

**BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

PAUL DAVID LEE, L.Ac.

Acupuncture License No. AC9195,

Respondent.

Case No. 1A-2011-1

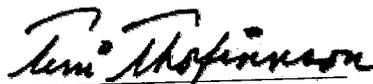
OAH No. 2011091124

NOTICE OF DECISION AND ORDER

No action having been taken on the attached Proposed Decision, pursuant to Government Code section 11517(c)(2) it is hereby deemed adopted.

Pursuant to Government Code section 11519, this Decision shall become effective on MAR 27 2013.

Date: FEB 25 2013



Terri Thorfinnson, J.D.
Executive Officer
Acupuncture Board

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

PAUL DAVID LEE, L.Ac.,
Acupuncture License No. AC-9195

Respondent.

Case No. 1A-2011-1

OAH No. 2011091124

PROPOSED DECISION

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 10, 2012, at Los Angeles.

Michel W. Valentine, Deputy Attorney General, represented Janelle Wedge (Complainant).

Patrick L. Fisher, Attorney at Law, represented Paul David Lee (Respondent) who was present at the hearing.

Oral and documentary evidence was received and the record was held open at Respondent's request to allow him to submit medical documentation regarding his diagnosis of anorexia on or before May 24, 2012. Complainant had until May 31, 2012, to respond to any supplemental evidence submitted by Respondent. On May 18, 2011, Respondent's counsel submitted medical records and a medical cannabis recommendation, which were collectively marked as Exhibit E. Complainant did not file a response and Exhibit E was admitted without objection. The case was submitted for decision on May 31, 2012, and the Administrative Law Judge finds as follows:

FACTUAL FINDINGS

1. On August 30, 2011, Janelle Wedge (Complainant) made and filed the Accusation in her official capacity as Executive Officer, Acupuncture Board (Board), Department of Consumer Affairs, State of California.

2. On September 18, 2003, the Board issued acupuncture license no. AC-9195 to Respondent. Said license is in full force and effect and will expire on September 30, 2012, unless renewed.

3. On December 13, 2010, in the Superior Court of California, County of San Luis Obispo, in *The People of the State of California v. Paul David Lee*, Case No. F000454185¹, Respondent was convicted on his plea of nolo contendere to one count of possession of not more than 28.5 grams of marijuana, in violation of Health and Safety Code section 11357, subdivision (b)², a misdemeanor. On January 11, 2011, pursuant to a Motion for Reduction from a Misdemeanor to an Infraction, the Superior Court, Judge J. Duffy, granted the motion and Respondent's conviction was reduced to an infraction. Respondent was fined \$585 and no probation was ordered by the court.

4. The facts and circumstances surrounding Respondent's December 13, 2012 conviction are that on October 25, 2010, the San Luis Obispo County Sheriff's Department (SLOCSO) was notified by the United States Postal Service (USPS) about an attempted shipment of marijuana through the mail. A envelope addressed to Respondent at 730 Calle Benita Avenue, Apartment A, Arroyo Grande, California, Respondent's home address, was observed by a postal service worker to have a strong odor of marijuana. A subsequent inspection of the envelope by Sheriff's officers and a canine trained to detect drugs confirmed that a controlled substance may have been inside the envelope. Based on this discovery, on October 27, 2010, SLOCSO affected a controlled delivery of the envelope to Respondent's residence. Respondent's wife, who was home at the time, accepted delivery of the envelope. While the envelope was being delivered to Respondent's residence, sheriff officers engaged Respondent at his place of employment and questioned him about the contents of the envelope. The officers told Respondent that they intended to apprehend the envelope that was delivered to his residence and that they believed it contained marijuana. They asked Respondent whether he possessed a medical marijuana "Physician's Statement" and he replied he did not. Respondent admitted that he smoked marijuana for a "weight loss issue" and that he receives marijuana through the mail from friends in Santa Cruz, California. The officers advised Respondent to obtain a medical marijuana "Physician's Statement" if he intended to continue to use marijuana to treat his weight loss issue.

5. Respondent denied involvement in the sales of marijuana or that he had additional marijuana at his residence. A subsequent search of the envelope revealed three (3) baggies containing a total of 4.85 grams of marijuana. Officers also discovered another

¹ Complainant Accusation incorrectly cites Case No. 101008134 as the San Luis Obispo Superior Court Docket Number for Respondent's December 13, 2010, conviction. Case No. 101008134 references the case number for the San Luis Obispo Sheriff's Office Crime/Incident Report, dated October 28, 2010.

² Complainant's Accusation incorrectly alleges that Health and Safety Code section 11357, subdivision (b), prohibits possession of marijuana over 28.5 grams, when in fact, that section prohibits possession of marijuana of not more than 28.5 grams.

baggie at Respondent's residence containing a small amount of marijuana. Respondent was "extremely cooperative" with officers and immediately admitted his involvement in receiving the marijuana through the mail. Respondent was not arrested, but was later booked and released for the offense on December 22, 2010.

