BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition to Revoke Probation Against: ROBERT PAUL SIMMONS 36127 FAIR OAK TRL. YUCAIPA, CA 92399 Acupuncture License No. AC 11640 Respondent.	Case No.: D1-2011-21 OAH No.: 2014020028

DECISION AND ORDER

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

This Decision shall become effective on JUL 03 2014.

IT IS SO ORDERED JUN 03 2014.

Michael Shi, Chair
Acupuncture Board
Department of Consumer Affairs
State of California

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In the Matter of the Accusation and Petition to Revoke Probation Against: ROBERT PAUL SIMMONS, L.AC. Acupuncturist License No. AC 11640, Respondent.	CASE No. D1-2011-21 OAH No. 2014020028

PROPOSED DECISION

Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on March 19, 2014.

Deputy Attorney General Joseph F. McKenna III represented complainant.

Robert P. Simmons (respondent) represented himself.

The matter was submitted on March 19, 2014.

FACTUAL FINDINGS

1. The Accusation and Petition to Revoke Probation against respondent was filed by Terri Thorfinnson (complainant), while acting in her official capacity as the Executive Officer of the Acupuncture Board, Department of Consumer Affairs, State of California (the Board).

License History

2. On February 23, 2007, the Board issued Acupuncturist License Number AC 11640 to respondent.

3. On January 3, 2012, then Executive Officer, Janelle Wedge, signed and thereafter filed and served on respondent, an Accusation in Case No. 1A-2011-2.

4. On September 4, 2012, respondent signed a "Stipulated Settlement and Disciplinary Order." In the stipulation, which became effective on June 5, 2013, respondent made the following admissions: On January 27 and 28, 2011, respondent possessed, and was under the influence of, methamphetamine; respondent admitted to the police officers who arrested him on January 28, 2011, that he frequently used methamphetamine; on March 3, 2011, respondent failed to appear for a scheduled court appearance and a warrant for his arrest was issued; on April 20, 2011, respondent appeared for a prehearing conference, the warrant was recalled, and another prehearing conference was scheduled for August 29, 2011; respondent failed to appear for the August 29, 2011, prehearing conference and another warrant for his arrest was issued; on November 9, 2011, police officers went to respondent's residence to execute the arrest warrant; pursuant to a consent search, the officers found methamphetamine in respondent's residence; respondent was arrested for the outstanding warrant and for possessing methamphetamine; a later analysis of respondent's blood revealed that he was again under the influence of methamphetamine at the time of his November 9, 2011 arrest.

5. As a result of the stipulated settlement respondent's license was revoked, the revocation was stayed, and respondent was placed on five years of probation on the following relevant terms and conditions:

> 1. PSYCHOLOGICAL EVALUATION Within 90 days of the effective date of this decision and on a periodic basis thereafter as may be required by the Board or its designee, respondent shall undergo a psychological evaluation (and psychological testing, if deemed necessary) by a Board-appointed California licensed psychologist . . . .
>
> If the Board concludes from the results of the evaluation that respondent is unable to practice independently and safely, he shall immediately cease practice and shall not resume practice until notified by the Board. If the Board concludes from the results of the evaluation that respondent would benefit from ongoing psychotherapy, respondent shall comply with the Board's directives in that regard.
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> Respondent shall pay all costs associated with the psychological evaluation . . . .
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> 2. ALCOHOL AND DRUG ABUSE TREATMENT Effective 30 days from the date of this decision, respondent shall enter an inpatient or outpatient alcohol

or other drug abuse recovery program (a minimum of six (6) months duration) or an equivalent program as approved by the AC.

Quitting the program without permission or being expelled for cause shall constitute a violation of probation by respondent. Subsequent to the program, respondent shall participate in on-going treatment such as receiving individual and/or group therapy from a psychologist trained in alcohol and drug abuse treatment; and/or attend Twelve Step meetings or the equivalent as approved by the Board at least three times a week during the first year of probation; and/or other substance abuse recovery programs approved by the Board. Respondent shall pay all costs of treatment and therapy, and provide documentation of attendance at Twelve Step meetings or the equivalent as approved by the Board. The psychologist shall confirm that respondent has complied with the requirements of this decision and shall notify the Board immediately if she or he believes respondent cannot safely render acupuncturist services. Respondent shall execute a release authorizing the psychologist to divulge the aforementioned information to the Board.

[¶] . . . [¶]

4. BIOLOGICAL FLUID TESTING Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the Board or its designee. 'Biological fluid testing' may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Within 15 days of the effective date of this Decision, respondent shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

> A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent.
>
> If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, and/or if respondent has a confirmed positive biological fluid test for any substance (whether or not legally prescribed) and has not reported his use thereof to the Board or its designee, respondent shall receive a notification from the Board or its designee to immediately cease the practice of acupuncture. Respondent shall not resume the practice of acupuncture until final decision on an accusation and/or petition to revoke probation . . . .

6. At all times relevant to the instant Accusation and Petition to Revoke Probation, respondent's license was on probation on the preceding, relevant terms and conditions.

Respondent's Violations of Probation

7. Respondent violated term 1 (psychological evaluation) by failing to undergo a psychological evaluation by a Board-appointed California licensed psychologist within ninety days of June 5, 2013, (the effective date of the underlying decision). As of March 19, 2014, the date of the instant hearing, respondent still had not complied with term 1 of his probation.

8. Respondent violated term 2 (alcohol and drug abuse treatment) of his probation. Term 2 required respondent to enter an inpatient or outpatient alcohol or other drug abuse recovery program as approved by the Board, within 30 days of June 5, 2013. As of the date of the instant hearing respondent had failed to provide proof of having entered an approved program. Additionally, although respondent's probation monitor made several requests for proof of respondent's having attended Twelve Step recovery program meetings, respondent failed to present such proof. On the date of the instant hearing respondent did provide a document he claimed evidenced his attendance of 30 Twelve Step meetings. The document, Exhibit A, demonstrated that respondent attended four meetings in December of 2011, and 26 meetings in January of 2012. This meager documentation is woefully inadequate evidence that respondent is in compliance with term 2's requirement that respondent "attend Twelve Step meetings or the equivalent as approved by the Board at least three times a week during the first year of probation."

9. Respondent violated term 4 (biological fluid testing) of his probation. Term 4 required respondent to submit to biological fluid testing, at respondent's expense, with a laboratory approved in advance by the Board. The Board-approved laboratory was Phamatech Laboratories & Diagnostics (Phamatech). Prior to June 5, 2013, respondent had been provided instructions on how to login with Phamatech for daily notification of drug testing, and instructions on what to do if he was selected for drug testing on a particular day. Respondent was required to login to Phamatech's secured internet website or call Phamatech's telephone system on a daily basis to determine if he had been selected for a drug test that day. If respondent was randomly selected for a drug test, he was required to report to a collection site to provide a biological specimen that same day. As of the date of the instant hearing, respondent had repeatedly failed to login on a daily basis. For example, between August 9, 2013, and November 11, 2013, respondent failed to login on 25 separate dates. Respondent also repeatedly failed to appear and provide biological specimens at a collection site after being notified during his logins that he had been randomly selected for a drug test. Respondent's failures to comply occurred even though his probation monitor notified him, on several separate occasions, that his "no shows" and failures to login constituted non-compliance with his probation, and could result in further disciplinary action.

Respondent's Testimony

10. Respondent testified that he had problems complying with the terms and conditions of probation due to the fact that he lives in a remote area of Big Bear, California. According to respondent, he has to take public transportation to get to appointments and he just cannot timely get to appointments. Respondent's weak excuses were unavailing. It was evident that respondent just did not take his probation seriously. A grant of probation is an act of grace by the Board and once that act of grace is bestowed on a licentiate, it is the licentiate's duty to strictly comply with the terms and conditions of the probation; terms and conditions designed to protect the public. Respondent was given many chances to comply with the terms of his probation. As of the date of the instant hearing respondent had been on probation for nine months and he had not made any meaningful efforts to comply with terms 1, 2, and 4; essential terms of his probation, necessary to protect the public. Two of the terms, term 2 and term 1, required action within 30 and 90 days of the effective date of the decision (June 5, 2013).

LEGAL CONCLUSIONS

1. Causes exist for revocation of respondent's probation based jointly and severally on each of respondent's failures to comply with probationary terms 1, 2, and 4, as set forth in Findings 5, 6, 7, 8, and 9.

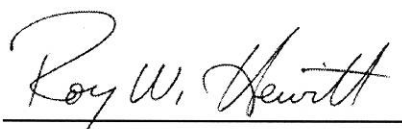
2. Causes exist for discipline pursuant to Business and Professions Code sections 4955 because, respondent's repeated and continual violations of probation, as set forth in Findings 5, 6, 7, 8, and 9, constituted unprofessional conduct. Respondent's violations of probation constituted conduct that breached the rules and ethical codes of the acupuncture profession, conduct that was unbecoming to a member of the profession, and conduct that demonstrated an unfitness to practice acupuncture.

3. Considering respondent's numerous violations of probation and the attitude he exhibited during the hearing (that he was the victim of circumstances beyond his control), the only appropriate discipline, necessary to ensure public protection, is outright revocation.

ORDER

The accusation is sustained and the petition to revoke probation is granted. Acupuncturist License Number AC 11640, issued to respondent, Robert Paul Simmons, is revoked.

Dated: April 9, 2014



ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings