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ACUPUNCTURE BOARD

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Amended Accusation Against: **FREDD HILTON DUNHAM,** **P.O. Box 196** **Buellton, CA 93427** **Acupuncturist License No. AC 10742,** Respondent.	Case No. 1A-2012-109 **AMENDED ACCUSATION**

Complainant alleges:

PARTIES

1. Terri Thorfinnson (Complainant) brings this Amended Accusation solely in her official capacity as the Executive Officer of the Acupuncture Board.

2. On or about October 31, 2005, the Acupuncture Board issued Acupuncturist License Number AC 10742 to Fredd Hilton Dunham (Respondent). That Acupuncturist License was in full force and effect at all times relevant to the charges brought herein and expired January 31, 2015. Pursuant to Business and Professions Code Section 118 subsection (b), the Acupuncture Board may take disciplinary action against Respondent notwithstanding the expiration of his license.

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JURISDICTION

3. This Amended Accusation is brought before the Acupuncture Board (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 4927, subdivision (d), of the Code states:

"'Acupuncture' means the stimulation of a certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping, and moxibustion."

5. Section 4937 of the Code states, in pertinent part:

"An acupuncturist's license authorizes the holder thereof:

"(a) To engage in the practice of acupuncture.

"(b) To perform or prescribe the use of Asian massage, acupressure, breathing techniques, exercise, heat, cold, magnets, nutrition, diet, herbs, plant, animal, and mineral products, and dietary supplements to promote, maintain, and restore health. Nothing in this section prohibits any person who does not possess an acupuncturist's license or another license as a healing arts practitioner from performing, or prescribing the use of any modality listed in this subdivision.

". . ."

6. Section 4955 of the Code states, in pertinent part:

"The board may deny, suspend, or revoke, or impose probationary conditions upon, the license of any acupuncturist if he or she is guilty of unprofessional conduct.

"Unprofessional conduct shall include, but not be limited to, the following:

". . ."

"(i) Any action or conduct that would have warranted the denial of the acupuncture license.

". . ."

7. Section 4955.2 of the Code states, in pertinent part:

The board may deny, suspend, revoke, or impose probationary conditions upon the license of any acupuncturist if he or she is guilty of committing any one of the following:

" (a) Gross negligence.

"(b) Repeated negligent acts.

". . ."

COST RECOVERY

8. Section 4959 of the Code states:

"(a) 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.

"(b) The costs to be assessed shall be fixed by the administrative law judge and shall not in any event be increased by the board. When the board does not adopt a proposed decision and remands the case to an administrative law judge, the administrative law judge shall not increase the amount of any costs assessed in the proposed decision.

"(c) When the payment directed in the board's order for payment of costs is not made by the licensee, the board may enforce the order for payment in the superior court in the county where the administrative hearing was held. This right of enforcement shall be in addition to any other rights the board may have as to any licensee directed to pay costs.

"(d) In any judicial action for the recovery of costs, proof of the board's decision shall be conclusive proof of the validity of the order of payment and the terms for payment.

"(e) All costs recovered under this section shall be considered a reimbursement for costs incurred and shall be deposited in the Acupuncture Fund."

Factual Summary

9. Patient R.S.[1] is a 50 year old female former bus driver who sought treatment at the Spine and Orthopedic Center (SOC) for injuries which resulted from a vehicular accident. R.S.'s

[1] Patient and certain other witnesses' names are abbreviated to protect their privacy rights. The names will be provided to Respondent upon written request for discovery.

patient records reflect that she presented to SOC's owner, Dr. M., with a chief complaint of neck pain with bilateral upper extremity and right hand symptoms which had been ongoing for six months.

10. On or about April 26, 2012, patient R.S. went to SOC for her first acupuncture treatment with Respondent, who was employed by SOC as a staff acupuncturist. The treatment was conducted in a private, closed curtained treatment room. The patient's chief complaint to Respondent was she was suffering neck and lower back pain which radiated bilaterally to her arms, hands, and legs.

Respondent did not document a traditional Chinese medical diagnosis anywhere in the patient's records, nor a treatment plan, nor a rationale for utilizing "Infrared Asian Massage"[2] during R.S.'s acupuncture treatment.

11. After R.S.'s intake interview with Respondent, he provided acupuncture treatment to her back, utilizing acupuncture needles for approximately 45 minutes and then removed the acupuncture needles. Respondent did not wear gloves throughout the patient's appointment.

The patient was lying face down on the treatment table after Respondent removed the needles. Respondent stood by R.S.'s head and began to perform "Infrared Asian Massage" on the her lumbar area. There was no female co-worker in the room with R.S. and Respondent. Approximately two minutes after Respondent began massaging R.S. his breathing changed, becoming louder and more rapid. At that time Respondent, with no explanation, suddenly pulled R.S.'s pants down, past her naked buttocks to her upper legs, and R.S. then briefly felt something hard touch the back of her head. Respondent's behavior made R.S. uncomfortable and she was afraid Respondent would make unwanted sexual advances towards her.

12. SOC had received a complaint from another female patient in 2012, patient A.W., who Respondent was treating for a broken pelvis. Patient A.W. complained she was

[2] Infrared Asian Massage is not part of the basic acupuncture curriculum in California Acupuncture schools. This technique can be taught outside of the basic curriculum if an acupuncturist wishes to obtain additional certification in different massage techniques.

uncomfortable because Respondent did not wear gloves or have a female coworker present during her appointments when he treated her exposed pubic bone area.

After receiving Patient A.W.'s complaints a SOC Human Resources representative counseled Respondent and suggested that he use gloves when treating female patients' "sensitive areas" and that he always have a female staff member present during those treatments. The SOC representative further advised Respondent to obtain prior written authorization from female patients when rendering any acupuncture services. In his subsequent acupuncture practice Respondent did not utilize any of these suggestions.

13. Patient A.W. began treating with Respondent in 2012, at the recommendation of her primary care physician due to acute pain she was experiencing as a result of her pubic bone being broken during an automobile accident. All of A.W.'s treatments with Respondent were conducted in a private, closed curtained treatment room, and there were no female staff members present during any of the treatments.

During her initial appointment A.W. told Respondent she had never undergone acupuncture treatment. Respondent told A.W. he planned to use acupuncture, electrical stimulation, and acupressure on her pelvic region to reduce her pain, but did not explain any of those terms or what those treatments entailed. Although A.W. was concerned when Respondent did not offer a detailed explanation of her treatment, she allowed Respondent to treat her because she was in so much pain. Respondent did not document a traditional Chinese medical diagnosis anywhere in the patient's records, nor did he document a treatment plan.

14. When A.W. arrived for her second scheduled appointment she noticed there were no staff members or patients present in the office. At Respondent's direction she removed all of her clothing and wrapped herself in a sheet while Respondent waited outside of the examination room. Respondent entered the treatment room and, without asking permission, opened the sheet in which A.W. was wrapped and pressed his gloved fingers onto her clitoris so strongly A.W. screamed in pain.

15. With no prior explanation Respondent used his ungloved hand to insert approximately eight acupuncture needles throughout A.W.'s pubic area. Respondent then placed

approximately four acupuncture needles into both sides of A.W.'s upper labia and one above her clitoris. A.W. screamed in pain as Respondent inserted the needles. After Respondent placed the acupuncture needles into A.W.'s labia and clitoral area he physically attempted to spread her legs apart, but A.W. refused to allow him to do this. Respondent never explained to A.W. why he attempted to spread her legs apart.

A.W. did not observe Respondent use any sterilization methods on the acupuncture needles he inserted. A.W. felt "horrified" by what happened during this appointment but nonetheless returned for additional treatment because she believed she had no other pain management options.

16. At A.W.'s third appointment, prior to inserting the acupuncture needles, Respondent laid a wet towel on her naked body as she lay face up on the treatment table. Respondent did not explain why he placed the wet towel on A.W.'s body nor why he left it until the towel became cold. As a result of the placement of the cold, wet towel, A.W.'s nipples enlarged and protruded upwards, greatly embarrassing her.

After removing the towel Respondent used his ungloved hand to insert acupuncture needles into A. W.'s vaginal area as she lay naked on the treatment table. A.W. screamed in pain when Respondent inserted the needles, yelling at Respondent that he was hurting her. Respondent responded to her screams by laughing out loud.

Respondent then placed his ungloved hand on her labia and penetrated her vagina with his forefinger. As Respondent did this A.W. observed a "bulge" in his crotch which she believed to be his erect penis. Respondent moved to the side of the examination table, while moaning and repeatedly rubbing his clothed crotch area rapidly against the table as he looked at the patient's naked body. A.W. removed the acupuncture needles herself, got dressed and ran to her car.

Respondent's behavior during A. W.'s fourth appointment was very similar to her third appointment.

17. J.S., A.W.'s grandmother, went to A.W.'s fifth appointment with her and accompanied A.W. into the examination room. During this appointment Respondent behaved differently then he had during the previous appointments, and asked A.W.'s permission to place his hands on her vagina before he touched her.

Respondent used his ungloved hand to insert acupuncture needles into A.W.'s vagina while she screamed and whimpered in pain throughout the treatment. When Respondent used one hand to insert the acupuncture needles inside of her vagina and the other hand to massage her upper thighs, J.S. and A.W. left the office.

FIRST CAUSE FOR DISCIPLINE

(Gross Negligence)

18. Respondent is subject to disciplinary action under 4955.2, subsection (a), in that he was grossly negligent in his care and treatment of his patients, R. S. and A.W. The circumstances are as follows:

19. The standard of care when treating first time acupuncture patients requires the acupuncturist provide an explanation and/or discussion with the patient about what to expect during an acupuncture visit. It is the standard of care for an acupuncturist to make patients feel comfortable during the course of an acupuncture treatment.

20. The standard of care requires the acupuncturist to formulate a Traditional Chinese Medical diagnosis and treatment plan during the patient's initial intake interview.

21. When a male acupuncturist treats a disrobed female patient the standard of care requires a female witness to be present during treatment, particularly if the treatment involves access to sensitive areas and continuous manipulation of those areas.

22. The standard of care also requires an acupuncturist to have appropriate draping for a patient if access to sensitive body areas is needed during treatment.

23. The standard of cares further requires the acupuncturist to explain to the patient why the acupuncturist needs access to different areas of the body for treatment.

24. The standard of care requires the acupuncturist to request that patients remove their own clothing or change into a gown.

25. The standard of care requires that an acupuncturist not touch a female patients' vagina.

26. The needle insertion points utilized by Respondent during A.W.'s treatments were not within the standard of care.

27. Respondent failed to conform to the applicable standard of care for an acupuncturist in his care and treatment of patients R.S. and A.W. when he failed to explain his intended treatment and his subsequent actions resulted in the patients becoming uncomfortable and afraid.

28. Respondent failed to have a female coworker present as a chaperone during his care and treatment of patients R.S. and A.W. Respondent also failed to provide appropriate draping for patients R.S. and A.W. during the patients' acupuncture treatments, resulting in both patients becoming uncomfortable and afraid.

29. Respondent failed to articulate a Traditional Chinese Medical diagnosis for either patient.

30. Respondent failed to provide any justifiable rationale for utilizing "Infrared Asian Massage" for patient R.S. during her acupuncture treatment.

31. Respondent's care and treatment of patients R.S. and A.W. as set forth above includes the following acts and/or omissions which constitute extreme departures from the standard of practice:

A. Respondent's failure to explain his intended treatment and his subsequent actions during his acupuncture treatments of patients R. S. and A.W.

B. Respondent's failure to have a female coworker present as a chaperon and his failure to provide appropriate patient draping during his acupuncture treatments of patients R. S. and A.W.

C. Respondent's failure to articulate a Traditional Chinese Medical diagnosis during his acupuncture treatments of patients R. S. and A.W.

D. Respondent's failure to develop a treatment plan for patient R.S. or A.W. during the patients' initial intake interviews.

E. Respondent's failure to wear gloves during his treatments of patients R.S. and A.W.

F. Respondent's use of an ungloved hand to touch patient A.W.'s vagina during treatment.

G. Respondent's repeated touching of patient A.W.'s vagina during treatment.

H. Respondent's laughter during A.W.'s treatment following her screams of pain.

I. Respondent's continuing treatment of A.W. after she yelled that he was hurting her.

J. Respondent's insertion of his finger into patient A.W.'s vagina during treatment.

K. Respondent's use of a wet, cold towel on patient A. W. while she lay naked on the treatment table.

L. Respondent's attempt to physically spread A. W.'s legs apart during treatment.

32. Respondent's acts and/or omissions as set forth in paragraphs 10 through 31, inclusive, above, whether proven individually, jointly, or in any combination thereof, constitute gross negligence pursuant to section 4955.2, subdivision (a), of the Code. Therefore cause for discipline exists.

SECOND CAUSE FOR DISCIPLINE

(Repeated Negligent Acts)

33. Respondent is subject to disciplinary action under section 4955.2, subdivision (b), of the Code, in that he has committed repeated acts of negligence in the practice of acupuncture. The circumstances are as follows:

34. Complainant refers to, and by reference incorporates herein paragraphs 9 through 31, inclusive, above.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

35. Respondent is subject to disciplinary action under section 4955 of the Code, for unprofessional conduct. The circumstances are as follows:

36. Complainant refers to, and by reference incorporates herein paragraphs 9 through 34, inclusive, above.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Acupuncture Board issue a decision:

1. Revoking or suspending Acupuncturist License Number AC 10742, issued to Fredd Hilton Dunham, AC;

2. Ordering him to pay the Acupuncture board the reasonable costs of the investigation

and enforcement of this case, pursuant to Business and Professions Code section 4959;

2. If placed on probation, ordering him to pay to the Acupuncture Board the costs of probation monitoring; and;

3. Taking such other and further action as deemed necessary and proper.

DATED: FEB 25 2015

TERRI THORFINNSON
Executive Officer
Acupuncture Board
Department of Consumer Affairs
State of California
Complainant

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