6. On October 29, 2010, Respondent sought treatment from Dr. Atsuko Rees, MD in San Luis Obispo who certified that Respondent had a "serious medical condition" that required the use of medical marijuana. Dr. Rees diagnosed Respondent with anorexia and neuropathies and authorized a marijuana recommendation that expired on October 29, 2011. The marijuana recommendation was renewed on November 8, 2011, and will expire on November 8, 2012.

7. Respondent testified that he began smoking marijuana in 2009 as a result of his inability to gain weight and what he described as an eating disorder. Initially Respondent did not seek treatment with marijuana from a physician because he believed a "stigma" would be attached to him that could negatively impact his practice as an acupuncturist. Respondent was told by his neighbor in Santa Cruz, where he was living at the time, that smoking marijuana would help with his weight loss and the neighbor offered to provide him the marijuana. Respondent decided to obtain the marijuana from the neighbor who he believed was growing his own marijuana. It is unclear from the record whether Respondent purchased the marijuana from his ex-neighbor. Respondent believed smoking marijuana improved his appetite, which ultimately stymied his weight loss. Consequently, when he moved to San Luis Obispo in 2010, the neighbor offered to mail Respondent marijuana for his weight loss problem. Respondent testified that he received marijuana through the mail from his ex-neighbor in Santa Cruz no more than five times. Respondent admitted that he was aware receiving the marijuana in this manner was unlawful, but that he continued its use because of his frustration with not being able to gain weight. He testified that his primary care physicians had not been able to explain or diagnose the problem that was causing his weight loss, and therefore he tried the marijuana which he believed improved his ability to gain weight.

8. Respondent is currently being treated by a dietician and nutritionalist, in addition to his treatment by Dr. Rees with the marijuana, to address his medical condition. He continues to use marijuana three to four times per month to stimulate his appetite pursuant to the recommendation from Dr. Rees. However, Respondent testified that in spite of the marijuana use, he continues to experience difficulty in maintaining his weight, although not as severe as before. He testified that his patients were not aware of his use of marijuana and that he has never been under the influence of marijuana when treating his patients. There is no evidence that Respondent's marijuana treatment has negatively impacted his ability to treat his patients and no evidence was offered by the Board to substantiate any substandard care or complaints by any patients.

9. Respondent was forthright and honest regarding his culpability for his criminal conduct. He understands that he should have gotten a physician's recommendation for the use of marijuana prior to using marijuana illegally for the treatment of his weight loss

condition. Since his arrest and conviction, Respondent has been authorized by his physician to legally treat his medical condition with marijuana. There is no evidence that Respondent used marijuana for any purpose other than to treat his confirmed weight loss problem.

10. Respondent has had no prior disciplinary actions against him and has no prior criminal record.

11. The Board's costs of enforcement and prosecution in this matter total \$8,372.50, as set forth in Exhibit 4. The costs included 49.25 hours of attorney time as set forth in the Certification of Prosecution Costs in Exhibit 4. The Board's costs are deemed reasonable.

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Business and Professions Code³ section 4955 provides that "[t]he board may deny, suspend, or revoke, or impose probationary conditions upon, the license of any acupuncturist if he or she is guilty of unprofessional conduct." Unprofessional conduct shall include, but is not limited, the following:

(a) Using or possessing any controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or dangerous drug or alcoholic beverage to an extent or in a manner dangerous to himself or herself, or to any other person, or to the public, and to an extent that the use impairs his or her ability to engage in the practice of acupuncture with safety to the public.

(b) Conviction of a crime substantially related to the qualifications, functions, or duties of an acupuncturist, the record of conviction being conclusive evidence thereof.

[¶]...[¶]

(i) Any action or conduct that would have warranted the denial of the acupuncture license.

(Bus. & Prof. Code § 4955 subs. (a), (b), and (i).)

³ All further statutory references shall be to the Business and Professions Code unless otherwise specified.

2. Section 480, subdivision (a), provides in relevant part that “[a] board may deny a license regulated by this code on the grounds that the applicant has ... [b]een convicted of a crime. A conviction ... means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.” A license may be denied “only if the crime or act is substantially related to the qualifications, functions, or duties” of the license applied for by the applicant. (Bus. & Prof. Code § 480, subd. (a)(3)(B).)

3. Section 4956 provides in relevant part that:

A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge which is substantially related to the qualifications, functions, or duties of an acupuncturist is deemed to be a conviction within the meaning of this chapter. The board may order a license suspended or revoked, or may deny a license, or may impose probationary conditions upon a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing the person to withdraw his or her pleas of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment.

4. The Board has not defined the term “substantially related to the qualifications, functions, or duties” of an acupuncturist. In instances where the Board has not defined “substantial relationship” or developed criteria for determining substantial relationship, existing case law may be relied upon. A conviction may be the basis for disciplinary action only where there is a sufficient nexus between the conviction or act and the licensee’s fitness or competence to practice. (*Hughes v. Board of Architectural Exam’rs* (1998) 17 Cal.4th 763, 788; *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 769; *Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1416.) The crime or act does not have to be committed while the licensee was performing his or her professional duties. There simply must exist a nexus between the conduct and the licensee’s fitness to practice the profession. (*Griffiths v. Superior Court, supra*, 96 Cal.App.4th at p.769.) There need not be showing of actual harm to a patient or consumer during the course of the licensee’s practice to prove a nexus exists between the conduct and the licensee’s fitness to practice, the nexus is satisfied by virtue of the potential for such harm to occur in the future. (See *Watson v. Superior Court, supra*, 176 Cal.App.4th at 1415; *Griffiths, supra*, at p. 757.)

5. Cause exists to discipline Respondent’s acupuncture license for unprofessional conduct pursuant to Business and Professions section 4955, subdivisions (a), (b), and (i), in

that Respondent was convicted of a crime that is substantially related to the qualifications, functions, or duties of a licensed acupuncturist, as set forth in Factual Findings 3 through 5.

Substantial Relationship

6. Section 4926 expresses the Legislature's intent in licensing acupuncturists in the State of California. It states a "concern with the need to eliminate the fundamental causes of illness, not simply to remove symptoms, and with the need to treat the whole person." This provision states that the Legislature intended to establish a "framework for the practice of the art and science of Asian medicine through acupuncture." The Legislature's intent was to "encourage the more effective utilization of the skills of acupuncturists by California citizens desiring a holistic approach to health and to remove existing legal constraints which are an unnecessary hindrance to the more effective provision of health care services." In expressing this intent, the Legislature clearly signaled its approval of acupuncture as an alternative form of medical treatment. However, the Legislature also cautioned that as acupuncture affects the public health, safety and welfare, "there is a necessity that individuals practicing acupuncture be subject to regulation and control as a primary care profession."

7. Respondent's conduct in unlawfully using marijuana to treat his anorexia or weight loss condition raises legitimate concerns for the Board because Respondent it shows poor judgment by Respondent in seeking an alternative form of medical treatment before obtaining the proper recommendation and authorization from a licensed physician, psychiatrists, or other authorized medical professional. Given that Respondent is licensed to administer an alternative form of medical treatment to his patients as an acupuncturist, ensuring that he practices within the guidelines and regulations is of utmost importance for the health, safety, and welfare of his patients. Respondent's poor judgment in using marijuana illegally obtained from a non-medical provider to treat a medical condition that had personally frustrated Respondent because of its unknown origin, raises legitimate concerns about the potential for poor judgment in the treatment of his patients seeking alternative and holistic approaches to address symptoms that are of sometimes unknown origins. Even though Respondent has not caused harm to any of his patients or provided any treatment below the standard of care, actual harm is not required to show a substantial relationship between the misconduct and the licensed activity. The potential for such harm to occur is sufficient. (See *Watson v. Superior Court*, *supra*, 176 Cal.App.4th at 1415; *Griffiths*, *supra*, at p. 757.)

Rehabilitation and Mitigation

8. There is sufficient evidence of rehabilitation and mitigation to warrant Respondent's continued licensure after Public Repeval, pursuant to Business and Professions Code section 495, by reason of Factual Findings 6 through 10. In mitigation, Respondent has a medical condition that he is now legally treating with marijuana from his physician, Dr. Atsuko Rees. He suffers from anorexia which causes an inability to maintain weight. Dr. Rees has provided a recommendation for marijuana treatment from October 29, 2010, right after Respondent's arrest, through November 8, 2012. The recommendation from

Dr. Rees reduces the likelihood that Respondent would resort to purchasing marijuana illegally in the future.

9. Respondent admitted his criminal conduct immediately upon being confronted by law enforcement officers and took full responsibility for his actions. Although the Board alleged that Respondent was placed on probation following his December 13, 2010 conviction, the conviction records did not substantiate this allegation. Respondent was initially convicted of a misdemeanor for possessing less than 28 grams of marijuana and was fined \$585 by the court. The misdemeanor was reduced to an infraction on January 11, 2011. That the Superior Court granted Respondent's motion to reduce the misdemeanor to an infraction, and did not impose formal or informal probation, is an indication that the criminal court does not view Respondent as a potential repeat offender.

10. Respondent has no prior disciplinary history or criminal record. The purpose of an administrative disciplinary proceeding is to protect the public, and not to punish the licensee. (See *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) In light of the relative minor offense for which Respondent was convicted, an offense that was later reduced to an infraction, and Respondent's prior good record, the public welfare can be protected by the issuance of a Public Repeval pursuant to Business and Professions Code section 495.

Cost Recovery

11. The Board's prosecution costs in the amount of \$8,372.50 are found to be reasonable, and therefore, costs are awarded to the Board pursuant to Business and Professions Code section 125.3. Respondent presented no evidence regarding his financial inability to pay the costs, nor did he challenge the validity of the Board's costs.

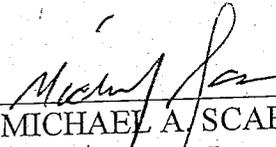
WHEREFORE, the Administrative Law Judge makes the following Order:

ORDER

1. Respondent Paul David Lee's Acupuncture License No. AC 9195 is publicly reprovved, pursuant to Business and Professions Code section 495.

2. Respondent is ordered to pay the Board's costs of prosecution in the amount of \$8,372.50

Dated: July 10, 2012


MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings