

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

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

CHING HUA CHENG,

Petitioner.

Case No. PETP-1A-2009-115

OAH No. 2011070421

DECISION

This matter was heard before a quorum of the Acupuncture Board (Board)¹ in Sacramento, California on August 25, 2011. Administrative Law Judge Linda A. Cabatic, State of California, Office of Administrative Hearings, presided over the hearing.

Maura Faust, Deputy Attorney General, represented the Attorney General's Office, pursuant to Government Code section 11522.

Ching Hua Cheng (petitioner) was present and represented herself.

The record was held open to allow petitioner to submit evidence of the expungement of her conviction. On August 25, 2010, petitioner faxed copies of the documents and order granting her Petition and Order Under Section 1203.4 of the Penal Code. Since the documents and order provided by petitioner were not certified copies, the documents were admitted as administrative hearsay and marked as Exhibit 3. The matter was submitted for decision on August 30, 2011.

FACTUAL FINDINGS

1. On or about March 9, 2009, the Board received petitioner's application for an Acupuncture license, in which petitioner certified under penalty of perjury to the truthfulness of all her statements, answers and representations contained therein.

2. On or about January 21, 2010, a Statement of Issues was filed against petitioner because petitioner checked the box marked "No" in answer to the question:

¹ Board members present for the hearing were Robert Brewer, Chair; Charles Kim, Vice Chair; Nancy Carroll, Frank He, An York Lee and Paul Weisman.

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? **NOTE:** You are **required** [bold type in original] to list any conviction that has been set aside and dismissed under Penal Code section 1203.4 of the Penal Code or under any other provision of law.

Petitioner failed to disclose in her application, her 2002 misdemeanor conviction for hit and run, in violation of Vehicle Code section 20002. In the Statement of Issues, the Board alleged that petitioner's misdemeanor conviction was substantially related to the qualifications, functions or duties of an acupuncturist pursuant to Business and Professions Code sections 4955, subdivision (b), and 4956.

3. On March 9, 2010, effective April 8, 2010, the Board rendered its Decision and Order, adopting a Stipulated Settlement and Disciplinary Order entered into by petitioner. By entering into the Stipulated Settlement and Disciplinary Order, petitioner admitted that the charges and allegations contained in the Statement of Issues, if proven at the hearing, constituted cause for imposing discipline upon her Acupuncture license, in exchange for resolving the matter without the expense and uncertainty of further proceedings. Petitioner agreed to abide by the conditions of probation set forth in the Stipulation and Settlement and Disciplinary Order, and serve a probationary term for two years. Petitioner's probation terminates on April 8, 2012.

The terms and conditions of petitioner's probation include: (1) reimbursing the Acupuncture Board for the hourly costs incurred in monitoring her probation; (2) obeying all laws; (3) submitting quarterly declarations regarding her compliance with the conditions of probation; (4) complying with the Board's probation surveillance program; (5) appearing for an interview with the Board; (6) notifying the Board of any changes in employment; (7) notifying the Board if she left the State; and (8) agreeing not to employ or supervise acupuncture trainees while on probation. In addition, she agreed that if she violated these terms and conditions, her probation would be revoked. She also agreed that, if she left California to reside or practice outside of the state, she would notify the Board of her departure date and her return date, and the period of time she was outside California would not apply to the reduction of her probationary period.

4. As a result of the Board's Decision and Order approving the Stipulated Settlement and Disciplinary Order, petitioner was granted a probationary license. The Board also agreed that upon petitioner's successful completion of probation, petitioner's license would be fully restored.

5. On June 16, 2008, petitioner's hit and run conviction was expunged by the Superior Court of Santa Clara County.

6. On or about April 8, 2011, petitioner filed her Petition for Early Termination of Probation. In her narrative statement, petitioner stated that she has followed the rules of probation and it is her dream to open her own clinic and be a role model for her children, who are currently students of Chinese medicine and acupuncture.

7. Also included with her Petition for Early Termination of Probation were two letters of recommendation: one from Caiping Tang, attesting to the fact that petitioner is a good student and dedicated to her profession, and one from Yi Sun, who stated that petitioner is an independent contractor for YICAWLL Acupuncture & Herbal Center Inc., as a massage therapist. According to Yi Sun, petitioner is friendly and patient towards her clients, and no patient has complained about her services.

8. At the hearing, petitioner stated that her probation limited her functions. Being on probation has caused her financial hardship and with two of her children in college, it was difficult for her to continue with her probation. Petitioner wants to be a good example to her children and she wants to serve her community. She has a part-time job at a health center.

9. Petitioner also stated that her probation limits her practice because she cannot supervise trainees. If she cannot hire people, she cannot provide training. Her probation also limits her ability to earn money.

10. Petitioner was concerned that her probation limited her ability to vacation in China. When petitioner was questioned about her application and why she did not disclose the 2002 misdemeanor conviction, petitioner admitted that her attorney told her at the time of her conviction that she had to tell the truth about her conviction and she now understands about future disclosures.

LEGAL CONCLUSIONS

1. Business and Professions Code section 4928.1, states:

Protection of the public shall be the highest priority for the Acupuncture Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

2. Business and Professions Code section 4960.5, which contains the provisions of law dealing with reinstatement of licenses for acupuncturists, provides, in pertinent 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.

[¶ . . . ¶]

(b) The board may require an examination for that reinstatement.

(c) Notwithstanding Section 489, a person whose application for a license or registration has been denied by the board, for violations of Division 1.5 (commencing with Section 475) of this chapter, may reapply to the board for a license or registration only after a period of three years has elapsed from the date of the denial.

3. California Code of Regulations, title 16, section 1399.469, incorporates the Board's Disciplinary Guidelines by reference. With respect to petitions for early termination of probation, these Guidelines provide that:

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.

4. In a proceeding for early termination of probation, the burden at all times rests on petitioner to prove that she has rehabilitated herself and should have her probation terminated, and not on the board to prove to the contrary. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) It goes without saying that the pertinent issues in the inquiry are petitioner's activities since being placed on probation and her present qualifications, ability and learning. (*Ibid.*) Statutes relating to licensed professions seek to maintain integrity and high standards, and preserve public confidence in holders of professional licenses. (*Clerci v. Dept. of Motor Vehicles* (1990) 224 Cal.App.3d 1016.)

5. Petitioner was convicted of a misdemeanor hit and run in violation of Vehicle Code section 20002, subdivision (a), which is a conviction that would subject her license to disciplinary proceedings pursuant to Business and Professions Code sections 4955, subdivision (b), and 4956. (Finding 2.) It has been almost nine years since she was convicted. Petitioner has complied with the terms of her probation and conditions of her sentence. (Finding 3.) Petitioner's motion to expunge her conviction was granted. (Finding 3.)

6. Petitioner was honest at the hearing and admitted she made a mistake. She also admitted that her attorney told her that she had to tell the truth about her prior conviction. (Finding 10.) Petitioner has complied with the terms of her probation and has served 15 out of the 24 months of her probation. (Finding 6.) The only reasons petitioner provided for seeking a reduction in the length of her probation are due to financial concerns and her desire to supervise her children. (Finding 6, 8 and 9.) Under the terms of her probation, petitioner is fully employable as an acupuncturist and can vacation in China as long as she does not reside there and work as an acupuncturist. Petitioner can work in California as an acupuncturist. She just cannot employ or supervise acupuncture trainees during her probation. (Finding 3.) Petitioner agreed to the terms and conditions set forth in the Stipulated Settlement and Disciplinary Order for a period of two years in exchange for the Board's issuance of a probationary license. (Finding 3.)

7. Protection of the public is the highest priority of the Board in exercising its licensing, regulatory, and disciplinary functions. The public interest in regulating acupuncture through licensing statutes is to make certain that the privileges granted under an acupuncture license are not exercised in contravention of the law, to ensure that the regulated activity remains upright and honest, and to require and maintain professional standards of conduct on the part of licensees. (Legal Conclusion 1.)

8. Petitioner had the burden of establishing that she has been rehabilitated and that she does not pose a risk to the public interest, safety or welfare. To protect the public, the Board must ensure that petitioner continues to practice in an upright and honest manner and maintains the professional standards expected of all licensees. The Board can only do this by ensuring petitioner completes her probation as she originally agreed to do. Petitioner has benefitted from her settlement with the Board and needs to complete only seven more

months of her probationary term. In the absence of any compelling reason to reduce her probationary term, it would not be in the public's interest to issue her a full license at this time.

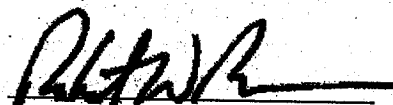
ORDER

The Petition for Early Termination of Probation filed by petitioner Ching Hua Cheng is DENIED.

This decision shall become effective on the 3rd day of November, 2011.

Dated: OCT 04 2011

By:



ROBERT BREWER

Board Chair

California Acupuncture Board