BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:	)	Case No.: 1A-2008-154
	)	OAH No.: 2010070663
	)	
JOHANNES H. SCHOTHORST	)	
12 CALAIS	)	
IRVINE, CA 92602	)	
	)	
Respondent.	)	
	)	

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 DEC 2 2 2010.

IT IS SO ORDERED NOV 2 2 2010.

Robert Brewer, Chair
Acupuncture Board
Department of Consumer Affairs
State of California

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: JOHANNES H. SCHOTHORST, Respondent.	Case No. 1A-2008-154 OAH No. 2010070663

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 1, 2010, in San Diego, California.

Heidi R. Weisbaum, Deputy Attorney General, Department of Justice, State of California, represented complainant Janelle Wedge, Executive Officer of the Acupuncture Board, Department of Consumer Affairs, State of California.

Keith W. Carlson, Attorney at Law, represented respondent Johannes H. Schothorst, who was present throughout the hearing.

The matter was submitted on September 13, 2010.

FACTUAL FINDINGS

Jurisdictional Matters

1. On March 15, 2010, respondent submitted an application for license to the board. By letter dated March 22, 2010, the board denied respondent's application, on the basis of certain criminal convictions. By letter dated March 29, 2010, respondent requested a hearing.

2. On June 17, 2010, complainant signed the statement of issues in her official capacity. On or about the same date, the statement of issues and other required jurisdictional documents were served on respondent by certified mail.

3. On September 13, 2010, the record was opened, jurisdictional documents were received, sworn testimony was given, documentary evidence was introduced, closing argument was presented, and the matter was submitted.

The Criminal Convictions

4. On or about March 30, 1998, respondent pled guilty and was convicted of one count each of violating Health and Safety Code section 11377, subdivision (a) (possession of a controlled substance, methamphetamine), a felony, and Health and Safety Code section 11364 (possession of drug paraphernalia), a misdemeanor. Respondent was placed on summary probation for three years. The terms of probation included service of 60 days in custody, fines and fees.

5. On or about September 1, 1998, respondent pled guilty and was convicted of one count each of violating Health and Safety Code section 11377, subdivision (a) (possession of a controlled substance, methamphetamine), a felony, Penal Code section 12020, subdivision (a) (possession of a deadly weapon, a knife), a felony, and Health and Safety Code section 11550, subdivision (a) (being under the influence of a controlled substance, methamphetamine), a misdemeanor. Respondent's sentencing was continued to allow respondent to complete a Salvation Army residential program prior to sentencing.

6. On or about June 9, 1999, respondent pled guilty and was convicted of one count of violating Health and Safety Code section 11383, subdivision (c) (possession of pseudoephedrine/ephedrine with intent to manufacture a controlled substance, methamphetamine), a felony. Respondent also admitted probation violations in the criminal matters identified in Findings 4 and 5. Respondent was sentenced to two years in prison.

7. On or about January 16, 2003, respondent pled guilty and was convicted of one count of violating Health and Safety Code section 11377, subdivision (a) (possession of a controlled substance, methamphetamine) with a prior conviction, a felony. Respondent was placed on formal probation for three years. The terms of probation included completion of a drug treatment program, participation in a narcotics anonymous (NA) program, registration as a narcotics offender, and the payment of fines and fees.

On or about April 20, 2004, respondent's January 2003 guilty plea was set aside, his conviction was vacated, and the criminal complaint was dismissed pursuant to Penal Code section 1210 as a result of his successful completion of the drug treatment program.

Respondent's Background, Rehabilitation and Character

8. Respondent testified at the hearing. He stated that he started consuming alcohol and smoking marijuana in the eleventh grade. A number of years later, he began to use methamphetamine, which his wife had been using. His life was a "downward spiral" from that time, approximately 1992 and 1993. He associated primarily, if not solely, with people from whom he could acquire methamphetamine; "they were really bad people." For the most part, he broke off communication with his family. He did not have an outlook on

life. Nothing mattered to him except methamphetamine. He plainly testified, "I was addicted."

Respondent testified that at the time of his last arrest, January 7, 2003, he thought, "I can't believe this is happening again. How did I get here?" He thought about his nieces, and how he was letting them down. This was the low point in his life and it was then that he made the conscious decision that he no longer wanted to be an addict.

Respondent testified without hesitation that January 7, 2003, was his sobriety date, and that he has not used methamphetamine since then. He also stopped drinking alcohol at that time. Though he began to drink again in 2006, he ceased the consumption of alcohol altogether in May 2007. He explained the latter decision in terms of his desire to stay sober so that his mind would be clear and he would not return to methamphetamine in a moment of weakness.

Respondent testified that he participated in a drug treatment program, and resided in a half-way house.

Respondent testified that in order to stay sober, he has completely cut off his relationships with his former drug associates.[1] While living in the half-way house, he asked his family to throw away all of his old belongings, lest there might be something among them that could prompt his return to methamphetamine use. He has also attended AA/NA, at first several times per week, and gradually less frequently. He now attends about once per week. His life is structured now, e.g., he goes to the gym, keeps his mind healthy (by staying away from negative people), and has a goal of being clean and healthy. He would like some day to be a drug counselor.

9. In 2003, respondent enrolled at a community college. In 2005, he began his studies in acupuncture at the South Baylo University. In December 2008, he received his degree, with a cumulative GPA of 3.55. He passed the licensing exam in February 2010.

10. Since 2003, respondent has lived with his sister and brother-in-law, who provide a stable, strong, positive influence on him.

Respondent has a girlfriend, who is also a recovering addict. According to respondent, she has been clean for about ten years. Respondent and his girlfriend "live AA."

11. Seven reference letters were submitted on respondent's behalf from colleagues at the South Baylo University and others.[2] These individuals all spoke very highly of respondent on both a personal and professional level.

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[1] Respondent and his wife divorced in 1998.

[2] Five of the seven also testified at the hearing, as described below.

12. Eight individuals testified on respondent's behalf at the hearing: (i) Kathleen Quan, a registered nurse whose husband is a close friend of respondent, and who has known respondent for five years; (ii) Marcel Dhont, respondent's cousin, who has known respondent his whole life and presently sees respondent two to three times per week; (iii) Ronald Hubbs, Jr., a licensed acupuncturist and former classmate of respondent at South Baylo University; (iv) Mike Haney, who knew respondent from high school, had a falling out in connection with respondent's drug use, and became reacquainted with respondent two years ago when respondent contacted him to reconnect and make amends; (v) Steve Hing, an acupuncturist who employed respondent on a full-time basis for about a year in 2008 and who is also a friend of respondent; (vi) Kathy Lin, presently the academic dean at South Baylo, who was respondent's teacher in two classes he took there; (vii) Jeffrey Salberg, an attorney and former deputy sheriff who has known respondent for about ten years and who had substantial experience in the arrest of drug users during his law enforcement career; (viii) Harold S. Black, a chiropractor, and respondent's brother-in-law, who has known respondent for 15 years and with whom respondent has lived since 2003.

All eight individuals spoke about respondent in highly positive terms on both a personal and professional level and in each case their testimony seemed quite sincere and heartfelt. In describing respondent today, they used terms like "model citizen," "great guy," "diligent," "a lot of character," "dependable," "consistent," "very dedicated," and "wonderful role model." Those who knew respondent when he used methamphetamine testified to fundamental and dramatic changes in his life since he became sober. None of those who testified have detected any indication of drug use since 2003. Several testified about respondent's unselfish service to others while he was a student at South Baylo. Several testified about respondent's present stable living environment, with his sister and brother-in-law.

13. The evidence presented at the hearing overwhelmingly established that respondent has overcome his methamphetamine addiction and has been rehabilitated, and that issuance to him of a probationary license to practice acupuncture would be consistent with the public health, safety and welfare. Respondent testified in a direct, candid, and sincere fashion about his addiction. He was able to articulate the steps he has taken to overcome it. He exhibited insight into how his addiction arose and what he needs to do to avoid a return to it. He no longer associates with the individuals with whom he was involved when he was addicted. He has been sober for seven years. He is in a very stable, supportive living environment. The testimony (and reference letters) of numerous people who have known respondent at different times in his life and in different contexts provided substantial, and at times quite dramatic, corroborative evidence of the fundamental changes in his life since the days of his addiction. Respondent is to be commended for the manner in which he has turned his life around and now aspires to help others through the profession of acupuncture.

CONCLUSIONS OF LAW

1. In the absence of a statute to the contrary, the burden of proof is on the applicant for a license or permit. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224-1225; *Southern California Jockey Club, Inc. v. California Horse Racing Board* (1950) 36 Cal.2d 167, 177.) The burden of proof in this matter is thus on respondent.

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.) The preponderance of the evidence standard applies to this proceeding.

"The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)" (1 Witkin, Evidence, *Burden of Proof and Presumptions* § 35 (4th ed 2000).)

3. The board may deny a license to an individual who has been convicted of a crime that is substantially related to the qualifications, functions or duties of the profession for which licensure is sought. (Bus. & Prof. Code, § 480, subd. (a)(1).) Convictions relating to the possession or use of controlled substances such as methamphetamine are substantially related.

The board may also deny a license to an applicant who has done any act which would be grounds for suspension of a licentiate. Use or possession of controlled substances such as methamphetamine are among proscribed acts. (Bus. & Prof. Code, §§ 480, subd. (a)(3) and 4955, subd. (a).)

4. By reason of Findings 1 through 13, and Conclusions 1 through 3, the board is legally authorized to deny a license to respondent pursuant to Business and Professions Code sections 480, subdivision (a)(1) and (3) and 4955, subdivisions (a) and (b).

5. The board has issued disciplinary guidelines to be applied when determining the proper disposition of a statement of issues or accusation involving misconduct by an applicant or licentiate. The administrative law judge is not required to follow the guidelines, but if he or she deviates from them, an explanation for such deviation, including the identification of mitigating circumstances, should be included in the proposed decision. (Guidelines, pp. 2, 9.)

The Guidelines provide that in cases involving the use of controlled substances, the maximum penalty is denial of a license, and the minimum penalty is five years probation, with standard and certain optional terms of probation. (Guidelines, p. 9.) In cases involving convictions of substantially related crimes, the maximum penalty is denial of a license, and the minimum penalty is five years probation, with standard and certain other optional terms of probation. (Guidelines, p. 10.)

6. By reason of Factual Findings 1 through 13, and Legal Conclusions 1 through 5, it is concluded that respondent has overcome his methamphetamine addiction and has been rehabilitated, and that to grant him an acupuncture license, subject to appropriate terms and conditions of probation, would not be inconsistent with the public health, safety, and welfare. Cause thus exists to grant respondent such a probationary license.

Accordingly, there issues the following:

ORDER[3]

By reason of Legal Conclusions 1 through 6, the application of respondent Johannes Schothorst for an acupuncturist license is granted, subject to the following terms of probation, and assuming he otherwise meets all qualification for issuance of such a letter.

1. Term of Probation

Respondent shall be on probation for five years.

2. 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 an evaluation by a Board appointed California licensed psychologist, or other mental health professional, who is a substance abuse specialist as determined by the Board. The Board shall receive a current DSM-IV-TR diagnosis and a written report regarding the respondent's judgment and/or ability to function independently as an acupuncturist with safety to the public, and whatever other information the Board deems relevant to the case. Respondent shall execute a release authorizing the

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[3] This order deviates from the Guidelines in the follow respects. First, optional condition of probation 1 (suspension) is omitted, since that condition is understood to apply to respondents who are currently licensed by the board, as opposed to applicant's seeking licensure. While it may be appropriate in certain unusual cases to impose a suspension on a new license to be granted to an applicant, the present case was not such a case. Second, optional condition 8 (drug abuse treatment) is omitted. In light of the substantial evidence of rehabilitation offered, including that respondent has from all accounts been drug-free for nearly eight years, it is sufficient to insert (as has been done below) in optional condition 2 (psychological evaluation) a provision that explicitly permits the board to order that respondent undergo a drug treatment program should his evaluator deem that appropriate. Third, the order omits optional term 12 (community service). In light of the remoteness in time of respondent's conviction, and the other evidence of rehabilitation proffered at the hearing, ordering community service at this time would not serve to provide any additional protection to the public. Fourth, standard condition 20 (cost recovery) is omitted, because complainant did not introduce any evidence with regard to investigation and enforcement costs or request cost recovery.

evaluator to release all information to the Board. The completed evaluation is the sole property of the Board.

If the Board concludes from the results of the evaluation that respondent is unable to practice independently and safely, he/she 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, or from participation in a drug abuse treatment program, respondent shall comply with the Board's directives in that regard.

Respondent shall pay all costs associated with the psychological evaluation. Failure to pay costs will be considered a violation of the probation order.

3. Practice Monitor

Within 90 days of the effective date of this decision, and for the first two years of the probationary period, unless the Board determines that this condition of probation should extend beyond two years, respondent shall submit to the Board for its prior approval, the name and qualifications of one or more California licensed acupuncturists whose license is clear (no record of complaints) and current and 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. The monitor's education and experience shall be in the same field of practice as that of the respondent. The monitor shall submit written reports to the Board on a quarterly basis verifying that monitoring has taken place and providing an evaluation of respondent's performance. It shall be respondent's responsibility to assure that the required reports are filed in a timely fashion. The respondent shall provide access to the monitor of respondent's fiscal and client records and shall be permitted to make direct contact with patients. Further, the monitor shall have no prior business, professional, personal or other relationship with respondent. Respondent shall execute a release authorizing the monitor to divulge any information that the Board may request.

Respondent shall notify all current and potential patients of any term or condition of probation which will affect their treatment or the confidentiality of their records (such as this condition which requires a practice monitor). Such notification shall be signed by each patient prior to continuing or commencing treatment.

If the monitor quits or is otherwise no longer available, respondent shall not practice until a new monitor has been approved by the Board. All costs of monitoring shall be borne by the respondent. Monitoring shall consist of at least one hour per week of individual face to face meetings.

4. Abstain from Drugs and Alcohol and Submit to Tests and Samples

Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act (Division 10, commencing with section 11000, Health and Safety Code) and dangerous drugs as

defined by Section 4211 of the Business and Professions Code, or any drugs requiring a prescription. Respondent shall abstain completely from the use of alcoholic beverages.

Respondent shall undergo random, biological fluid testing as determined by the Board. Respondent shall bear all costs of such testing. The length of time and frequency will be determined by the Board. Any confirmed positive finding will be considered a violation of probation.

5. **Solo Practice**

Respondent is prohibited from engaging in the solo practice of medicine for the first two years or the probationary period, unless the Board determines that this condition of probation should extend beyond two years.

6. **Ethics Course**

Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a course in ethics, at respondent's expense, approved in advance by the Board or its designee. Failure to successfully complete the course during the first year of probation is a violation of probation.

Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

7. **Obey All Laws**

Respondent shall obey all federal, state and local laws and all regulations governing the practice of acupuncture in California. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence.

8. **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. **Surveillance Program**

Respondent shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Respondent shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) victims or complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert examiners.

10. Interview with the Board or Its Designee

Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

11. Changes of Employment

Respondent shall notify the Board in writing, through the assigned probation surveillance compliance officer of any and all changes of employment, location and address within 30 days of such change.

12. Tolling for Out-of-State Practice or Residence

In the event respondent should leave California to reside or to practice outside the State, respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

13. Employment and Supervision of Trainees

Respondent shall not employ or supervise or apply to employ or supervise acupuncture trainees during the course of this probation. Respondent shall terminate any such supervisorial relationship in existence on the effective date of this probation.

14. Violation of Probation

If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stated. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No petition for modification or termination of probation shall be considered while there is an accusation or petition to revoke probation pending against respondent.

15. Completion of Probation

Upon successful completion of probation, respondent's license will be fully restored.

DATED: 10/6/2010

DONALD P. COLE

Administrative Law Judge

Office of Administrative Hearings

DECLARATION OF SERVICE BY MAIL

In the Matter of the Statement of Issues filed Against:

JOHANNES SCHOTHORST Case No. 1A-2008-154

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is 444 N. 3rd Street, Suite 260, Sacramento, CA 95811. I served a true copy of the attached:

DECISION AND ORDER

by registered/regular mail on each of the following, by placing same in an envelope(s) addressed (respectively) as follows:

NAME and ADDRESS	REGISTERED MAIL NO.
Johannes Schothorst 12 Calais Irvine, CA 92602	7009 3410 0000 0533 1110
Heidi Weisbaum, DAG California Department of Justice Office of the Attorney General/HQE 110 West "A" St., Ste. 1100 San Diego, CA 92101	regular mail
Donald P. Cole, Administrative Law Judge Office of Administrative Hearings 1350 Front Street, Rm. 6022 San Diego, CA 92101	regular mail
Keith W. Carlson Carlson & Jayakumar 2424 SE Bristol St., Ste. 300 Newport Beach, CA 92660	regular mail

Each said envelope was, on November 22, 2010, sealed and deposited in the U.S. mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid for attempt at service on Respondent.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 22, 2010, at Sacramento, California.

Kristine Brothers
DECLARANT