BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

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| In the Matter of the Accusation Against:<br><br>HONGWEI SUN,<br><br>Respondent. | Case No. 1A-2012-31<br><br>OAH No. 2015040455<br><br>**ORDER OF DECISION** |

## DECISION

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

This Decision shall become effective on April 16, 2016.

IT IS SO ORDERED this 17th day of March 2016.

By: _____

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

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| In the Matter of the First Amended Accusation Against:<br><br>HONGWEI SUN,<br><br>Acupuncture License No. AC 8581<br><br>Respondent. | Case No. 1A-2012-31<br><br>OAH No. 2015040455 |

**PROPOSED DECISION**

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on September 1 and 2, 2015, and November 4, 2015.

Joshua M. Templet, Deputy Attorney General, California Department of Justice represented complainant Terri Thorfinnson, Executive Officer of the Acupuncture Board.

Hongwei Sun, respondent, represented himself on the first two days of hearing. Thereafter Craig Brandt, Attorney at Law, represented respondent Hongwei Sun.

The matter was submitted on December 9, 2015.[1]

[1] The hearing in this matter occurred on September 1, 2, and November 4, 2015. The record remained open for receipt of written closing argument. On December 1, 2015, Complainant's Closing Argument and Renewed Request for Sanctions was filed, and it was marked Exhibit 15. On December 3, 2015, Respondent's Closing Argument was filed, and it was marked Exhibit N. On December 4, 2015, Respondent's Response to Request for Sanctions and Declaration of Craig A. Brandt was filed, and it was marked Exhibit O. On December 9, 2015, Complainant's Rebuttal Argument and Renewed Request for Sanctions was filed, and it was marked Exhibit 16.

On December 9, 2015, the record was closed, and the matter was submitted.

## FACTUAL FINDINGS

*Jurisdictional Background*

1. On September 17, 2002, the Acupuncture Board, Department of Consumer Affairs, issued Acupuncture License Number AC 8581 to Hongwei Sun. At all times relevant, the license was in full force and effect and expired on November 30, 2015.[2]

2. Terri Thorfinnson filed Accusation and First Amended Accusation, Case No. 1A-2012-31, in her official capacity as the board's Executive Officer.

3. On May 2, 2012, J.K., a psychologist, filed an on-line complaint with the board.

In her complaint, J.K. stated her patient, N.S., a minor female, reported respondent touched her inappropriately during an acupuncture treatment session; and M.F., N.S.'s mother also reported respondent touched M.F. inappropriately during an acupuncture treatment session.

*Factual Background*

4. On March 23, 2012, M.F. began treatment with respondent for, among other things, pain stemming from fibromyalgia, including pain in her neck and arms. On April 6, 2012, and April 9, 2012, she returned to respondent for treatment. During one of her treatment sessions, she told respondent she thought her daughter, who was experiencing similar pain to her own, would benefit from acupuncture treatment. Respondent agreed to treat N.S.

5. On April 2, 2012, N.S. began treatment with respondent for, among other things, pain stemming from fibromyalgia and endometriosis, including pain in her neck, shoulders, back and hips, and pain related to her menstrual period. During the treatment session, respondent placed acupuncture needles in N.S.'s head, neck, legs and abdomen. No evidence was offered to establish N.S. had complaints about this session.

6. On April 6, 2012, N.S. returned for a second treatment session with respondent. He placed acupuncture needles in her ankles, neck, back, forehead and chest.

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[2] Pursuant to Business and Professions Code section 118, subdivision (b), the expiration of respondent's license during any period during which "it may be renewed, restored, reissued or reinstated does not deprive the board of authority to continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending or revoking the license or otherwise taking disciplinary action against the licensee on any such ground."

7. N.S. was 15 years old when respondent provided her treatment.

*Allegation of Sexual Misconduct*

8. Complainant alleged, among other things, that when respondent provided treatment to N.S. on April 6, 2012, he pulled down N.S.'s panties, exposed her vagina, touched her outer vagina, including her Labia Majora, and began touching and rubbing her clitoris; when he provided treatment to M.F. on April 9, 2015, respondent did the same thing.

In support of the charges, complainant subpoenaed N.S. and M. F. Between the date the subpoenas were issued and the date of hearing, N.S. left the State of California to attend college. Initially, complainant requested N.S. be allowed to testify when she was home from college. However, testifying in this proceeding was difficult for M.F. In addition to the nature of her testimony, respondent was very emotional; at times, prior to the presence of his attorney and during examination of M.F., respondent was loud and angry, despite orders from the administrative law judge to cease this conduct. M.F. testified that she would not allow her daughter to testify. When complainant realized that N.S. was over the age of 18 years and an adult, she elected not to call N.S. as a witness and made a motion to dismiss charges regarding respondent's acts involving N.S. Without objection by respondent, the administrative law judge granted the motion. Thereafter, the administrative law judge ordered complainant to file the First Amended Accusation reflecting the foregoing. Therefore, all evidence regarding the allegations of respondent's acts involving N.S. is disregarded.

9. In support of the allegations in the First Amended Accusation, complainant offered the testimony of M.F., the report and testimony of Lance S. Lee, D.C., L.Ac., complainant's expert witness, and other documentary evidence. In response, respondent testified, called prior clients as witnesses, and offered documentary evidence.

In order to ascertain whether respondent engaged in the acts alleged in the First Amended Accusation occurred, the testimonial and documentary evidence have been evaluated, particularly the credibility, reliability and trustworthiness of the evidence.

10. In the First Amended Accusation, it is alleged, that on April 9, 2012, M.F. returned to respondent for acupuncture treatment; during treatment, M.F. kept on her clothing; respondent pulled up M.F.'s skirt, spread her thighs apart, pushed her panties to one side, and exposed her vagina; then he rubbed and pinched her outer vagina, and rubbed and pinched her clitoris.

On May 1, 2012, M.F. filed a complaint with the Pleasanton Police Department. The next day, N.S.'s psychologist filed the complaint with the board. On May 6, 2012, Eric Gora, an officer with the Police Department, interviewed M.F.; the interview was video recorded; thereafter Officer Gora filed a report.

On July 12, 2012, Detective Mardene Lashley interviewed respondent. This interview was video recorded. Officer Archie Chu was present during the interview as a Mandarin interpreter.

The board's investigator completed an investigation and issued a report, dated April 30, 2013, and a supplemental investigation report, dated July 31, 2013.

11. In the psychologist's complaint and in her recorded interview, M.F. stated that respondent put needles in her vaginal area; during the recorded interview, when asked if he massaged her clitoris, respondent stated that she thought he was preparing the area for the needles.

M.F. executed a declaration, dated December 11, 2014, and she stated in part:

> I did not remove my clothing for this treatment because I was wearing a loose skirt and top. Respondent provided acupuncture treatment. During this visit, Respondent pulled my skirt up, spread my thighs apart and pushed my panties to one side, exposing my vagina. Respondent then rubbed and pinched my outer vagina, including the area surrounding the clitoris, and then rubbed and pinched my clitoris.

During the hearing, M.F. testified that on April 9, 2012, she wore loose clothes, possibly a skirt and top; during treatment, respondent exposed her vagina; he did not explain he would expose her vagina or the reason for doing so; when he exposed her vagina, she was laying on her back and there was no one else in the room; she testified "'we' would have pushed up my skirt or pulled it down to expose my stomach area; he moved her legs by spreading them; he pushed aside her underwear; he was standing on the side of the table; she was laying on her back and assumed her vagina was visible to him; she did not anticipate her vagina would be exposed during treatment; he did not explain he was going to touch her vagina or why he needed to do so. During her testimony, M.F. described how respondent touched her vagina. She testified, after he pushed her panties aside, he touched the area around and on the vagina and pinched it; since she had had acupuncture treatment previously, she knew, in order to make sure the needle does not sting, the acupuncturist pinches the area or prepares it. Also, he touched her outer vagina and clitoris.

12. Dr. Lee testified as complainant's expert witness. He described his education, training and experience as an acupuncturist. Dr. Lee obtained a bachelor's of science degree in biology from the University of California, Riverside in 1989; he obtained a doctorate of chiropractic from the Los Angeles College of Chiropractic in April 1993 and a master's of science degree in oriental medicine from SAMRA University in January 1994. He practiced as an acupuncturist for 20 years. Over the years, he has treated several hundred acupuncture patients. Since the beginning of 2015, Dr. Lee has reduced his acupuncture practice. He provides treatment for his current patients, presumably not accepting new patients.

Dr. Lee complies with the board's requirements regarding continuing education. Dr. Lee explained the board's licensing examination is administered in several languages, including Korean. Dr. Lee translates the board's examination from English to Korean. He is familiar with the standards of care for acupuncture in 2012.

In rendering his opinion, Dr. Lee reviewed the complaint filed by N.S.'s psychologist, the board's investigation reports, the medical records and declarations of N.S. and M.F., and relevant statutes and regulations. Dr. Lee assumed the statements by N.S. and M.F. were true.

13. Considering Dr. Lee's report and testimony, with the exception of conduct that he described as sexual misconduct, Dr. Lee did not criticize respondent's care and treatment of either patient. There was no evidence that Dr. Lee was anything but knowledgeable and objective as an expert witness. His report and testimony were clear and easy to understand.

14. During the interview by the detective, respondent denied that he engaged in the acts alleged in the Accusation and the First Amended Accusation. During the hearing, respondent testified that, on April 9, 2012, M.F. told him that she wanted to lose weight; he placed 10 needles in acupuncture points that included two needles at the ST25 point (the point closest to the vagina); one needle was two inches to the left of the navel and one was two inches to the right of the navel; in order to place the needles near the navel, he moved or adjusted M.F.'s skirt; he pulled the skirt up or down to expose the stomach area; he moved her legs; he pushed her underwear aside; he did not expose or touch her vagina during treatment. Placing the needle at the ST25 point can possibly cause sensation of pain in the vaginal area; it depends on whether the woman is "overweight or skinny or sensitive"; if the points are needled properly and precisely, needled SP25 will activate Qi; the direction Qi travels depends on the placement of the needle; if the needle is placed towards the vagina, the woman will feel pain and sensation there. In this case, since M.F. requested weight loss, respondent moved the needles all around so as to increase the weight loss effect; so, M.F. may have confused this pain and sensation for the alleged improper conduct.

15. M.F. had no complaint about the first two treatments provided by respondent. During the third treatment, M.F. was uncomfortable and confused but did not object; she questioned whether the treatment was appropriate; although she had acupuncture treatments prior to treating with respondent, no acupuncturist had touched her vagina. M.F. did not want to file a complaint if the treatment was appropriate. On the other hand, if respondent's acts were inappropriate, M.F. did not want him to repeat the acts. After doing some research, M.F. determined that his conduct was inappropriate.

Respondent argued M.F. filed the complaint seeking financial gain. However, M.F. has not filed a civil suit against respondent; M.F. testified she paid all money owed for services rendered by respondent; there is no evidence to the contrary. The evidence did not support respondent's contention.

On the date of hearing, M.F. was inconvenienced. She arrived at or about the time of commencement of the hearing, anticipated leaving before noon but was required to stay until the end of the hearing day, missing a day at work, including a meeting she anticipated she would attend at work. Her testimony was delayed while the interpreter reviewed documents with respondent. Testifying was a difficult emotional experience for M.F., exacerbated by respondent's conduct during the hearing.

M.F. was a credible and trustworthy witness.

16. Respondent's credibility is more difficult to evaluate.

The board has licensed respondent for 13 years. There have been no prior complaints about respondent, including his care and treatment of patients. There is testimony and letters supporting his testimony that he has not engaged in the conduct alleged in this case.

Respondent has consistently denied he engaged in improper acts. Though there is a recorded interview of respondent, it was not offered by either party; therefore, it is not part of the evidence and not reviewed by the administrative law judge. Neither the police report nor the law enforcement officers present during the interviews are among the evidence in the record; therefore, except for purposes of denial, respondent's statements during the police interview could not be considered.

During the first two days of hearing, when not represented by counsel, respondent's conduct was abrasive, at times he was screaming, despite orders to cease the conduct by the administrative law judge. For whatever reason, he did not respond to direct questions/issues; instead, he rambled. His attorney argued respondent is Chinese, and respondent's conduct was cultural; but there is no evidence that supports this argument.

Respondent testified that the woman who referred M.F. is a family member of M.F.'s and continues treatment with him; there is no evidence to the contrary.

17. Complainant has the burden of proof. This is a "he said, she said" case. M.F.'s statement to officer Gora was made at or about the time of the incident in May 2012. Her declaration, executed in 2014, and her testimony in 2015 contain more detail than her statement to Officer Gora. In her statement to Officer Gora, M.F. stated that respondent placed needles in her vaginal area. In her testimony, M.F. denied the foregoing. There is no explanation for the inconsistencies in her statement in 2012, her declaration in 2014 and testimony in 2015. There is no testimony that supports M.F.'s statements.

With the exception of diagrams created by M.F., the documentary evidence does not support her testimony. The investigation reports are summaries of police reports, without the police reports, recorded interviews or testimony of the police office that interviewed respondent or even the testimony of the investigator being introduced. There is no evidence that the investigator interviewed M.F. or respondent.

18. Considering the testimonial and documentary evidence that was offered, insufficient evidence was offered to establish, on April 9, 2012, during the treatment session, respondent pushed her panties to one side, exposed her vagina, rubbed and pinched her outer vagina, and rubbed and pinched her clitoris.

19. Considering the testimonial and documentary evidence that was offered, insufficient evidence was offered to establish on April 9, 2012, respondent engaged in sexual misconduct and/or unprofessional conduct.

*Recordkeeping*

20. Complainant alleged that respondent's recordkeeping was inadequate, a departure from the standard of care.

21. Expert testimony established the standard of care for recordkeeping, to wit: the records shall include results of initial examination, diagnosis, treatment provided, and progress from treatment.

22. Respondent's records for M.F. and N.S. did not document the results of his initial examination, each patient's diagnosis, detailed description of the acupuncture treatment provided or the progress of each patient as a result of the acupuncture treatment. As a consequence, respondent failed to maintain adequate and accurate records. This constitutes a departure from the standard of care.

23. Respondent's failure to maintain adequate and accurate records for two patients over serial treatment sessions constituted repeated negligence.

*Costs*

24. Complainant requested respondent be ordered to pay the board's costs of investigation and enforcement. She certified the board's costs of investigation and expert witness costs of the case, through October 24, 2014, are $12,655.60. Attached to her certification was a declaration from the investigator who identified generally the tasks performed, the number of hours spent on the tasks, and the hourly rate.

Joshua Templet, the deputy attorney general who prosecuted the case, filed a "Certification of Costs of Prosecution Costs: Declaration of Joshua M. Templet" stating that the Department of Justice billed the board $23,605 for "work on this case" through August 21, 2015.

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## LEGAL CONCLUSIONS

*Burden and Standard of Proof*

1. Complainant bears the burden of proof of establishing that the charges in the accusation are true.

2. With respect to the accusation portion of the pleadings, the standard of proof required is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The obligation to establish charges by clear and convincing evidence is a heavy burden. It requires a finding of high probability; it is evidence so clear as to leave no substantial doubt, or sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

*Statutes*

3. Business and Professions Code section 726 states:

> The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division or under any initiative act referred to in this division and under Chapter 17 (commencing with Section 9000) of Division 3.

4. Business and Professions Code section 4955 states:

> The board may deny, suspend, or revoke, or impose probationary conditions upon, the license of an acupuncturist if he or she is guilty of unprofessional conduct.
>
> Unprofessional conduct shall include, but not be limited to, the following:
>
> [¶] . . . [¶]
>
> (d) Aiding or abetting in, or violating or conspiring in, directly or indirectly, the violation of the terms of this chapter or any regulation adopted by the board pursuant to this chapter…

5. Business and Professions Code section 4955.1 states:

> The board may deny, suspend, or impose probationary conditions upon the license of any acupuncturist if he or she is

guilty of committing a fraudulent act, including but not limited to, any of the following:

[¶] . . . [¶]

(e) Failing to maintain adequate and accurate records relating to the provision of services to their patients.

6. Business and Professions Code section 4955.2 states:

The board may deny, suspend, revoke, or impose probationary conditions upon the license of any acupuncturist if he or she is guilty of committing any of the following:

(a) Gross negligence;

(b) Repeated negligent acts;

(c) Incompetence.

7. California Code of Regulations, title 19, section 1399.453 states:

An acupuncturist shall keep complete and accurate records on each patient who is given acupuncture treatment, including but not limited to, treatments given and progress made as a result of acupuncture treatment.

