BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Reinstatement of Revoked License of: GUANG YAN CHEN, Petitioner.	Case No. 1A-2015-51 OAH No. 2015050688

NOTICE OF DECISION AND ORDER

No action having been taken on the attached Proposed Decision, pursuant to Government Code section 11517(c)(2) the attached decision is hereby deemed adopted by operation of law on DEC 11 2015.

Pursuant to Government Code section 11519, this Decision shall become Effective on JAN 13 2016.

Date: DEC 14 2015

Terri Thorfinnson, J.D.
Executive Officer
Acupuncture Board

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PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on August 6, 2015, in Los Angeles, California.

Robert Bazikyan, Attorney at Law, represented petitioner Guang Yan Chen. Judith T. Alvarado, Supervising Deputy Attorney General, appeared under Government Code section 11522.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 6, 2015.

FACTUAL FINDINGS

1. Petitioner filed a Petition for Penalty Relief on July 17, 2014.

2. The Board issued Acupuncturist Certificate Number AC 7872 to petitioner on April 6, 2001; the certificate was scheduled to expire on May 31, 2010, unless renewed.

3. The Board revoked petitioner's certificate on November 6, 2008, in a Default Decision and Order effective November 6, 2008 (Default Decision). The Board found that petitioner, named as respondent in the Board's Accusation, admitted the charges and allegations in the Accusation by virtue of his default.

4. In its Default Decision, the Board determined the following issues:

> "a. Violations of law on Respondent's business premises by employees or persons working under Respondent's professional

license or business permit, pursuant to Business and Professions Code section 4955, subdivision (j), in that massage therapists solicited patients or customers for sex on multiple occasions at Respondent's place of business, in violation of Penal Code section 647, subdivisions (a) and (b);

b. Violations of law on Respondent's business premises by employees or persons working under Respondent's professional license or business permit, pursuant to Business and Professions Code section 4955, subdivision (j), in that massage therapists performed massage on patients or customers at Respondent's place of business without a massage therapist license, as required by section 5-24.04 of the San Juan Capistrano Municipal Code, a misdemeanor. These crimes are conclusively established by the criminal convictions of X.C., J.X., A.H., and H.Q., for operating a massage establishment without a license at Respondent's place of business.

c. Using a false, assumed, or fictitious name other than the name in which Respondent was licensed, without notifying the Board, in violation of Business and Professions Code section 4955, subdivision (*l*);

d. Violating the Acupuncture Licensing Act, pursuant to Business and Professions Code section 4955, subdivision (d); and

e. Unprofessional Conduct, pursuant to Business and Professions Code section 4955." (Ex. 1, attachment C.)

Petitioner became eligible for reinstatement in November 2011.

5. At the hearing, petitioner explained the circumstances underlying the charges leading to the Default Decision. He testified that the San Juan Capistrano business in question was not his. He lived in San Gabriel and, he testified, he was only attempting to lease space from the business owners for his acupuncture practice; he never practiced there. He was never criminally charged in connection with any of the activities occurring on the business premises.

6. Petitioner testified that he never received notice of the 2008 disciplinary hearing and so did not appear to defend the charges brought against him by the Board. Petitioner also testified that he did not receive notice of the Default Decision. He first learned that his certificate had been revoked when he attempted to renew the certificate prior to its scheduled expiration in May 2010. He had notified the Board of two of addresses for his certificate. One, in Irvine, was the

address of South Coast Medical Center, where he was temporarily employed at the time. The other, in Walnut, was a friend's address. Since his certificate was revoked, he has kept the Board informed as to his current home address.

7. After his certificate was revoked, petitioner attended, and received a Doctor of Chiropractic degree from, the Cleveland Chiropractic College in 2010. He has volunteered at chiropractors' offices and at the California Association of Acupuncture and Medicine (CAAM). Petitioner testified that he cannot obtain a chiropractic license because his acupuncture certificate has been revoked. Petitioner testified that, if his certificate is reinstated, he would reapply for a chiropractor's license, which, if obtained, would allow him to practice both acupuncture and chiropractic. Petitioner testified that he loves acupuncture, and wants to use his skills to help people. He believes that using both acupuncture and chiropractic skills simultaneously to treat back pain could be particularly effective.

8. Petitioner submitted two character reference letters. In one, licensed acupuncturist Chang San Xin Lac, petitioner's mentor for more than 10 years at CAAM, wrote that he would "love to have [petitioner] to consult with pain management related cases once he gets his reinstatement license sustained." (Ex. 1, attachment B.) He wrote that petitioner is humble and smart, and "eager to learn and advance his expertise." (*Ibid.*) In the second letter, Yushan Han Lac, a licensed acupuncturist and chair of CAAM, wrote that he has known petitioner for over 10 years, that petitioner served for eight years as a CAAM director, performing charity work for CAAM and serving the community. Since his certificate was revoked, the letter states, petitioner has been improving his skills by learning more about practice management and through coaching by senior acupuncturists. (*Ibid.*)

9. The evidence on the record is sufficient to demonstrate petitioner's rehabilitation. Petitioner's testimony as to the reasons he did not contest the Accusation brought against him in 2008 was convincing. At the same time, it reveals petitioner's failure to comply with the requirement that he keep the Board apprised at all times of his current mailing address. Petitioner's experience volunteering for and working with chiropractic and acupuncture practitioners over the last seven years, however, has given him an appreciation of the need for complying with governing statutes and regulations and engaging in good business practices. It is unlikely that he will again fail to keep the Board informed of his whereabouts. There is no evidence on the record that petitioner has engaged in any illegal activities or unprofessional conduct in the past seven years. On the basis of the evidence submitted with the petition and at hearing, it would not be equitable to deny petitioner a certificate.

LEGAL CONCLUSIONS

1. A person whose certificate has been revoked may petition the Board for reinstatement. (Bus. & Prof. Code, § 4960.5.) The Board may require an examination for reinstatement. (Bus. & Prof. Code, § 4960.5, subd. (b).)

2. Protection of the public "shall be the highest priority" for the Board y. (Bus. & Prof. Code, § 4928.1.) In a proceeding to reinstate a revoked certificate, the burden rests on petitioners to prove that they have rehabilitated themselves and that they are entitled to have their certificate restored. (*Flanzer v. Bd. of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) Persons seeking reinstatement must present strong proof of rehabilitation and a sufficient showing of rehabilitation to overcome the Board's former adverse determination. (*Hippard v. State Bar of California* (1989) 49 Cal.3d 1084, 1092-1093.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Id.; Housman v. Bd. of Medical Examiners* (1948) 84 Cal.App.2d 308.)

3. Cause exists under Business and Professions Code section 4960.5 to deny petitioner's request for reinstatement of his certificate, by reason of Factual Findings 1 through 4.

4. "In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Acupuncture Board shall consider the disciplinary guidelines entitled "Department of Consumer Affairs, Acupuncture Board 'Disciplinary Guidelines' 1996" which are hereby incorporated by reference." (Cal. Code Regs., tit. 16, § 1399.469.) Those Disciplinary Guidelines provide that, on a petition for reinstatement, the Board will consider the nature and severity of the act or offense, total criminal record, time elapsed since the offense, whether the licensee has complied with any probationary terms, and evidence of rehabilitation.

5. Considering the relevant disciplinary guidelines, petitioner has established sufficient rehabilitation to warrant the issuance of a restricted license. (Factual Findings 1-9.) The nature and severity of the alleged acts, established by petitioner's default, are serious. Petitioner, however, explained the reasons for his default, and he was never criminally charged in connection with the activities underlying the Default Decision. Since then, petitioner has demonstrated a record of responsible and reliable conduct sufficient to show by clear and convincing evidence that the public would be protected if he were granted a restricted certificate. After having had his certificate disciplined by the Board, petitioner worked to hone his skills, volunteered for his professional association, volunteered to perform charity work and serve the community, and obtained a degree as a Doctor of Chiropractic, with which he hopes to obtain a license to practice chiropractic. Petitioner submitted two letters of reference from practicing acupuncturists who have personal knowledge of petitioner's activities since the Board imposed discipline on his certificate. In one letter, the author offers petitioner employment as a consultant should he receive a certificate. (Factual Finding 8.) Petitioner's testimony in this hearing, and the evidence on the record as a whole, demonstrates the unlikelihood that petitioner will endanger the public health, safety, and welfare if he is issued an appropriately restricted certificate.

ORDER

The petition of Guang Yan Chen for reinstatement of his acupuncturist certificate is

denied; the denial is stayed, however, and a restricted acupuncturist certificate shall be issued to petitioner upon his compliance with all statutory and regulatory requirements for the license, including his successfully passing any licensing examination required by the Board. The restricted certificate shall be subject to the following terms and conditions:

1. Practice Monitor

Within 90 days of the effective date of this decision, Petitioner 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 Petitioner's practice shall be monitored. The monitor's education and experience shall be in the same field of practice as that of the Petitioner. The monitor shall submit written reports to the Board on a quarterly basis verifying that monitoring has taken place and providing an evaluation of Petitioner's performance. It shall be Petitioner's responsibility to assure that the required reports are filed in a timely fashion. The petitioner shall provide access to the monitor of petitioner'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 petitioner.

Petitioner shall execute a release authorizing the monitor to divulge any information that the Board may request.

Petitioner 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, petitioner shall not practice until a new monitor has been approved by the Board. All costs of monitoring shall be borne by the petitioner.

Monitoring shall consist of at least one hour per week of individual face to face meetings.

2. Obey All Laws

Petitioner 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 petitioner to the Board in writing within seventy-two (72) hours of occurrence.

3. Quarterly Reports

Petitioner 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.

4. Surveillance Program

Petitioner shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Petitioner shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Petitioner 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.

5. Interview with the Board or Its Designee

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

6. Changes of Employment

Petitioner 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.

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

In the event petitioner should leave California to reside or to practice outside the State, petitioner 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.

8. Employment and Supervision of Trainees

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

9. Violation of Probation

If petitioner violates probation in any respect, the Board may, after giving petitioner 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 petitioner 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 petitioner.

10. Completion of Probation

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

DATED: August 31, 2015

DocuSigned by:
Howard W. Cohen
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HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings