

**BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition to Revoke Probation against:

KANG DAE CHOI, L.Ac

Acupuncture License No. AC 4900

Respondent

Agency Case No. D1-2014-206

OAH No. 2019050033

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 on January 1, 2020.

IT IS SO ORDERED this 2nd day of December.

By: 

Amy Matecki, MD, L.Ac.
Acupuncture Board
Department of Consumer Affairs
State of California

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PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 7, 2019, in Los Angeles, California.

Wendy Widlus, Deputy Attorney General, represented complainant Benjamin Bodea, Executive Officer, Acupuncture Board (Board), Department of Consumer Affairs.

Respondent Kang Dae Choi represented himself.

Myoung S. Lim provided Korean interpreter services during the hearing.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 7, 2019.

FACTUAL FINDINGS

Procedural History

1. On September 7, 1994, the Board issued acupuncture license number AC 4900 to respondent. The license is current and active.
 2. In a Decision and Order effective March 31, 2017, the Board revoked the license, stayed the revocation, and placed respondent on probation for two years. (Decision and Order (Mar. 3, 2017, Case No. 1A-2014-206).) The terms and conditions of probation required respondent to submit a practice monitor proposal and quarterly reports of compliance to the Board, to complete coursework, and to pay the Board \$6,000 in costs, among other requirements.
 3. On March 22, 2019, complainant filed a petition in his official capacity to revoke respondent's probation and to revoke or suspend the license, alleging that respondent violated the requirements described above. Complainant also requested an order requiring respondent to pay the reasonable costs of investigating and prosecuting the petition. Under the terms of the Decision and Order, the filing of the petition extended the Board's jurisdiction and the period of probation until the petition is resolved. (Exhibit 7, pp. 6-7.)
 4. Respondent submitted a notice of defense dated April 9, 2019, and complainant requested that OAH schedule a hearing on the petition.
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Factual Background

5. The Decision was a stipulated settlement of an Accusation charging respondent with gross negligence, failure to maintain a sanitary office, and failure to maintain adequate and accurate records in connection with his treatment of a patient in 2013 and 2014. The Accusation alleged respondent did not follow proper protocols to maintain clean needle technique; used non-sterile acupuncture needles; did not maintain appropriate standards for cleanliness and labeling of herbs; and kept incomplete treatment records for the patient. As part of the settlement, respondent “admit[ted] the truth of each and every charge and allegation in [the] Accusation,” and represented that he had carefully read the stipulated settlement, fully discussed it with his attorney, and entered into it voluntarily, knowingly, and intelligently. (Exhibit 7, pp. 3-4, 8.) He “agree[d] to be bound by the Board’s probationary terms,” and also agreed that “[i]f [he] violate[d] probation in any respect, the Board may, after giving [him] notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was [stayed].” (*Id.* at pp. 4, 6-7.)

6. Probation conditions 1, 3, 5, and 9 required respondent to submit a practice monitor proposal, complete coursework, submit quarterly reports of compliance, and pay \$6,000 in costs to the Board, respectively:

1. PRACTICE MONITOR Within 90 days of the effective date of this decision, Respondent shall submit to the Board for its prior approval, the name and qualifications of one or more California licensed acupuncturists . . . who has agreed to serve as a practice monitor. Once approved, the monitor shall submit to the Board a plan by which Respondent's practice shall be monitored. . . . It shall be

Respondent's responsibility to assure that the required reports are filed in a timely fashion. [¶] . . . [¶] If the monitor quits or is otherwise no longer available, Respondent shall not practice until a new monitor has been approved by the Board. . . .

[¶] . . . [¶]

3. COURSEWORK Respondent shall take and successfully complete not less than eight (8) hours of coursework which the Board's probation monitor approves in each of the following area(s) for a total of thirty-two (32) hours: CNT (clean needle technique), herbal preparation, record keeping, and public health. All coursework shall be taken at the graduate level at a school approved by the Board. Classroom attendance must be specifically required. Course content shall be pertinent to the violation and all coursework must be completed within the two (2) year probationary period. [¶] Within 90 days of the effective date of this decision, Respondent shall submit a plan for the Board's prior approval for meeting the educational requirements. . . .