*Evaluation*

8. Complainant charged, in his care and treatment of two patients, respondent inappropriately touched two patients and maintained inadequate records. Though she subpoenaed both witnesses, prior to conclusion of the testimony of M.F., complainant withdrew the subpoena of N.S. and dismissed the allegations of misconduct involving N.S. The testimonial and documentary evidence offered was inadequate to establish respondent engaged in sexual misconduct or unprofessional conduct with M.F.

Expert testimony established respondent's medical record keeping was inadequate because respondent did not include the results of his examination of the patients, each patient's diagnosis, detailed acupuncture treatment provided or the progress of each patient as a result of the acupuncture treatment. His keeping inadequate records for the visits constituted repeated negligent acts.

*Violations*

9. Cause does not exist to discipline respondent's license pursuant to Business and Professions Code section 4955; insufficient evidence was offered to establish respondent engaged in sexual misconduct or unprofessional conduct in violation of Business and Professions Code sections 726.

10. Cause exists to discipline respondent's license because he failed to maintain adequate and accurate records for two patients over serial treatment sessions; this conduct constitutes repeated negligent acts in violation of Business and Professions Code sections 4955.2, subdivision (b), and 4955.1, subdivision (e), and California Code of Regulations, title 16, section 1399.453.

*Discipline Determination*

11. The purpose of an administrative proceeding seeking the revocation or suspension of a professional license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

12. The determination as to whether respondent's license should be revoked or suspended includes an evaluation of any evidence of rehabilitation. The board has licensed respondent more than 10 years. There has been no prior discipline of his license, and, until this case, there has been no prior evidence of any violations. Due to lack of evidence, complainant did not establish sexual misconduct, the most significant charge in the case. Respondent offered no evidence to establish he appreciated his lack of knowledge about maintaining adequate and accurate records or he has taken steps to remediate this problem.

13. Complainant argued there are aggravating factors that should be considered in deciding the appropriate discipline in this case.

Complainant asserted the appropriate discipline is revocation of respondent's license because his misconduct harmed his patient and the reputation of his profession. This argument is based on her contention that, during acupuncture treatment, respondent exposed and touched M.F.'s vagina, rubbed and pinched her outer vagina, and rubbed and pinched her clitoris, and the harm sustained by M.F. as a consequence of respondent's sexual misconduct. However, there was insufficient evidence in the record to establish the underlying facts. As such, that argument is disregarded.

Complainant argued respondent revealed a lack of candor in the disciplinary process because respondent attempted to offer a false record during the hearing. In June 2013, respondent received a subpoena for his records for N.S. and M.F. during the board's investigation. He produced two pages of records for each patient. In September 2014, the third page appeared after the board filed and served the Accusation, in which it is alleged the patient records lacked certain information. In addition, complainant argued that the pages

were visually distinct from the original pages, with different color ink, different letterhead, different font and different layout. Complainant argued, respondent's conduct in falsifying a record and attempting to use false evidence to protect himself from serious allegations of unprofessional conduct demonstrates unprofessional conduct and dishonesty; this action, taken together with his acts of sexual misconduct and failure to accept responsibility for his actions demonstrates that he is unfit to hold an acupuncture license.

During the hearing, the administrative law judge excluded the third page of the records for each patient but made no finding that the document was false. Complainant did not file a motion to amend the charges to include an allegation of lack of candor and dishonesty in the First Amended Accusation. Insufficient evidence was offered to establish that respondent engaged in acts of sexual misconduct. Therefore, in determining disciplinary penalty, this argument is not considered.

Also, complainant asserted respondent abused the disciplinary process and proceedings. As the hearing commenced, respondent stated that he had not reviewed discovery provided to him prior to hearing. As a result, the administrative law judge set aside time to allow the interpreter to review each document with respondent. During the first two days and during a telephonic status conference, frequently respondent did not answer questions but made irrelevant arguments; complainant alleged that he bullied the complaining witness, the administrative law judge, and opposing counsel by repeating arguments in a raised voice and even shouting at times; as a result of respondent's squandering of hearing time, and his repeated refusal to address the substantive matters at issue, an extra day of hearing was required; finally, complainant argued that respondent and his cousin intimidated the complaining witness, the administrative law judge, and opposing counsel; during a break, respondent's cousin, who accompanied and assisted respondent throughout the proceeding, told M.F. respondent had a difficult few years, including death of some relatives, asked her to tell the truth and threatened her with civil damages if the outcome was not favorable to respondent. During the hearing, the administrative law judge questioned M.F. and admonished respondent's relative.

Respondent argued there were language and cultural issues that caused this disruptive behavior. No evidence was offered in support of respondent's argument.

The record includes some facts that support complainant's arguments, but not clear and convincing facts. Insufficient evidence was offered to establish the most substantive charges in this case. As such, this argument has been given minimal, if any, consideration in determining the appropriate discipline.

14. Based on the facts and violations, it is not contrary to the public interest to impose the discipline set forth in the Order below.

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*Cost Recovery*

15. Pursuant to Business and Professions Code section 4959, complainant seeks recovery of the reasonable costs of investigation and prosecution of the instant matter in the amount of $36,250.50. This statute states:

> (a) The board may request the administrative law judge, under his or her proposed decision in resolution of a disciplinary proceeding before the board, to direct any licensee found guilty of unprofessional conduct to pay to the board a sum not to exceed actual and reasonable costs of the investigation and prosecution of the case.
>
> (b) The costs to be assessed shall be fixed by the administrative law judge and shall not in any event be increased by the board. When the board does not adopt a proposed decision and remands the case to an administrative law judge, the administrative law judge shall not increase the amount of any costs assessed in the proposed decision.
>
> (c) When the payment directed in the board's order for payment of costs is not made by the licensee, the board may enforce the order for payment in the superior court in the county where the administrative hearing was held. This right of enforcement shall be in addition to any other rights the board may have as to any licensee directed to pay costs.
>
> (d) In any judicial action for the recovery of costs, proof of the board's decision shall be conclusive proof of the validity of the order of payment and the terms for payment.
>
> (e) All costs recovered under this section shall be considered a reimbursement for costs incurred and shall be deposited in the Acupuncture Fund.

16. The Office of Administrative Hearings has enacted regulations for use when evaluating an agency's cost request. California Code of Regulations, title 1, section 1042, provides in part:

> (a) An agency shall allege in its pleading any request for costs, citing the applicable cost recovery statute or regulation.
>
> (b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs

incurred and the reasonableness of the costs, which shall be presented as follows:

> (1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration. . .
>
> (2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

[¶] . . . [¶]

17. In this case, the deputy attorney general submitted a declaration indicating that he and a paralegal worked on the case. The deputy attorney general's declaration included the general tasks performed but did not include the specific task performed, no description of the time spent on each task, or the billing rate for the professional; there was no break down by the person providing the service, no description of the general tasks performed, and no description of the time spent on each task. The deputy attorney general's declaration did not include a copy of the Department of Justice's time and billing records submitted by the service provider. The declaration did not provide sufficient facts to support a finding of the actual costs incurred and did not comply with the requirements of the California Code of Regulations, title 1, section 1042, subsections (b)(2) or (b)(3). As a result, complainant's request for the cost of prosecution is denied.

18. Another factor that must be considered when determining costs is *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

The *Zuckerman* case held that a regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5 (similar to Bus. & Prof. Code, § 4959) did not violate due process. But, it was incumbent on the board in that case to exercise discretion to reduce or eliminate cost awards in a manner such that costs imposed did not "deter [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing." The Supreme Court set forth four factors to consider in deciding whether to reduce or eliminate costs: (1) whether the licensee used the hearing

process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a "subjective" good faith belief in the merits of his position; (3) whether the licensee raised a "colorable challenge" to the proposed discipline; and (4) whether the licensee had the financial ability to make payments. The reasoning of *Zuckerman* must be applied to Business and Professions Code section 4959 since the cost recovery regulation in *Zuckerman* contains substantially the same language as that is set forth in Business and Professions Code section 4959.

In this case, respondent used the hearing process to obtain dismissal of charges and the reduction of discipline imposed; he had a "subjective" good faith belief in the merits of his position; however, no evidence was offered regarding respondent's financial ability to pay.

After applying the *Zuckerman* criteria in the instant matter, it is reasonable to require respondent to pay costs to investigate the matter in the amount of $2,000.

*Complainant's Renewed Request for Sanctions*

19. In her closing argument, complainant renewed her request for sanctions under Government Code section 11455.30, briefed in her Consolidated Motions to Quash Respondent's Subpoena of Lance S. Lee, D.C., La.C., and Subpoena Duces Tecum and argued during hearing.

Government Code section 11455.30, subdivision (a) states

> The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

Code of Civil Procedure section 128.5, subdivision (b) states, in part:

> For purposes of this section:
>
> (1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.
>
> (2) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party.

The deputy attorney general argued respondent's attorney issuance of the subpoenas and refusal to withdraw them prior to the deputy attorney general's filing of the Motion to Quash demonstrated bad faith; respondent's attorney knew the administrative law judge had ruled that the only evidence that would be permitted at the November 4, 2015, hearing was the conclusion of respondent's testimony; further, months prior to the hearing, respondent had received the materials sought in his subpoena, as part of complainant's discovery.

After complainant filed and served the Motions to Quash, respondent withdrew the subpoenas, one before hearing and the subpoena duces tecum during hearing. Complainant asserted respondent's withdrawal of the subpoenas further confirms their lack of merit.

Complainant's counsel represented that he spent 5.5 hours preparing the Motions to Quash, at a rate of $170 per hour. These expenses will be billed to the board. Complainant's counsel argued the board should not be required to incur the costs of respondent's frivolous tactics; instead, respondent's counsel should be required to pay $935 in accordance with Government Code section 11455.30.

20. Respondent argued that the request for sanctions should be denied because there is no evidence that the subpoenas were issued in bad faith as an attempt to delay the hearing.

Respondent retained Craig A. Brandt, his attorney, after the second day of hearing and before the final day of hearing. Mr. Brandt represented he had difficulty understanding what occurred during the hearing on September 1, and 2, 2015, because respondent was confused and difficult to understand; as such, Mr. Brandt was required to obtain the assistance of an interpreter; he issued the subpoenas for what he believed to be missing documents, and the subpoena for Dr. Lee to possibly call him on rebuttal; he placed Dr. Lee on telephone standby in a good faith effort to not delay the hearing while preserving respondent's due process rights; he released Dr. Lee when he determined there was not sufficient time to file an appropriate motion for leave. In addition, Mr. Brandt submitted letters, dated October 26, 2015, and a Meet and Confer letter, dated October 29, 2015, in an effort to resolve issues prior to hearing.

Mr. Brandt represented that the deputy attorney general informed him the only testimony would be respondent's; this was inconsistent with respondent's memory; no written order was available to review; in truth and in fact, the administrative law judge allowed taking testimony of character witnesses on November 4, 2015.

Prior to issuing the subpoenas, Mr. Brandt made a Motion for a Continuance to obtain a copy of the transcript for each day to better understand what occurred during the hearing in order to properly represent his client. However, due to an error on the part of the administrative law judge, the Order denying the continuance motion was not issued and served on the parties until November 4, 2015, the last day of the hearing.

21. During the hearing, respondent was emotional and confused. As such, Mr. Brandt's argument that it was difficult to represent respondent for the foregoing reason was credible and reasonable.

22. Considering the arguments of counsel, Mr. Brandt filed the subpoenas to properly represent his client. It was not established that the subpoenas were frivolous or filed for the purpose of delaying the hearing. As such, complainant's request for sanctions is denied.

## ORDER

1. No later than six months from the effective date of this decision, Hongwei Sun shall take and successfully complete not less than 10 hours of coursework in recordkeeping. The coursework shall be at graduate level at a school approved by the Acupuncture Board. Classroom attendance must be required. The course content shall be pertinent to the violation. The required coursework shall be in addition to any continuing education. No later than 30 days from the effective date of this decision, respondent shall submit a plan for the Acupuncture Board's prior approval for meeting the educational requirement. Hongwei Sun shall bear the cost of the coursework. Within five business dates of completion, Hongwei Sun shall provide documentation of completion of the coursework.

2. Unless otherwise authorized by the Acupuncture Board, no later than 30 days from the effective date of this decision, Hongwei Sun shall pay $2,000 for the Acupuncture Board's cost of investigation of the case.

3. The Decision in this matter constitutes the Public Reprimand of Hongwei Sun's license, and its issuance is conditioned upon Hongwei Sun completing a board-approved records course and paying the $2,000 investigative costs within 60 days of the effective date of the board's decision in this matter.

DATED: February 8, 2016.

DocuSigned by:
Vallera J. Johnson
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VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings