BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Interim Suspension Order Against: RANDALL JAMES NEUSTAEDTER, Acupuncture License No. AC 1541 Respondent.	Case No. 1A-2015-157 OAH No. 2015090931

DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on October 14, 2015, in Oakland, California.

Carolyne Evans, Deputy Attorney General, represented petitioner Terri Thorfinnson.

George P. Eshoo, Attorney at Law, represented respondent Randall James Neustaedter, who was present throughout the proceeding.

The matter was submitted for decision on October 14, 2015.

FACTUAL FINDINGS

1. On August 30, 1983, the Acupuncture Board (board) issued license number AC 1541 to Randall James Neustaedter (respondent). The license is current and will expire on November 30, 2016, unless renewed.

2. On September 24, 2015, Terri Thorfinnson, Executive Officer of the board (petitioner), filed a petition with the Office of Administrative Hearings seeking an interim order suspending the acupuncture license issued to respondent.

3. Petitioner seeks an interim order suspending respondent's license under Government Code section 11529. Interim orders may be issued under this section where affidavits in support of the petition show that the licensee has engaged in, or is about to

engage in, acts or omissions constituting a violation of the Acupuncture Licensure Act, or is unable to practice safely due to a mental or physical condition, and that permitting the licensee to continue to engage in the practice of acupuncture will endanger the public health, safety, or welfare.

Petitioner contends respondent has violated the Acupuncture Licensure Act by engaging in criminal sexual misconduct with patients under the guise of professional treatment, and that immediate suspension of his acupuncture license is required in order to appropriately protect the public.

4. On or about August 13, 2015, a criminal complaint was filed against respondent in San Mateo Superior Court charging him with two felony violations of Penal Code section 289, subdivision (a)(1)(A) (sexual penetration by foreign object), two felony violations of Penal Code section 243.4, subdivision (c) (sexual battery), and one misdemeanor violation of Penal Code section 243.4, subdivision (e)(1) (sexual battery), for his treatment of patients V.V. and E.B.[1]

5. On August 14, 2015, the board filed a motion in San Mateo Superior Court pursuant to Penal Code section 23[2] seeking to have a practice restriction placed on respondent's acupuncture license. On August 21, 2015, at respondent's bail hearing, the court imposed the following practice restriction: "As a condition of remaining on bail, Defendant must have a Board appointed chaperone present for all office visits with any patient of the female sex (children or adults.) If Defendant violates, he will be remanded."

6. Pursuant to the Superior Court order, on August 27, 2015, the board mailed a letter via overnight mail to respondent's attorney of record informing him of the board's terms and conditions for the court ordered chaperone. The letter notified respondent that he needed to submit the name of a person who would act as a chaperone during all visits with

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[1] Initials have been used to protect patient privacy.

[2] Penal Code section 23 states in pertinent part:

> In criminal proceedings against a person who has been issued a license to engage in a business or profession by a state agency pursuant to the provisions of the Business and Professions Code . . . the state agency which issued the license may voluntarily appear to furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to protect the interests of the public . . . if the crime is substantially related to the qualifications, functions, or duties of a licensee.

female patients to the board for its prior approval, within ten calendar days of the August 21, 2015, Superior Court order. Respondent thus needed to submit the name of a chaperone to the board by August 31, 2015.

The board's letter further advised respondent that he could not consult with, examine, or provide treatment to any female patient until the board had approved a chaperone, he would need to maintain a log, signed and dated by the chaperone, of all patients seen for whom a chaperone was required, and he would have to provide written notice to female patients that a chaperone was required to be present during all consultations, examinations or treatments.

7. As of the October 14, 2015, hearing date in this matter, respondent had not submitted the name of a chaperone to the board.

8. On September 29, 2015, after additional criminal charges were filed against respondent,[3] the San Mateo Superior Court issued a new order regarding the practice restriction imposed as a condition of bail for respondent. The order states in pertinent part: "Defendant RANDALL JAMES NEUSTAEDTER is prohibited from practicing acupuncture or 'Oriental Medicine' during the pendency of this criminal proceeding on any female (adult or child) clients. This order is [/] shall remain in effect while Defendant is released on bail or on his own recognizance, until the conclusion of this criminal proceeding."

9. Affidavits from female patients V.V. and E.B., as well as the San Mateo County Sheriff's Office Misdemeanor and Supplemental Reports, were submitted and considered. Both V.V. and E.B. indicate respondent touched their genital area during their acupuncture treatments without their consent. Patient V.V. states that during an acupuncture session in June 2015, respondent suggested an acupuncture massage along with the acupuncture and she agreed. During the massage respondent touched her anus, vagina and clitoris under her underwear, and she could feel his erection through his pants against her arm. During the entire encounter she felt helpless, like she could not move, and frightened because she was alone with respondent in his office. Shortly after her appointment, at the urging of her friends, V.V. contacted the San Mateo County Sherriff's Office. During subsequent "pretext" calls, arranged through the San Mateo County Sheriff's Office, V.V. confronted respondent about his conduct. Respondent told her that his conduct was part of the acupuncture massage and that he was massaging "acupuncture channels. At one point, V.V. accused respondent of sexual assault. Respondent remained silent for several seconds and did not make any denials. Respondent stated he was sorry if the massage got too personal and denied any sexual intent.

Patient E.B. contacted police after reading a news article about respondent sexually assaulting one of his patients. In December 2013 E.B. had gone to see respondent for a sore throat and lower back pain. E.B. states that following acupuncture treatment, respondent

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[3] The additional criminal charges are pending. The substance of those charges has not been considered in issuing this order.

offered her a massage. During the massage he put his hand under her underwear, and massaged her anus for a number of minutes. E.B froze and did not want to believe what was happening. Respondent then started to put his hand between her labia moving toward her clitoris. As he touched her vagina, E.B. was able to sit up, tell respondent she was done and leave.

10. Detective Scott Berberian of the San Mateo County Sherriff's office arranged the pretext calls from V.V. to respondent and monitored those calls. In his report, Berberian confirms that respondent did not deny the accusation from V.V. of sexual assault during the pretext telephone calls and that respondent apologized for his actions. Berberian also took the statement of victim E.B. He confirmed that E.B. did not know who the other victim was in the case. In addition, Berberian's report indicates he received two other complaints from female former patients of respondent, who desired to remain anonymous, alleging inappropriate conduct by respondent during their acupuncture sessions. The evidence presented through the affidavits and sheriff's reports shows a pattern of respondent preying on his female patients.

11. Barbara Berger is an expert consultant for the board. She has been licensed to practice acupuncture in California since 1979. Dr. Berger reviewed materials provided by the board, including the San Mateo County Sheriff's reports and the statements of V.V. and E.B. to detective Berberian. Dr. Berger opines that the reports, and respondent's admissions, "appear to present a clear image of an acupuncturist engaging in a disturbing pattern of sexual abuse that is contradictory with the safe practice of acupuncture." She notes, "There is no recognized or legitimate acupuncture treatment which involves massaging or touching of a patient's anus, vagina, labia or clitoris. It is particularly disturbing [respondent] appears to have molested two patients under the guise of legitimate acupuncture treatment." Dr. Berger concludes,

> Based on my education, experience, knowledge, I am of the opinion that Dr. Neustaedter grossly departed from the standard of care for acupuncturists, violated his obligations as a professional and engaged in violations of Business and Professions Code section 726 (commission of act of sexual abuse or misconduct with patient or client), and section 729 (sexual exploitation of patient or client.) It is unprofessional conduct to engage in any acts of sexual misconduct with a patient. Given these facts, it is my opinion that permitting Dr. Neustaedter to continue to engage in the practice of acupuncture at this point in time will endanger the public health, safety and welfare.

12. Respondent denies sexually assaulting V.V. or E.B. and argues his license should not be suspended because he has now located a chaperone for his practice. At hearing, respondent proposed acupuncturist Elham Khodabandeloo as a chaperone but admitted he had not yet submitted her name to the board for approval.

13. Respondent also argues that any license restriction imposed by the board should be the same as the license restriction imposed by the San Mateo Superior Court on August 21, 2015, requiring him to have a chaperone present for all office visits with female patients. With respect to the license restriction imposed by the San Mateo County Superior Court on September 29, 2015, prohibiting him from practicing acupuncture or oriental medicine on female patients during the pendency of the criminal proceeding, respondent contends the order is incorrect and does not reflect the actual ruling of the court. However, he failed to offer any subsequent court order as evidence.

Respondent further contends the San Mateo County Sheriff's reports and the affidavits of V.V. and E.B. are hearsay and insufficient to support issuance of an interim suspension order.

14. Respondent failed to offer affidavits, expert testimony or any other evidence to refute Dr. Berger's determination that allowing respondent to continue to practice acupuncture will endanger the public health, safety, and welfare.

LEGAL CONCLUSIONS

1. Government Code section 11529, subdivision (a) provides:

> The administrative law judge of the Medical Quality Hearing Panel . . . may issue an interim order suspending a license, or imposing . . . other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, or is unable to practice safely due to a mental or physical condition, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety or welfare.

2. Respondent contends the affidavits of V.V. and E.B. are hearsay and insufficient to support issuance of an interim suspension order. Respondent cites several cases in support of his position, but primarily relies upon *Gray v. Superior Court* (2005) 125 Cal.App.4th 629. In *Gray*, the court held that the Superior Court's suspension of a physician's medical license as a condition of bail violated due process where it was based upon the recommendation of the Medical Board, which was presented at the bail hearing, without prior notice to the physician or an opportunity for the physician to prepare a response before the bail hearing. However, *Gray* does not address Penal Code section 23, which now expressly authorizes such a practice. Moreover, the court in *Gray* clearly recognizes the ability of a board, acting through an administrative law judge, to administratively suspend a license pursuant to Government Code section 11529. Section 11529 authorizes an

administrative law judge to issue an interim order suspending a license if affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Acupuncture Licensure Act, and that permitting the licensee to continue to engage in the practice of medicine will endanger the public health, safety, or welfare. The affidavits in this case satisfy these requirements. Respondent's contention that the affidavits are insufficient to support an interim order of suspension is rejected.

3. Government Code section 11529, subdivision (e) provides:

> . . . the administrative law judge shall grant the interim order where, in the exercise of discretion, the administrative law judge concludes that:
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> (1) There is a reasonable probability that the petitioner will prevail in the underlying action.
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> (2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

The standard of proof to obtain an interim order is preponderance of the evidence. (Bus. & Prof. Code, §§ 11529, subd. (e) & 494, subd. (e).)

4. In order to "prevail" in the underlying action, petitioner must show that respondent has engaged in, or is about to engage in, acts or omissions constituting a violation of the Acupuncture Licensure Act. Dr. Berger, the board's expert witness, has opined that allowing respondent to continue to practice acupuncture will endanger the health, safety, and welfare of the public. Her conclusion is based upon materials provided by the board, including the San Mateo County Sheriff's reports and the statements of V.V. and E.B. to Sheriff's detective Berberian. These materials establish respondent violated the Acupuncture Licensure Act by engaging in criminal sexual misconduct with patients under the guise of professional treatment. Respondent primarily relies upon his own self-serving denials, which are not very persuasive, as a defense. Based on the evidence presented, it is determined that there is a reasonable probability that petitioner will prevail in the underlying action.

5. It is also determined that the likelihood of injury to the public in not issuing the order for interim suspension outweighs the likelihood of injury to the licensee in issuing the order. The preliminary evidence establishes that respondent has established a pattern of misuse of his license to sexually abuse female patients under the guise of providing acupuncture treatment. An acupuncturist committing these types of acts cannot be trusted to provide proper care and treatment to patients. Respondent argues the requirement initially imposed by the Superior Court that he have a board chaperone present during all office visits with female patients is sufficient to protect the public. His contention is not persuasive. Pursuant to the court's order, the board directed respondent to provide the name of a chaperone within

10 days. Nearly two months after the court's order, respondent still had not submitted the name of a proposed chaperone to the board. This suggests respondent cannot be relied upon to comply with requirements imposed to protect the public. Because respondent failed to timely submit the name of a chaperone for board approval, other conditions the board sought to impose to protect female patients, such as requiring respondent to maintain a log, signed and dated by the chaperone, of all female patients, have not been implemented. Respondent's belated offer of the name of possible chaperone is insufficient. The public is at great risk if respondent is permitted to continue to practice in the manner that he has practiced previously. Although respondent will clearly be injured by issuance of an interim order of suspension, his right to have a full hearing on an accelerated time line, if he so chooses, provides a measure of protection. Based on the foregoing, it is determined that the likelihood of injury to the public in not issuing the order for interim suspension outweighs the likelihood of injury to the licensee in issuing the order.

4. The affidavits in support of the petition for an interim order of suspension show that respondent has engaged in acts or omissions constituting a violation of the Acupuncture Licensure Act. Permitting respondent to continue to practice acupuncture will endanger the public health, safety and welfare. Cause thereby exists under Government Code section 11529 to issue an order suspending license number AC 1541 issued to respondent, pending a hearing on the accusation against him.

ORDER

The Petition for an Interim Order of Suspension is granted. Acupuncture license number AC 1541issued to respondent Randall James Neustaedter is suspended in accordance with Government Code section 11529.

DATED: October 27, 2015

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Cheryl R. Tompkin
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CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings