

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

YU-TAI FU

Acupuncture License No. AC 8506,

Respondent.

Case No. 1A-2009-187

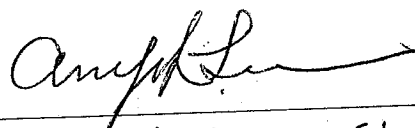
OAH No. 2011090869

DECISION

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

This Decision shall become effective on Dec. 15, 2012.

IT IS SO ORDERED NOV 15 2012


Anyork Lee, Chair
Acupuncture Board
Department of Consumer Affairs
State of California



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PROPOSED DECISION

Administrative Law Judge Diane Schneider, State of California, Office of Administrative Hearings, heard this matter on June 7 and 8, 2012, in Oakland, California.

Catherine E. Santillan, Senior Legal Analyst, represented complainant Janelle Wedge, Executive Officer of the Acupuncture Board of California.

Edward Hung, Attorney at Law, Wong and Associates, represented respondent, who was present.

The matter was submitted for decision on June 8, 2012.

FACTUAL FINDINGS

1. On July 3, 2002, the Acupuncture Board of California issued Acupuncture License No. AC 8506 to respondent Yu-Tai Fu. Respondent's acupuncture license will expire on October 31, 2013, unless renewed.

2. Between March or April and October 2009, patient A.C. received acupuncture treatment from respondent for low back pain. At the time, she was 34 years old. A.C. was referred to respondent by her father's acupuncturist. The candid and credible testimony of A.C. established the facts set forth in Findings 3 through 8.

3. On Friday, October 2, 2009, at about 5:15 p.m., A.C. went to respondent's office at 3033 Clement Street in San Francisco, for an acupuncture treatment for her low back pain. At the time of her appointment A.C. had a bad cold, and informed respondent about this.

4. When A.C. entered a treatment room, respondent told her to take off her pants and shirt and lie face down on the table. Respondent did not offer her a drape or sheet to place over her body. Respondent placed needles in her back and left the room. Respondent re-entered the room and removed the needles. Next, he performed a cupping treatment on her back and left the room again.

5. When respondent returned to the room he told A.C. that he wanted to perform qi gong massage to unblock her energy and help her chi flow throughout her body. A.C. agreed. During this time, respondent asked her questions about her personal life, such as whether she was married or had a boyfriend.

As respondent massaged A.C., he started to focus on her genital area. Respondent removed A.C.'s panties and told her he needed to do so in order to work on the energy that was trapped in her genital area. Respondent began to focus the massage on her inner thighs and genital area. As respondent rubbed and pressed on A.C.'s perineum, A.C. told him to stop and asked him to focus on her back. Respondent re-focused his attention away from her genitals for a brief period, but then returned to massaging her genital area, including her labia majora and minora. He said that he was attempting to open up her blocked energy channels.

6. A.C. felt that respondent's behavior was "not right," but she did not want to accuse him of intentionally touching her genitals because he was a "Chinese elder" who "made everything sound medical and technical." For these reasons, in spite of her discomfort, A.C. allowed respondent to continue massaging her. When respondent began pressing his fingers in a rapid motion in A.C.'s genital area, however, A.C. told him to stop in a firm voice. She put her underwear on, and respondent resumed massaging her back. He instructed A.C. that she needed to relax in order for the treatment to work, and that she should not speak and close her eyes. Again, respondent made his way down to her genital area. Respondent then removed A.C.'s underwear and began massaging her genital area. He rapidly moved his finger tips in A.C.'s genital area, and inserted his fingers into her vagina. A.C. told respondent to stop and that she needed to leave his office.

A.C. put her clothes on and paid his treatment fee of \$60. A.C. wanted to get out of respondent's office as soon as possible. As she was leaving his office respondent told her that she was a "good girl" and that he did not like "bad girls." Respondent also tried to hug A.C. and said that "American girls are the best."

7. After A.C. left respondent's office she went straight to her car. She checked the time, and it was 9:15 p.m. A.C. could not believe what had just happened and wrote the details of the incident on a piece of paper in her car. She was 90 percent sure that respondent's behavior was inappropriate, but wanted to confirm her instincts with the board. The following Monday morning she called the board. She informed the board about the incident, which led to her filing a complaint and a police report regarding the incident.

8. In the months following the incident with respondent, A.C. realized that she was avoiding intimacy and had "zero libido." She received counseling from a rape crisis center which helped her work through her difficult feelings about the incident.

9. Board expert Alex Feng, Ph.D., L.Ac., holds a doctorate in oriental medicine and has extensive experience in the field of acupuncture and Chinese medicine. He testified to the following facts: Respondent's acts of removing A.C.'s underwear, repeatedly massaging A.C.'s genital area, and inserting his fingers into her vagina, constituted sexual misconduct, repeated acts of negligence, and an "outrageous and extreme departure from the standard of care." Additionally, respondent's failure to provide A.C. with a towel or sheet, his inquires to A.C. regarding her marital status, and his attempt to hug her, were unprofessional.

10. Dr. Feng also opined that respondent's conduct was incompetent.¹ Insofar as it was not established that respondent lacked the requisite knowledge or ability in discharging his professional obligations, the facts did not prove that respondent was incompetent, as that term is used in the context of professional disciplinary proceedings.

Respondent's Evidence

11. Respondent's expert, Xiao (Rocky) Wang, L.Ac., is an acupuncturist with extensive experience in Chinese medicine. His testimony focused on the aspects of respondent's treatment of A.C. that fell within the standard of care. Mr. Wang agreed, however, that if respondent committed the sexual misconduct alleged in the accusation, he acted inappropriately and below the standard of care.

12. Respondent also agreed that the sexual misconduct alleged is clearly outside of the standard of care. He firmly denied, however, that he engaged in any of the conduct set forth in Factual Findings 5 and 6. Respondent described the allegations against him as "unbelievable" and commented that "if it's proven true you can take my license." Respondent's testimony lacked credibility and candor.

Costs

13. Complainant has incurred costs in the amount of \$13,165 in the investigation and enforcement of this matter. This consists of \$1,350 in expert fees and \$11,815 in Attorney General costs. In the absence of any evidence to the contrary, these costs are found to be reasonable.

¹ In order to establish that a practitioner is incompetent, it must be established that he lacked the requisite knowledge or ability in discharging his professional obligations. (*James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096, 1109.)

LEGAL CONCLUSIONS

First Cause for Discipline: Sexual Misconduct

1. Pursuant to Business and Professions Code section 726, the "commission of any act of sexual abuse, misconduct or relations with a patient" is grounds for discipline. Based upon the matters set forth in Factual Findings 5, 6, and 9, cause for discipline exists under this section.

Second Cause for Discipline: Gross Negligence

2. Pursuant to Business and Professions Code section 4955.2, the board may take disciplinary action against a licensee who commits an act of gross negligence. Gross negligence is defined as an extreme departure from the standard of care. (*James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096, 1113.) Based upon the matters set forth in Factual Findings 5, 6, and 9, cause for discipline exists under this section.

Third Cause for Discipline: Repeated Negligent Acts

3. Pursuant to Business and Professions Code section 4955.2, the board may take disciplinary action against a licensee who commits repeated negligent acts. Based upon the matters set forth in Factual Findings 5, 6, and 9, cause for discipline exists under this section.

Fourth Cause for Discipline: Incompetence

4. Pursuant to Business and Professions Code section 4955.2, the board may take disciplinary action against a licensee who commits an act amounting to incompetence. In the context of professional licensing, incompetence means "a lack of knowledge or ability in the discharging of professional obligations." (*James v. Board of Dental Examiners, supra*, 172 Cal.App.3d 1096, 1109.) Based upon the matters set forth in Factual Finding 10, cause for discipline does not exist under this section.

Fifth Cause for Discipline: Unprofessional Conduct Stemming from Dishonest Act

5. Pursuant to Business and Professions Code section 4955.1, subdivision (c), the board may take disciplinary action against a licensee who commits an act involving dishonesty or corruption. Complainant alleges that respondent's failure to provide A.C. with a sheet or towel, his acts of sexual misconduct, his inquires to A.C. regarding her marital status, and attempting to hug her, constitute a violation of this section. Complainant also alleges that insofar as respondent engaged in an act involving dishonesty he also committed unprofessional conduct pursuant to Business and Professions Code section 4955, subdivision (d). Although respondent committed multiple acts of misconduct, as set forth in Legal Conclusions 1 through 3, it was not demonstrated that such acts involved dishonesty or corruption. Accordingly, cause for discipline does not exist under these sections.

Appropriate Discipline

6. Respondent committed serious acts of sexual misconduct during an acupuncture treatment session with patient A.C. He steadfastly denies culpability for his shocking and extreme departure from professional standards. The board's highest priority is the protection of the public. The facts of this case establish that respondent's continued licensure poses a risk to public safety. Accordingly, his license is revoked.

Costs

7. Business and Professions Code section 4959 provides that a licensee found to have committed unprofessional conduct may be ordered to pay a sum not to exceed the reasonable costs of investigation and prosecution. By reason of the matters set forth in Legal Conclusions 1 through 3, cause exists to require respondent to pay cost recovery.

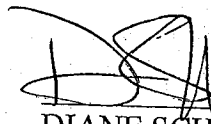
In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Supreme Court enumerated several factors that a licensing board must consider in assessing costs. The board must not assess the full costs of investigation and enforcement when to do so would unfairly penalize a respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; and the board must consider a respondent's ability to pay.

None the factors enumerated by the court in *Zuckerman* militate against imposing the entire cost recovery requested by complainant. The basis for the accusation is respondent's sexual misconduct. He did not present any evidence disproving such allegations. Additionally, respondent did not present evidence that he is unable to pay the cost award requested by complainant. Accordingly, cause exists to require respondent to pay cost recovery in the amount of \$13,165.

ORDER

1. Acupuncture License No. AC 8506 issued to respondent Yu-Tai Fu is revoked.
2. Respondent shall pay to the board its costs of investigation and enforcement in the amount of \$13,165.

DATED: 7/2/12



DIANE SCHNEIDER
Administrative Law Judge
Office of Administrative Hearings