BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Termination/Modification of Probation of: LAWRANCE TSAI, Petitioner.	Case No. PETP 1A 2010 138 OAH No. 2014090249

DECISION

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

This Decision shall become effective on August 5, 2015.

IT IS SO ORDERED this 6th day of July, 2015.

By: _____

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ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
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In the Matter of the Petition for Termination/Modification of Probation of: LAWRANCE TSAI, Acupuncturist License No. AC 14519 Petitioner.	Case No. PETP 1A 2010 138 OAH No. 2014090249

PROPOSED DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter on May 4, 2015, in Oakland, California.

Deputy Attorney General Carolyne Evans represented the Acupuncture Board, Department of Consumer Affairs, State of California.

Ray Hsu, Attorney at Law, represented petitioner Lawrance Tsai, who was present.

The matter was submitted on May 4, 2015.

FACTUAL FINDINGS

1. On October 1, 2011, the Acupuncture Board (Board) issued acupuncturist license number AC 14519 to petitioner Lawrance Tsai, immediately revoked and stayed the revocation, and placed the license on probation for five years.

2. On April 7, 2014, petitioner filed with the Board a Petition for Penalty Relief requesting that his probation be terminated and/or modified. This hearing followed.

Background

3. On February 24, 2005, in the Los Angeles County Superior Court, petitioner was convicted on his plea of nolo contendere of a misdemeanor violation of Vehicle Code

section 23152, subdivision (b) (driving with a blood alcohol content of 0.08 percent or more (also known as "DUI").) He was placed on probation for three years under terms and conditions that included paying fines, completing a three-month First Offender alcohol and drug education program, and having his driving privileges restricted for 90 days. Petitioner completed the First Offender alcohol program. On December 31, 2012, the charges were dismissed pursuant to Penal Code section 1203.4.

4. On April 1, 2010, in the Napa County Superior Court, petitioner was convicted on his plea of nolo contendere of a misdemeanor violation of Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol content of .08 percent or more), with a special allegation under Vehicle Code section 23578 (excessive blood alcohol above 0.15 percent). He was placed on probation for five years under terms and conditions that included serving 10 days in jail, payment of fines and fees, and completing an 18-month Drinking Driver Program. Petitioner completed the 18-month Drinking Driver Program. On December 5, 2012, the charges were dismissed pursuant to Penal Code section 1203.4.

The circumstances underlying this conviction were that petitioner was stopped for reckless driving. He admitted to the officer that he had consumed a total of six glasses of wine at two wineries. His blood alcohol level was 0.16 percent.

5. The Board denied petitioner's application for an acupuncturist license on April 25, 2011. A Statement of Issues was issued alleging causes for denial based on the two criminal convictions as being substantially related to the qualifications, functions and duties of an acupuncturist, in violation of Business and Professions Code sections 475, subdivisions (a)(1) and (2); 480, subdivision (A)(1); 480, subdivision (3)(B); 490, subdivision (c); and 4955, subdivision (b). The matter was resolved by a stipulated settlement.

The Board issued a license to petitioner on a probationary basis for five years, effective October 1, 2011, with standard and certain optional conditions, including, but not limited to, that he enter a six-month drug and alcohol abuse treatment program; participate in ongoing treatment such as individual or group therapy or attend 12-step meetings at least three times a week during the first year of probation; reimburse the Board for probation surveillance monitoring; complete an Ethics course; obey all laws; abstain from the use of controlled substances and alcohol; submit to random biological fluid testing; not employ or supervise acupuncture trainees; submit quarterly reports; comply with the Board's probation surveillance program; appear for interviews with the Board; notify the Board of changes of employment; and adhere to tolling provisions for out-of-state practice or residence. Upon successful completion of probation, his license will be fully restored. Petitioner's probation is scheduled to end on October 1, 2016.

Petitioner's Evidence

6. Regarding his 2005 conviction, petitioner stated that he was a 21-year-old college student, and "as an immigrant, [he did] not know the severity of [...] drinking and driving." He described himself as a social drinker. Regarding his 2010 conviction, he

admitted that he drank a few glasses of red and white wine at a "wine tasting" and had a food entrée that was mixed with alcohol. He "did not realize" that he was intoxicated. Petitioner deeply regrets his behavior. He states that he has rehabilitated himself, since 2010, by refraining from drinking alcohol and driving.

7. Petitioner submitted a written narrative statement with his petition including the following: Petitioner considers probation to be excessive and burdensome and seriously affects his livelihood. He is unable to obtain malpractice insurance while on probation, and unable to open his own practice. He is prohibited from providing any training to students of acupuncture. Also, probation "negatively impacts clients' impression of [petitioner], regardless of the excellent treatment and care they received from [petitioner]. For example, patients may not show up for medical appointments simply because they found out about [petitioner's] DUI convictions on the Board's website." Petitioner also wrote that he frequently travels to China to learn more about herbal medicine and its origins. According to petitioner, the random urine test "prevent[s] [him] from traveling to other cities in California to expand his practice because it may not be convenient to locate a urine test facility."

8. At hearing, petitioner reiterated the impact of the probation conditions. According to respondent, he logs in to the testing site at 5:00 a.m., to see if he has been selected for testing. The site opens at 8:00 a.m. This means that he cannot see patients in the mornings and can only schedule patients in the afternoons, because he does not know when he will be selected to test, which can be up to three times a month. Petitioner also stated that there was no harm to the public or any patients because of his DUI convictions. Also, he had never had a diagnosis of alcohol dependency. Currently, he does not drink alcohol, and he does not "intend to drink a lot of alcohol."

9. Petitioner seeks to be relieved from probation or, at a minimum, he seeks modification of the condition of probation requiring him to submit to random urine testing. If granted, he will be able to treat patients in morning. He will have more time available to volunteer. He can expand his practice to Southern California and better financially support his growing family.

10. Petitioner submitted three letters in support of his petition.

a. Jay Yuan is a licensed acupuncturist and a former classmate of petitioner. In a letter dated March 13, 2014, Yuan wrote that he never observed petitioner drunk, exhibit a lack of sleep, or exhibit a lack of attention to patient care. Yuan believes that petitioner can continue to be a competent and caring professional without the probation conditions.

b. Lisa Ngan is an acupuncturist and a former classmate of petitioner. In a letter dated March 18, 2014, Ngan writes that petitioner always maintained a professional manner. She never saw him drunk, exhibit a lack of sleep, or show a lack of attention to patient care. According to Ngan, petitioner is "well versed in oriental medicine," such that

he could teach students. Ngan confirms that an acupuncturist must travel to acquire new skills and research herbs in Asia. According to Ngan, the probationary conditions prohibits petitioner from committing to long trips to gain a deeper understanding of herbal medicine.

c. Li Isack is a licensed acupuncturist and a professor at the University of East-West Medicine in Sunnyvale. Isack is a former classmate and also shared a clinic with petitioner. In a letter dated March 18, 2014, Isack writes that based on his observations of petitioner, he has never committed any "dishonest act." Isack supports petitioner obtaining an unrestricted license.

11. Petitioner received his Master's Degree in Oriental Medicine in 2011. He currently works at Doctcm Acupuncture and Herbal Care Center in Sunnyvale. He volunteers at a clinic treating low income and patients over the age of 75. Petitioner has completed continuing education courses. He intends to go back to school and become a professor.

12. Petitioner was married in 2012, and has a young child.

13. Petitioner is currently in compliance with his probation, including completing a 20-hour course in Ethics, and he has never tested positive for a random urinalysis test.

LEGAL CONCLUSIONS

1. Petitioner has the burden of proof in a petition for reduction of an administrative penalty. (*Flanzer v. Bd. of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084.)

2. Petitioner contends that since his convictions have been expunged, and, as a matter of law, he no longer has any criminal convictions, the reasons for placing him on probation and requiring him to submit to random urine tests has disappeared. He also contends that his DUI convictions are unrelated to the practice of acupuncture, because they have "nothing to do with fraud, patient care, or any intentional wrong doing."

Petitioner's contentions are in error. A crime is considered to be substantially related to the qualifications, functions or duties of a licensee if to a substantial degree it evidences the present or potential unfitness of a licensee to perform the functions authorized by his license in a manner consistent with the public health, safety, or welfare. In this case, respondent's conduct in operating a vehicle after consuming alcoholic beverages, threatened not only his personal safety, but the safety of others as well as the property of others, demonstrating a lack of judgment, which is necessary to perform the functions and duties of an acupuncturist.

Also, the Board may impose probationary conditions upon the license of any acupuncturist if he has been convicted of a crime substantially related to the qualifications, functions, or duties of an acupuncturist, even if the conviction has been expunged under Penal Code section 1203.4. (Bus. & Prof. Code, §§ 4955, subd. (b); 4956.)

3. According to the Board's disciplinary guidelines, the primary concern of the Board to determine whether penalty relief is appropriate is the evidence presented by the petitioner of his rehabilitation. The Board will consider the following criteria of rehabilitation: nature and severity of the act(s) or offense(s); total criminal record; the time that has elapsed since commission of the act(s) or offense(s); whether the licensee has complied with any terms of probation; evidence of expungement proceedings pursuant to Penal Code section 1203.4; and any evidence of rehabilitation submitted by the licensee. The Board also seeks comprehensive information from the petitioner regarding the specifics of rehabilitative efforts and results which should include programs, psychotherapy, medical treatment, etc., and the duration of such efforts.

Petitioner has not demonstrated that he is sufficiently rehabilitated to justify early termination or modification of his probation. Petitioner has been in compliance with the terms of his probation, had his convictions expunged, complied with the terms of his criminal probation, and it has been over five years since his last conviction. However, it was not established by clear and convincing evidence that he is satisfactorily rehabilitated. The impact of the first arrest and conviction and completing a First Offender alcohol education program should have provided the necessary jolt to avoid any subsequent criminal action as the result of excessive alcohol consumption. It did not and petitioner sustained a second arrest and conviction for DUI. His testimony did not establish that he has accepted full responsibility for his second DUI. Neither did he offer specifics of his rehabilitative efforts and the duration of those efforts, other than his testimony that he has "rehabilitated" himself. That he seeks to mitigate the economic effect of discipline is a reasonable goal, however, such a goal does not compel the termination of probation. Also, compliance with the terms and conditions of his probation, alone, does not compel early termination of probation. Whether a condition of probation is convenient for petitioner (such as finding a local testing facility when traveling) is not a compelling reason to modify his probation.

The purpose of probation is to protect the public. While petitioner has clearly made progress toward rehabilitation, once he is terminated from probation he would not be monitored in any way. He has a history of long term compliance with the law, as it was five year before he exhibited a lapse in good judgment and had his second DUI conviction. Petitioner needs to demonstrate a long term commitment to driving without being under the influence of alcohol and demonstrate that he can continue to do so. Not enough time has yet passed to establish this in a clear and convincing manner. Therefore, it would not be in the public interest to modify or terminate petitioner's probation at this time.

ORDER

The petition of Lawrance Tsai, for penalty relief of termination of probation and/or modification of probation is denied.

DATED: May 15, 2015

REGINA BROWN
Administrative Law Judge