied that she ever worked as a manager at Willow Glen, in either 2006 or 2007. However, in later testimony, she acknowledged that while she was working as a receptionist, she sometimes acted as the manager if Dr. Chan was not in the office. Dr. Chan was in the office three or four days a week, and respondent worked five days a week. On November 16, 2006, when the SJPD issued respondent a citation for Willow Glen's failure to have a license or permit to perform massage, and failure to keep a record of massages performed, respondent was working as acting manager. She was aware at that time that some of the massage therapists at Willow Glen did not have a required city license.

Respondent first denied that she ever took money directly from clients, and then later admitted she did take money from her massage clients. Respondent used the names "Mary" and "Maggie" when working as a massage therapist at Willow Glen. Respondent's inconsistent and conflicting testimony with regard to her work and activities at Willow Glen was not credible.

8. Respondent recalled giving Detective Chan a massage on October 18, 2007. She denied that she removed the covering towel or solicited an act of prostitution from him, or from any male client ever. She testified that she did not know what a "hand job" was when she first saw the term in the police report, and that she asked a friend who told her to look it up on the internet. Respondent testified both that her boss was not in the office on the day of Detective Chan's massage, and also that in the middle of the massage, her boss came in to bring more massage oil because respondent had run out. She said that she took money from Detective Chan that day because her boss was not in the clinic. She did not recall if Detective Chan tipped her that day, but she was certain that she has never received a tip for either \$40 or \$60. Respondent's testimony was not credible with regard to her massage of Detective Chan.

9. Respondent is 62 years old. She emigrated from China to the United States in 1992. She practiced massage in China, where she did not need a license to practice, for five years. From 1994 to 1995, respondent was an Office Assistant with the California Highway Patrol (CHP), where she processed traffic tickets issued in the Hayward, California office of the CHP. From 1995 to 2001 she worked as an Office Assistant for the CHP within the Office of Court Services of the California Supreme Court. Her work was primarily data

entry at this job. In 2001, respondent retired from the CHP due to an unspecified disability. She received a commendation for her work as an Office Assistant.

10. Respondent received vocational rehabilitation following her retirement from the CHP. In April 2005, she received her certification as a massage therapist from the Min Jian Hand Healing Institute in Fremont, California. She learned about professional boundaries and ethics as part of her program. This included attention to modest dress when performing a massage, and not touching the client's private parts.

11. Following her certification, respondent was licensed to practice massage therapy in the City of Fremont. She admitted that she was not licensed in San Jose, but asserted that she did not know that she had to be licensed by individual cities in order to perform massage therapy. She thought her Fremont license was good throughout California. After certification, respondent worked as a massage therapist at Livermore Medical Day Spa. However, she wanted to find a job as a massage therapist in an acupuncture office run by a Chinese doctor, and began working at Willow Glen Acupuncture sometime in 2006.

12. Between April 2007 and April 2010, respondent studied for a Masters Degree in Traditional Chinese Medicine at the University of East West Medicine in Sunnyvale, California. Professional ethics was part of the program. In addition to the use of needles to help a patient, massage was sometimes part of the practice. Respondent explained the importance of honesty and truthfulness, as acupuncturists must make reports and fill out insurance claims for themselves and clients. Respondent also has a Bachelor of Arts degree in Business Management from Shanghai University.

13. Respondent provided the following explanation with respect to her failure to disclose her criminal conviction on her Application for Examination. Respondent was in a serious automobile accident on February 4, 2010. She initially sought medical attention for neck and back pain at Kaiser Permanente Medical Offices in Oakland on February 9, 2010. She returned for treatment on February 23 and March 29. On March 29, she was prescribed Naproxen 500 mg., a non-narcotic anti-inflammatory pain medication, to be taken twice a day. Respondent completed and signed her application to take the acupuncture license examination on March 30, 2010. She claims she "forgot" about her 2009 conviction that day because she was in pain, and was dizzy from the Naproxen that she had taken before filling out the application. She asserts that the medication caused her to forget. This claim is not credible, in view of the memorable nature of the events leading up to that conviction (respondent twice had been cited for violations of the municipal code, and charged with solicitation for prostitution, which in her own words, was "disgusting"), the fact that she was still on criminal probation and prohibited from performing massage at the time she filled out the application, and there were no other errors in the application. In her November 2010 letter to the Board explaining the omission, respondent had to know she was being untruthful when she wrote that she did not admit the conviction in her application for examination because of her disgust for the underlying dismissed charge. She did not mention either her accident or the effect of pain medication in explaining her omission in either of her letters to the Board in 2010. (Finding 4.)

14. Respondent paid the full amount (\$3000) of her 2006 administrative citation fine in 2008. She paid her \$3500 fine for the 2007 administrative citation in 2009. Respondent paid the \$170 fine for her criminal conviction and successfully completed her one-year criminal probation in October 2010.

15. Since October 2011, respondent has worked at the University of East-West Medicine, teaching the Principles and Basic Theory of Massage. She teaches three and a half hours a day, three days a week. She cannot work in the university clinic without her acupuncture license.

Testimony of Dr. Bhanu Bhaskar

16. Dr. Bhanu Bhaskar is respondent's primary care physician at Kaiser Permanente Medical Group, Inc. in Oakland, California. She treated respondent after her automobile accident. At first, respondent took over-the-counter Advil for neck and back pain. On February 23, 2010, Dr. Bhaskar prescribed physical therapy and Ibuprofen 600 mg. for pain. Respondent went to physical therapy weekly for six weeks, and she did not complain of any side effects from the medication she was taking. On March 29, 2010, Dr. Bhaskar prescribed Naproxen 500 mg. because respondent was still in pain and the Ibuprofen was not effective.

Sometime in April 2010, respondent sent Dr. Bhaskar an email reporting that she was still in pain, and that she was having trouble remembering things. Dr. Bhaskar advised respondent to schedule an appointment, but respondent did not. That was the first time respondent reported that she was having difficulty remembering things. Respondent scheduled an urgent appointment with Dr. Bhaskar on August 5, 2011, to request a letter from the doctor to document her treatment for the automobile accident, and to state that the medication prescribed could cause drowsiness. This was the first time that respondent reported or mentioned drowsiness to Dr. Bhaskar. Respondent told the doctor that she needed the letter because she had marked something wrong on an application for a license, and she needed the letter to say that the medication caused the drowsiness. Dr. Bhaskar opined that the medication had that potential.

Respondent's Character Witnesses

17. Richard Segal testified that he has been respondent's friend for 15 years. He is also her former business partner and former roommate. They talk about once a month, or more or less depending on "what's going on." Mr. Segal knows respondent to demonstrate the highest integrity in business, and believes that she is always truthful. After the Statement of Issues was filed in this case, respondent told Mr. Segal about the charges and that she had marked the wrong box on her application because she was in pain and was drowsy. Mr. Segal believes that respondent was distraught from the automobile accident at the time, and this caused the mistake.

At the same time, respondent also told Mr. Segal about Detective Chan's allegation of solicitation for prostitution, stating to Mr. Segal that the detective solicited sex from her, and that she refused, saying "absolutely not, no!" Mr. Segal testified that respondent has traditional sexual values, and is somewhat prudish, and he does not believe that she would ever agree to sex for money.

18. Julius J. Dzbanski testified that he has known respondent socially for seven years, and that they talk once or twice a month and see each other for dinner or coffee every few months. He has never known her to lie. He did not know that respondent had been in an automobile accident until "quite a while after." Although Mr. Dzbanski did not recall when, respondent did tell him about the Statement of Issues and about her conviction for performing massage without a license. With respect to the application for examination, respondent told Mr. Dzbanski that she had made an honest mistake. She did not tell him that she was in pain from the accident at the time, or that she was feeling side effects from medication. Respondent also told Mr. Dzbanski that she did not think that she needed a separate license to perform massage in San Jose, because she thought her Fremont license was valid wherever she worked.

19. Goshan Zhu testified that she has known respondent for 40 years, since they were in middle school together in Shanghai, China. They talk once or twice a week, and they get together a couple of times a month. Ms. Zhu has never known respondent to lie. She believes her to be rigorously honest, and told of one time when they both worked at a hotel in San Francisco, and respondent found a diamond ring and returned it to the person who had lost it. Respondent told Ms. Zhu about her conviction. She also told Ms. Zhu about the prostitution charges, and was adamant that she did not do it. With respect to the wrong answer on the application for examination, respondent told Ms. Zhu that she did not see the question clearly because of the dizziness caused by the accident.

Rebuttal Evidence

20. Sergeant Richard Galea has been a SJPD Officer for 13 years. In November 2006, he worked in the Vice Unit. His duties included follow-up checks at massage clinics to ensure compliance with city ordinances for permits and licenses, and to make sure that there were no illegal activities at the clinics. He was assigned to the undercover investigation of Willow Glen because there had been a complaint of illegal activity there.

On November 2, 2006, Sergeant Galea went to Willow Glen where respondent was working at the front desk. He asked her for a massage. She replied, "Come with me," and introduced herself as "Maggie."³ She asked if he wanted a half or full hour massage, and he told her half hour. She said "\$40," and he handed her a marked and recorded \$100 bill, which she took and left the room. Sergeant Galea undressed and lay face down on the

³ Sergeant Galea testified that it is typical that massage therapists use a fake name in illegal businesses. In his experience, in businesses that are properly licensed and permitted, massage therapists use their true names.

massage table, with a towel covering his buttocks. Respondent came back into the room and began the massage. After about 15 minutes, respondent told him to turn over, which he did. His genitals were still covered. At that point, respondent leaned in close to the sergeant's ear and, pointing to his genitals, asked him, "Do you want me to massage you down there?" Sergeant Galea responded, "Yes," and asked out loud, "How much?" Respondent gave him a "funny look," creating a frown and wrinkling up her face and shaking her head back and forth. In the sergeant's experience in the vice squad, having asked his question out loud, a massage therapist might be tipped off that he was with the vice unit and feared that he was recording the session and seeking an audible reply from her. Respondent never touched his genitals, the massage continued, and he gave her a \$40 tip, which she accepted.

On November 16, 2006, Sergeant Galea returned to Willow Glen, and received a massage from "Cece," who also asked him if he wanted her to massage his genitals. When he asked "how much?" out loud, he got the same response from Cece as he had gotten from respondent on November 2. No sexual act was performed. He did not recall seeing respondent that day. Another officer in the unit issued citations that day.

21. Sergeant Mario Brasil has been a SJPD Officer for 13 years. In November 2006, he was a lead investigator in the Vice Unit. He directed the undercover investigation of Willow Glen in 2006. Willow Glen did not have a valid license as a massage business, a valid massage ownership license, or permits to provide massage services. Sergeant Brasil assigned Sergeant Galea to conduct an undercover investigation to determine if the business was conducting illegal massage and/or prostitution activity.

On November 2, 2006, Willow Glen employees were performing massage without a business license or permits for employees to do massage. Even if the business were properly licensed as an acupuncture business, the San Jose Municipal Code required the licensee (Dr. Chan) to be present if massage were being performed as part of acupuncture, and if she was not, the business was required to have a massage ownership license. The code also required individual massage therapists to each have a permit.

On November 16, 2006, Sergeant Brasil directed Sergeant Galea to return as a customer one more time before a pre-planned raid of the clinic. The return visit was to determine whether or not respondent's November 2 solicitation of Sergeant Galea was an isolated event. When Sergeant Brasil entered the business that day, respondent was at the front desk. She told him that she was the manager, and that she sometimes provided massages if other massage therapists were busy. In searching respondent's purse, Sergeant Brasil found the pre-recorded, pre-marked \$100 bill Sergeant Galea had given to respondent on November 2, 2006.

Two other massage therapists working on November 16 were cited for performing massage at Willow Glen without a permit. Respondent was cited for four different violations

of the San Jose Municipal Code;⁴ she paid the administrative citation fine of \$3500. Respondent was named together with Dr. Chan on the lease for Willow Glen Acupuncture.

22. Respondent's testimony is filled with conflicting explanations for her dishonesty in filling out the Application for Examination, and for her behavior at Willow Glen Acupuncture. Respondent was not a credible witness.

LEGAL CONCLUSIONS

1. The standard of proof to be applied in this proceeding is preponderance of the evidence.

2. Under Business and Professions Code section 480, subdivision (a)(1) and section 4955, subdivision (b), the Board may deny a license if the applicant has been convicted of a crime substantially related to the practice of acupuncture.

3. Under Business and Professions Code sections 480, subdivision (a)(2), the Board may deny an acupuncturist application if the applicant did any act involving dishonesty with the intent to substantially benefit herself.

4. Under Business and Professions Code section 480, subdivision (a)(3), and section 4955, subdivision (i), the Board may deny a license if the applicant has done any act that if done by a licentiate would be grounds for suspension or revocation of a license.

5. Under Business and Professions Code sections 480, subdivision (c), a board may deny a license if the applicant "knowingly made a false statement of fact required to be revealed in the application."

6. Under Business and Professions Code section 4955.1, subdivision (c), the Board may deny a license if the applicant has committed any act involving dishonesty or corruption with respect to the qualifications, functions, or duties of an acupuncturist.

7. Under Business and Professions Code section 490, subdivision (a), the Board may suspend or revoke a license if the licensee has been convicted of a crime that is substantially related to the qualifications, functions or duties of an acupuncturist.

8. Respondent's 2009 misdemeanor conviction for performing massage without a valid license was for a crime substantially related to the qualifications, functions or duties of an acupuncturist. Acupuncturists can perform and supervise others in the use of massage

⁴ The specific sections of the San Jose Municipal Code for which respondent was cited were: section 6.66.230a (Records of Massage Services); 6.44.220a (Listing of Services to be Posted); 6.44.100 (Massage Ownership/Management License required); 6.44.090 (Massage Business Permit Required).

therapy, but that practice is subject to conditions, including compliance with municipal codes in the jurisdiction of the practice. By reason of Factual Findings 5, 6 and 12, cause is established to deny her license application under Business and Professions Code section 480, subdivisions (a)(1) and section 4955, subdivision (b).

9. Respondent's 2009 misdemeanor conviction for performing massage without a valid license was an act, which if done by a licentiate, would be grounds for suspension or revocation of the license. By reason of Factual Findings 5, 6 and 12, cause is established to deny her license application under Business and Professions Code section 480, subdivision (a)(3) and section 490, subdivision (a).

10. Respondent's conduct in soliciting an act of prostitution on October 18, 2007 constituted a corrupt act with respect to the qualifications, functions, or duties of an acupuncturist. Respondent was working as a massage therapist in an acupuncture office at the time of the conduct. By reason of Factual Findings 6 and 12, cause is established to deny her license application under Business and Professions Code section 4955.1, subdivision (c).

11. Respondent knew, or had reason to know, that her representation in the application for examination that she had not been convicted of a crime was untrue. This dishonest act was intended to benefit herself by establishing her qualification to take the license examination. By reason of Factual Findings 2 through 5, 20 through 23, and 13, cause is established to deny her license application under Business and Professions Code section 480, subdivision (a)(2).

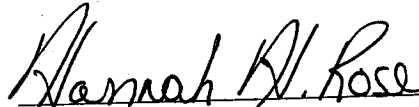
12. Respondent, by her representation in the application for examination that she had not been convicted of a crime, knowingly made a false statement of fact in her Application for Examination. By reason of Factual Findings 2 through 5, 20 through 23, and 13, cause is established to deny her license application under Business and Professions Code section 480, subdivision (c).

13. Respondent's conviction for performing massage without a license, combined with her corrupt act in soliciting an act of prostitution, both committed while working in an acupuncture office, demonstrate that respondent lacks the ability to conform with the laws and regulations governing the practice of acupuncture. Further, respondent's answer to Question 17 on the Application for Examination was dishonest. While respondent subsequently disclosed her conviction in her Application for License, this material omission on her examination application, signed under penalty of perjury, raises concerns about the applicant's honesty and integrity, and her trustworthiness in completing official documents. Respondent's conflicting explanations and lack of candor in her testimony about the nondisclosure only compounds these concerns. It would be contrary to the public interest to grant her an acupuncture license at this time, even on a restricted basis.

ORDER

The application of respondent Susan W. Shao for an acupuncture license is denied.

DATED: January 12, 2012



HANNAH H. ROSE
Administrative Law Judge
Office of Administrative Hearings