

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

TINA THOA LUU
aka Tina Luu Pham,

Acupuncture License No. AC 6799,

Respondent.

Case No. 1A-2010-49

OAH No. 2011031064

PROPOSED DECISION

Administrative Law Judge Diane Schneider, State of California, Office of Administrative Hearings, heard this matter on March 6, 2012, in Oakland, California.

David Carr, Deputy Attorney General, represented complainant Janelle Wedge, Executive Officer of the Acupuncture Board of California.

No appearance was made by or on behalf of respondent Tina Thoa Luu.

The matter was submitted for decision on March 6, 2012.

FACTUAL FINDINGS

1. Respondent Tina Thoa Luu, also known as Tina Luu Pham, was properly served with the Accusation and Notice of Hearing on the Accusation, pursuant to Government Code sections 11505 and 11509. Inasmuch as no appearance was made by or on behalf of respondent, this hearing proceeded by default pursuant to Government Code section 11520.

2. On July 20, 1999, the Acupuncture Board of California issued Acupuncture License No. AC 6799 to respondent. Respondent's acupuncture license expired on May 31, 2011, and is presently in delinquent status.

3. On February 11, 2008,¹ respondent was convicted in the Superior Court of California, County of Santa Clara, on her plea of nolo contendere to a misdemeanor violation of Penal Code section 487, subdivision (a) (grand theft), a crime that is substantially related to the qualifications, functions, or duties of an acupuncturist. Imposition of sentence was suspended. Respondent was placed on court probation for two years and ordered to serve 30 days in jail.

4. On May 24, 2010, respondent was convicted in the Superior Court of California, County of Santa Clara, on her plea of nolo contendere to a misdemeanor violation of Penal Code section 484/666, subdivision (a) (petty theft with prior conviction), a crime that is substantially related to the qualifications, functions, or duties of an acupuncturist. Imposition of sentence was suspended. Respondent was placed on court probation for two years and ordered to serve 30 days in jail.

5. On July 22, 2011, in the Superior Court of California, County of Santa Clara, respondent entered pleas of nolo contendere to the following felony offenses: Business and Professions Code section 2052, subdivision (a) (practicing medicine without a certification), Business and Professions Code section 4324, subdivision (a) (forgery of a prescription), and Penal Code section 487, subdivision (a) (grand theft).² There is no final judgment of conviction for these offenses. (Counsel for complainant represented that respondent's sentencing is scheduled to occur in April 2012.)

6. Tracy Tu is a Senior Investigator with the State of California Medical Board. On July 29, 2010, she engaged in an undercover operation at a medical office located at 1692 Tully Road, Suite 12, in San Jose. There she met respondent, who is not licensed to practice medicine.

7. Tu told respondent that she had learned about her from a Vietnamese radio and newspaper advertisement. Respondent asked Tu to complete a medical questionnaire and escorted Tu to an examination room. Tu complained of hemorrhoids. Respondent showed Tu photographs of a patient's anus, which respondent claimed she had successfully treated for hemorrhoids. Respondent told Tu that after she applied cream to the patient, the patient's hemorrhoids "fell off." When asked about the cost of treatment, respondent told Tu that she would first have to examine Tu's hemorrhoids. Respondent said that after she examined Tu, she would explain the procedure for treatment and the cost. Respondent further explained that the treatment required Tu to come to office, where respondent would apply a "special cream that no one else has." When Tu told respondent that wanted to come back at a later time for an examination, respondent gave her a business card bearing the name "Dr. Tina Thoa Luu." Respondent also wrote a telephone number on the card and handed it to Tu. She

¹ The date of the conviction alleged in the First Amended Accusation, February 11, 2010, is incorrect.

² The First Amended Accusation alleges that respondent pled guilty to these charges, but the court docket indicates that respondent pled no contest.

told Tu that she sees patients by appointment only. Before Tu left, respondent said that she normally charges a \$45 consultation fee, but would waive that charge for Tu's visit.

8. Vincent U. Yap, M.D., has been licensed to practice medicine since 1975. He is employed by the State of California Medical Board as a medical consultant. He is familiar with the standards and rules governing the practice of medicine in California. Dr. Yap reviewed respondent's conduct with Yu during Yu's undercover operation at respondent's medical office. Dr. Yap opined, and it is found, that respondent's conduct set forth in Factual Finding 7, constituted the practice of medicine in California. Dr. Yap's conclusion was not altered by the fact that respondent is a licensed acupuncturist.

Costs

9. Counsel for complainant submitted a cost certification declaration in which he states that the Department of Justice has billed complainant a total of \$11,730 for the time that he spent working on this matter. According to the declaration, these costs represent 69 hours of time, which is billed at the rate of \$170 per hour. Although the declaration describes the general tasks performed, it does not describe the time spent on each task.

LEGAL CONCLUSIONS

First Cause for Discipline

1. Pursuant to Business and Professions Code section 4955, subdivision (b), and Business and Professions Code section 4956, the board may discipline a licensee for unprofessional conduct, which is defined to include conviction of an offense that is substantially related to the qualifications, functions, or duties of an acupuncturist. Respondent's theft convictions, set forth in Factual Findings 3 and 4, are substantially related to the qualifications, functions or duties of an acupuncturist. Accordingly, cause exists for discipline under these sections.

Second Cause for Conviction

2. Pursuant to Business and Professions Code section 4955.1, subdivision (c), the board may discipline a licensee committing an act involving dishonesty relating to the qualifications, functions or duties of an acupuncturist. The First Amended Accusation alleges, and it is found, that respondent's two misdemeanor theft convictions, set forth in Factual Findings 3 and 4, constitute acts involving dishonesty, pursuant to Business and Professions Code section 4955.1, subdivision (c). Cause for discipline, therefore, exists under this section.

Third, Fifth and Sixth Causes for Discipline

3. The offenses to which respondent pled no contest in July 2011, set forth in Factual Finding 5, are not deemed a “conviction” within the meaning of Business and Professions section 4956, because a final judgment has not yet been entered. Accordingly, cause for discipline does not exist pursuant to Business and Professions Code section 4955, subdivision (b), based upon the conviction of a crime that is substantially related to the qualifications, functions, or duties of an acupuncturist.

Fourth Cause for Discipline

4. The First Amended Accusation alleges that respondent is subject to disciplinary action pursuant to Business and Professions Code section 4955.1, subdivision (c), on the grounds that her “conviction for grand theft constitutes an act involving dishonesty.” Since, as explained in Legal Conclusion 3, respondent’s plea to the charge of grand theft does not constitute a “conviction,” within the meaning of Business and Professions Code section 4956, it does not provide the basis for discipline as alleged in the First Amended Accusation.

Appropriate Discipline

5. In the instant case, respondent committed two theft offenses. Respondent failed to appear at the hearing or otherwise present any evidence of rehabilitation or mitigation. Under these circumstances, the board lacks assurance that respondent is able to practice acupuncture in a manner consistent with public safety. Revocation of respondent’s license, therefore, is the appropriate discipline.

It is noted that the First Amended Accusation does not allege that respondent’s act of practicing medicine without a certification constitutes a dishonest or fraudulent act under Business and Professions Code section 4955.1, subdivision (c). Additionally, as explained in Legal Conclusions 3 and 4, respondent’s plea of no contest does not provide a basis for discipline since a final judgment in that matter has not been rendered. For these reasons, as alleged in the First Amended Accusation, respondent’s act of practicing medicine without a certification, set forth in Factual Findings 7 and 8, is not considered in determining the level of discipline in this matter.

Costs

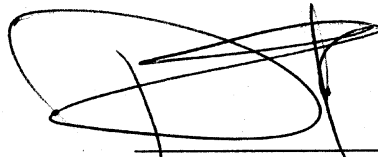
6. Business and Professions Code section 4959 provides that a licensee found to have committed unprofessional conduct may be ordered to pay a sum not to exceed the reasonable costs of investigation and prosecution. An agency that seeks to recover its costs must submit declarations “that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs” (Cal. Code Regs., tit. 1, § 1042.) The declaration or billing records must “describe the general tasks performed,

the time spent on each task and the hourly rate or other compensation for the service. (Cal. Code Regs., tit. 1, § 1042, subd. (b).) In the instant case, counsel's cost certification declaration does not describe the amount of time spent on each task, and it is not supported by itemized billing statements. (Finding 9.) The declaration submitted by counsel for complainant is, therefore, insufficient to establish the actual costs incurred and the reasonableness of the costs pursuant to the guidelines set forth in California Code of Regulations, title 1, section 1042, subdivision (b). The costs requested are not recoverable under Business and Professions Code section 4959.

ORDER

Acupuncture License No. AC 6799 issued to respondent Tina Thoa Luu, also known as Tina Luu Pham, is revoked.

DATED: 3/30/12



DIANE SCHNEIDER
Administrative Law Judge
Office of Administrative Hearings