[¶] . . . [¶]

5. QUARTERLY REPORTS Respondent shall submit quarterly declarations under penalty of perjury on forms

provided by the Board, stating whether there has been compliance with all the conditions of probation.

[¶] . . . [¶]

9. COST RECOVERY Respondent shall pay to the Board its cost of investigation and enforcement in the amount of \$6,000.00. This amount shall be paid in full, directly to the Board within six (6) months prior to the termination date of probation. . . . Respondent understands that failure to timely pay costs is a violation of probation, and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. . . .

(Exhibit 7, pp. 4-6.)

Probation Compliance

7. On March 20, 2017, Board Probation Monitor Kristine Brothers sent respondent two letters about his upcoming probation. One letter enclosed a copy of the Decision and Order, noted the effective date of March 31, 2017, and provided blank forms for the submission of quarterly reports of compliance beginning on July 5, 2017. Regarding a practice monitor, Brothers wrote, "Pursuant to Condition 1 . . . , within 90 days you are required to submit for the Board's prior approval the names and qualifications of one [or] more California licensed acupuncturists whose license is clear and current and who has agreed to serve as a practice monitor. This is due no later than **June 30, 2017.**" (Exhibit 8, p. 1.) Brothers also wrote that respondent was required to submit a proposed plan to complete the coursework specified in Condition

3 by the same date. However, the Board reduced the required coursework to 20 hours due to there not being enough coursework available to satisfy the full 32-hour requirement. In addition, Brothers notified respondent that Condition 9 required him to pay the Board's costs of \$6,000 in full at least six months before probation ended.

8. The other letter notified respondent that Brothers had set a telephonic initial probation meeting for March 28, 2017, to review the probationary requirements and to answer any questions he may have. Brothers called respondent on that date at his telephone number on file with the Board, but the message indicated the number was no longer in service. Brothers then emailed respondent the same day and asked him to contact her immediately, but he did not reply.

9. After respondent's probation began on March 31, 2017, Brothers wrote respondent letters on April 11 and May 22, 2017, asking again that he contact her. Respondent replied by letter on May 31, 2017, stating he had closed his clinic, moved to a new apartment, and been out of the country for several weeks. Brothers emailed respondent and asked for a current phone number for him, stating she would call him on June 9, 2017. But respondent did not email a reply until several days after June 9, stating that he had just seen the email. Brothers responded by asking him to call her on June 20, 2017. The evidence admitted at the hearing did not establish whether he did so.

10. On July 5, 2017, respondent sent the Board his first quarterly report of compliance and a proposed coursework plan. The quarterly report stated respondent had closed his clinic in December 2016 and started a new clinic on May 31, 2017. In addition, the report identified Byung Joe Kim as respondent's practice monitor, despite noting that the Board had not approved a practice monitor plan. The report also

stated respondent had "established payment plan of \$500/mo. to the board starting June 30, 2017." (Exhibit 29, p. 2.)

11. On July 10, 2017, the Board received a \$500 payment of costs from respondent, and a quarterly practice monitor form signed by Mr. Kim. On July 31, 2017, Brothers wrote to respondent that he was in violation of probation with respect to the practice monitor requirement. Brothers explained that respondent did not submit Mr. Kim's name and qualifications to the Board for prior approval, and that the Board did not have sufficient information to evaluate Mr. Kim's suitability as a monitor. Brothers requested that respondent submit a practice monitor proposal by August 15, 2017, and instructed him to discontinue using Mr. Kim as a practice monitor pending the Board's approval of the proposal. Brothers also stated, "This . . . means that you are to continue *not* practicing acupuncture until the Board has approved a practice monitor." (Exhibit 17.) In addition, Brothers wrote that the Board had not received or approved a payment plan request before receiving the \$500 payment, but nonetheless approved respondent paying the Board's costs in installments of \$500 per month.

12. On August 15, 2017, respondent emailed Brothers that he would send a résumé for Mr. Kim or another acupuncturist as soon as possible. On August 18, 2017, Brothers notified respondent that the Board had approved two of his proposed courses, totaling 12 hours of coursework. But Brothers also informed him that the Board did not approve respondent's other proposed courses because they were not listed in the Board's continuing education database. Brothers directed respondent to submit a revised plan for the remaining coursework by September 1, 2017.

13. Respondent did not submit a revised coursework plan or a résumé for Mr. Kim or another proposed practice monitor. On September 15, 2017, Brothers emailed respondent about the missing information, stating "I must stress that your

probation with the Board should take a higher priority than what is being evidenced by the effort you're currently putting forth." (Exhibit 20.) Regarding the coursework, Brothers stated he should refer to the Board's updated list of continuing education courses she had provided to him in August 2017. Brothers also asked respondent about his plan to pay the balance of the Board's costs, because respondent had still only made one \$500 payment. Brothers requested that respondent provide the coursework plan, practice monitor information, and payment plan information by September 29, 2017.

14. Respondent did not provide the requested information by September 29, 2017. He also missed the due dates for his next four quarterly reports of compliance, which were October 5, 2017, January 5, 2018, April 5, 2018, and July 5, 2018. The Board eventually received quarterly reports from him for the first two quarters of 2018, but not until July 30, 2018. Both reports stated respondent was not working as an acupuncturist, and that he had not taken the approved courses because he could not afford them.

15. On June 4, 2018, Brothers wrote to respondent that he was in violation of the practice monitor, coursework, quarterly report, and cost payment requirements. Brothers requested that respondent submit the practice monitor proposal, a plan for the remaining coursework, and all missing quarterly reports by June 29, 2018. Brothers also noted that respondent had still submitted only one \$500 payment of costs, and that the balance of \$5,500 was due by September 30, 2018.

16. Respondent did not comply by June 29, 2018, and Brothers sent him a letter scheduling a face-to-face meeting about the violations on July 27, 2018. Two days before the meeting, respondent emailed that he had "a health problem recently"

and asked to postpone the meeting. (Exhibit 26, p. 1.) Brothers asked for more information about the health problem, but never received a response.

17. As of the hearing date, respondent had still not submitted the practice monitor proposal, a plan for the remaining coursework, or any further payment of the Board's costs. He had also not taken the two courses approved by the Board.

Respondent's Evidence

18. At the hearing, respondent admitted he violated his probation, but requested a chance to start again. He testified he became withdrawn after the Board placed him on probation, closed his practice, and disregarded communications from the Board. He also testified he was financially unable to pay the remaining \$5,500 in costs because he has not been working as an acupuncturist. In addition, he disputed the charges in the underlying disciplinary action, asserting that the patient referenced in the Accusation had falsely accused him of reusing acupuncture needles. Respondent also testified he has been providing volunteer acupuncture services to the Los Angeles Police Department, despite not having an approved practice monitor.

Costs

19. Complainant's counsel submitted a certified statement of costs indicating that the Department of Justice has billed the Board \$6,827.50 for 37 hours of time spent working on the case. This amount is reasonable.

LEGAL CONCLUSIONS

Legal Standards

1. The Board has the authority to impose probationary conditions on a licensee in a disciplinary order. (Bus. & Prof. Code, §§ 4955-4955.2.) The disciplinary order in this case included a stayed revocation, and respondent agreed that “[i]f [he] violate[d] probation in any respect, the Board may, after giving [him] notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was [stayed].” (Exhibit 7, pp. 6-7.)

2. Complainant must prove the alleged probation violations by a preponderance of the evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441; Evid. Code, § 115.)

Discussion

3. The evidence established all of the alleged probation violations, as follows:

a. Respondent failed to submit a practice monitor proposal, which violated Condition 1. (Factual Findings 6-17.)

b. Respondent did not complete the required coursework or submit a plan for the remaining coursework beyond the two courses the Board approved, which violated Condition 3. (Factual Findings 6-17.)

c. Respondent failed to submit several quarterly reports on time, if at all, which violated Condition 5. (Factual Findings 6, 14.)¹

d. Respondent only paid \$500 of the \$6,000 in costs that were due to the Board, which violated Condition 9. (Factual Findings 6, 17.)

4. Respondent's assertion that the patient referenced in the Accusation had falsely accused him of reusing acupuncture needles is not a defense to the probation violations. In stipulating to the Decision and Order, respondent admitted the charges in the Accusation that he did not follow proper protocols to maintain clean needle technique; used non-sterile acupuncture needles; did not maintain appropriate standards for cleanliness and labeling of herbs; and kept inadequate treatment records for the patient. (Factual Finding 5.) Furthermore, respondent admitted during his testimony that he violated his probationary terms and conditions. (Factual Finding 18.)

5. Therefore, the Board may revoke probation for the violations and carry out the disciplinary order that was stayed, i.e., revocation of respondent's license. The extent of the violations and respondent's continued noncompliance warrant this result. Respondent's multiple violations evidence an inability or unwillingness to comply with the Board's probation program, which makes him a poor candidate for continuation of probation. Brothers gave respondent chance after chance to comply, but respondent

¹ The petition alleged respondent failed to submit three quarterly reports due no later than October 5, 2017, April 5, 2017, and January 5, 2018. However, no quarterly report was due by April 5, 2017. Respondent missed the other two due dates, and also missed the due dates for two additional quarterly reports due by April 5 and July 5, 2018.

never did. His testimony that he became withdrawn after being placed on probation does not justify granting his request to restart probation. Respondent's violations are long-standing, and he presented no evidence he has taken steps to correct any of the violations. With such a poor compliance record, a lesser discipline than license revocation is unwarranted.

6. Complainant also requests an order directing respondent to pay the Board's reasonable costs of investigating and enforcing the petition. "The board may request the administrative law judge, under his or her proposed decision in resolution of a disciplinary proceeding before the board, to direct any licensee found guilty of unprofessional conduct to pay to the board a sum not to exceed actual and reasonable costs of the investigation and prosecution of the case." (Bus. & Prof. Code, § 4959, subd. (a).) In evaluating a request for costs, the administrative law judge must consider whether complainant's investigation was "disproportionately large" compared to the violation, and whether the licensee: (1) committed some misconduct but "used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed;" (2) had a "subjective good faith belief in the merits of his or her position;" (3) raised a "colorable challenge" to the proposed discipline; and (4) "will be financially able to make later payments." (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45 [quoting *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 342, 345].)

7. The petition is a further disciplinary proceeding arising from the conduct initially charged in the Accusation, some of which was charged as unprofessional

conduct.² Therefore, the administrative law judge may direct respondent to pay the Board's reasonable costs of \$6,827.50 to investigate and prosecute the petition. (Factual Finding 19.) Complainant's investigation was not disproportionately large compared to the violations, and respondent did not raise a colorable challenge to the proposed discipline. He also did not obtain a reduction in the severity of the discipline imposed from the maximum discipline requested in the petition, i.e., revocation. But respondent did testify to financial difficulties, and still owes the Board \$5,500 in costs based on the underlying Decision and Order. (Factual Finding 18.) The revocation of his license will likely impair his ability to pay an additional \$6,827.50 in costs at this time. However, it is appropriate to require him to pay those additional costs if he is successful in petitioning the Board to reinstate his license in the future under Business and Professions Code section 4960.5.

² The Accusation's Third Cause for Discipline (Failure to Maintain Sanitary Office) was charged under Business and Professions Code section 4955 (exhibit 7, p. 21), which authorizes the Board to take disciplinary action against a licensee who is guilty of unprofessional conduct.

ORDER

Respondent Kang Dae Choi's probation is revoked, and the previously imposed stay on revocation is set aside. His acupuncture license number AC 4900 is revoked.

Respondent shall pay \$6,827.50 in costs to the Board due and payable only as a condition precedent to reinstatement of his license.

DATE: November 5, 2019

DocuSigned by:
Thomas Heller
THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings