

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues)
Against:)
)
CHAO PANG, L.AC.)
25 N. SANTA ANITA AVE., #C)
ARCADIA, CA 91006)
)
Acupuncture License No. AC 10529)
Respondent.)
_____)

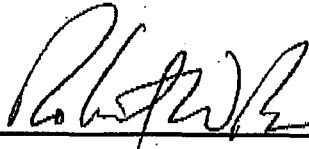
Case No.: 1A-2006-33
OAH No.: L2008110370

PROPOSED DECISION AND ORDER

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

This Decision shall become effective on OCT 14 2009.

IT IS SO ORDERED SEP 14 2009.



Robert Brewer, Chair
Acupuncture Board
Department of Consumer Affairs
State of California

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

In the Matter of the Accusation Against:

CHAO PANG, L.Ac.

Acupuncture License No. AC 10529

Respondent.

Case No. 1A-2006-33

OAH No. L2008110370

PROPOSED DECISION

This matter came on regularly for hearing on March 11 and 12, 2009, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Janelle Wedge (Complainant) was represented by Abraham M. Levy, Deputy Attorney General.

Chao Pang (Respondent) was represented by George L. Young¹ and Steven L. Sugars, Attorneys at Law.

Oral and documentary evidence was received. The record was held open to and including May 19, 2009, for the parties to submit closing and reply briefs in accordance with a specified briefing schedule. The two closing briefs and Complainant's reply brief were timely received. No reply brief was received from Respondent. Complainant's "Post-Hearing Brief & Memorandum of Law" was marked as Complainant's Exhibit 24 for identification. "Closing Argument of Respondent" was marked as Respondent's Exhibit C for identification. Complainant's "Post-Hearing Reply Brief & Memorandum of Law" was marked as Complainant's Exhibit 25 for identification. On May 19, 2009, the record was closed, and the matter was deemed submitted for decision.

¹ Mr. Young did not appear at the afternoon session on March 11, and he did not make any appearance on March 12.

In this case, Respondent is accused of violating (1) Business and Professions Code section 4955, by permitting unlicensed massage therapists to perform massages and solicit prostitution in three business he allegedly owned and operated; (2) Business and Professions Code section 731, by aiding and abetting prostitution in all three of those businesses; and (3) Business and Professions Code section 4961, by failing to register any of the three businesses with the Board. The three businesses were located in Covina, California, La Habra, California, and Stanton, California. They shall be referred to in this decision as the Covina, La Habra and Stanton facilities, respectively.

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. Complainant made the Accusation in her official capacity as Executive Officer of the Acupuncture Board (Board).
2. On September 21, 2005, the Board issued Acupuncture License No. AC 10529 to Respondent. The license was scheduled to expire on May 31, 2007, unless renewed. The evidence did not disclose whether the license has been renewed. However, if it has not, the board maintains jurisdiction over this matter pursuant to Business and Professions Code section 118, subdivision (b).

Respondent's Background

3. Respondent studied acupuncture for five years in China before beginning his career in 1985. He emigrated to the United States in 2001. He estimates the number of patients he has treated with acupuncture in the 20,000 to 30,000 range.

The Covina Facility

4. In approximately December of 2005, Respondent opened an acupuncture clinic, known as the Wellbeing Health Station, at 19506 E. Cienega Avenue in Covina, California. Respondent did not register his new location with the Board.

///

///

///

///

///

5. On March 7, 2006, officers from the County of Los Angeles Sheriff's Department conducted an undercover operation at the Covina facility. As part of that operation, an undercover officer went into the facility, paid for a massage, was directed to a massage room and was told to disrobe. During the course of the massage, the masseuse straddled the officer's legs and ground her genital area into his buttocks. For an additional fee, the masseuse agreed to perform a sex act on the officer and, in furtherance of that activity, she disrobed, except for her bra, and gave the officer a piece of plastic wrap to use as a condom. At that time, members of the vice team entered and placed the masseuse under arrest. When the masseuse heard the officers coming, she quickly put her jeans back on. She was in that process when the officers entered the locked room and found her with the undercover officer.

6. Following the arrest, another officer inspected the facility. He found several indicia of prostitution and few indicia of acupuncture. The officer described the premises as follows:

I did a visual inspection of the location and saw three massage rooms. Inside the rooms were dressers containing white towels. On the dressers were oils, lotions, and tissues. There were plastic cabinets in the rooms which contained lotions and a red container for the apparent use of used needles. An inspection of the office revealed no patient files, assessment forms, or medical forms. I only found one box of acupuncture needles in the office area and an empty needle box in the plastic cabinets inside one of the massage rooms. There was not anybody at the location who had a good grasp of the English languages [*sic*]. I also found a box containing plastic wrap similar to the one that was going to be used as a condom at the rear of the location.

Based on the prostitution violation on this date and the previous prostitution violation on 11/29/05, coupled with the fact that there was not a Doctor [*sic*] at the location if a customer wanted acupuncture, and how the location was set up (very little acupuncture needles, no medical forms, no assessment forms, no person at the location to ask the patient about his/her injuries, etc), in addition to the workers and customers at the location thinking the location was a massage parlor^[2], I formed the opinion the location was not an office for acupuncture but was a massage parlor and a house of prostitution. (Exhibit 9, AGO 0098.³)

² No finding is made based on the officer's belief that others in the building believed the premises were being used as a massage parlor.

³ All information regarding police operations, based on police reports, were received pursuant to Evidence Code section 1280 and *Lake v. Reed* (1997) 16 Cal. 4th 448.

7. At the administrative hearing, Respondent testified that the woman who was arrested was his patient whom he had been treating at the time the officers entered. That testimony was not credible. The arresting officers found the woman in a locked room with the undercover officer. Further, despite his testimony that he was in the Covina facility every day, Respondent was not in the facility at any time during the March 7, 2006 undercover operation.

8. An officer telephoned Respondent at the conclusion of the operation. Respondent answered the telephone in English, identified himself, and admitted he was in charge of the Covina facility. However, when the officer identified himself and said he was investigating the location, Respondent claimed he did not speak English.

9. According to the police report, the masseuse who gave the massage to the undercover police officer did not have a massage technician license from the County of Los Angeles. That statement cannot support a finding in that it was not established how he learned that alleged fact. According to the officer who wrote the report, the masseuse did not speak English and, apparently, he did not speak her language. There is no reference in the evidence to anyone having checked with the County of Los Angeles to determine whether the masseuse was licensed.

The La Habra Facility

10. Following the undercover operation in the Covina facility, Respondent moved his business to 412 Whittier Boulevard, La Habra, California. The business was owned by Tommy Ung (Ung), his wife, Jin Yu (Yu) and Zhong Yuan Zhang (Zhang). Ung had entered into a five-year lease for the premises and had applied to the City of La Habra for a conditional use permit, a business license and a massage establishment permit. Yu and Zhang had applied for massage technician permits. However, those applications were placed on hold pending the outcome of an investigation by the Santa Barbara Police Department into possible prostitution, pimping and pandering at a business in Santa Barbara owned and operated by Ung. Ung and Yu approached Respondent to take over the lease, which he did on October 17, 2006. A business certificate for the business was issued by the City of La Habra with an effective date of October 17, 2006. The name of the business on the certificate was "Guang Long Acupuncturist." Respondent was the listed owner.

11. Respondent did not register his new location with the Board.

///

///

///

12. A citizen complaint to the La Habra Police Department regarding the La Habra facility prompted an investigation. The complaint included printouts of several Internet advertisements for massage bearing photographs of young women in scanty clothing and provocative poses. Additional investigation into online reviews of the La Habra facility led police officers to believe prostitution was occurring there. Several subsequent surveillances revealed a pattern according to which a man would approach the locked door of the business, make one or more cellular telephone calls in front of it, and then enter the business. Experienced investigators recognized that pattern as one frequently used by businesses offering prostitution services.

13. On January 31, 2007, and February 2, 2007, La Habra Police Department detectives conducted additional surveillance at the La Habra facility. During the surveillance, several men entered and left the facility. The officers stopped each man upon leaving the facility, and questioned him⁴ about his activities inside. Each man told the officers that he had received a massage by a masseuse. None of them had seen a doctor before receiving the massage. One man stated that the masseuse had offered to perform a sex act on him for an additional sum, but that she had not done so because he did not have enough money. Another man reported giving the masseuse an \$80 tip after she exposed her breasts and vagina, and masturbated him while allowing him to touch her vagina.

///

///

///

///

///

///

///

///

///

///

⁴ All statements made by the men interviewed by La Habra Police Department detectives are admitted as "administrative hearsay" pursuant to Government Code section 11513, subdivision (d), to supplement and/or explain the indicia of prostitution discovered by the detectives.

14. On February 6, 2007, detectives from the La Habra Police Department executed an inspection warrant at the La Habra facility. Inside, they located two women who were identified as masseuses in the business⁵. They also found indicia of prostitution such as condoms hidden inside a lipstick case, a box of plastic wrap often used in lieu of a condom, towels, bedding and bottles of oil. With the possible exception of wooden barrels in each massage room containing grey rocks, the detectives found no indicia of a legitimate acupuncture clinic. One detective wrote:

During my inspection of this business several things caught my attention. First, there was nothing inside the business to indicate that any acupuncturist works at this business. There were no acupuncture needles, alcohol swabs or wipes, latex gloves, or any other implements that would normally be found in this type of business. Also, on the company business cards they advertise as also being involved in medicinal herbs. There were no herbs of any type found anywhere in this business. The only items found inside the business were related to giving massage. (Exhibit 10, AGO 0156.)

15. On February 7, 2007, a La Habra Police Department detective interviewed Respondent via an interpreter Respondent brought with him. Respondent admitted ownership of the business which he identified as an acupuncture clinic. Respondent was shown photographs of women who worked in the La Habra facility. He was unable to identify any of them. When he was told they were his employees, he stated that "Lisa" did the hiring. He identified Yu as "Lisa." Respondent admitted to the officer that he had not been to the La Habra facility for approximately one month. He also admitted that he had no business records, and that he brought his acupuncture equipment to the facility in a bag.

16. Despite Respondent's testimony that he was at the La Habra facility performing acupuncture every day, at no time during any of the surveillances or during the execution of the inspection warrant, did police officers observe Respondent enter, leave or be present in the facility.⁶

⁵ According to the police report, each woman denied having a massage technician license issued by the City of La Habra. However, the women's statements are hearsay which are not admissible pursuant to *Lake v. Reed, supra*. They are also inadmissible as "administrative hearsay" because they neither supplement nor explain other evidence.

⁶ The police officers' observations are more convincing that Respondent's testimony in this regard. Not only did Respondent admit to an absence from the facility for approximately one month, if Respondent had been on the premises each day as he testified, he more than likely would have been able to identify at least some, if not all, of the women who worked there.

17. In her closing brief, Complainant pointed out that, during the interview, Respondent failed to answer a number of questions and failed to respond to certain statements made by the detective. The detective documented one example of that conduct in his report:

I told Pang that from my investigation acts of prostitution were occurring at his business. Pang said he knew nothing about it. I explained the business was his responsibility. Pang did not respond. I told Pang that it was my opinion that his business was a front for a massage establishment and as such was a house of prostitution that he was allowing to operate. Pang had no comment. (Exhibit 10, AGO 0145.)

18. Complainant argued that Respondent's failure to answer the questions or respond to the detective's statement constituted tacit admissions⁷. That argument was not persuasive. The questions and comment were of an incriminating nature, and Respondent may not be faulted for exercising his Fifth Amendment rights. Further, as evidenced by the above quote from the detective's report, Respondent did respond to the accusation of prostitution in his business by denying any knowledge of it.

19. On May 10, 2007, In the Superior Court of California, County of Orange, West Justice Center, in Case No. 07CC05763, the City of La Habra and the People of the State of California filed a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Fees and Costs to Abate a Public Nuisance against Respondent, Ung, Yu and others, in connection with the La Habra facility. Respondent failed to appear in the action and, on April 9, 2008, the Court entered his default. On January 19, 2008, judgment was entered against Respondent in the sum of \$13, 558.76.

///

///

///

///

///

///

⁷ Complainant's reliance on Evidence Code section 1221 to support her argument is not well founded. Evidence Code section 1221 only creates an exception to the hearsay rule (Evid. Code, § 1200) for a statement adopted by a party if the statement is offered against that party.

20. Complainant argues that Respondent's default in the above civil action serves as res judicata in the instant action. It does not.

A prior judgment is not res judicata on a subsequent action unless three elements are satisfied: "1) the issues decided in the prior adjudication are identical with those presented in the later action; 2) there was a final judgment on the merits in the prior action; and 3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication. [Citation.] Even if these threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed.'" (Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal.App.4th 1053, 1065 . . .) (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 685-686.)

21. The issues in the civil action were not identical to those *sub judice*, and the clear and convincing evidence standard of proof applicable in this case, is greater than that in the civil case. Therefore, the doctrine of res judicata does not apply. However, by failing to appear in the civil action and allowing his default to be entered, Respondent is deemed to have admitted the allegations set forth in the civil complaint. Those admissions stand regardless of the standard of proof applied to a given case. In *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 33, the Court stated:

The rule is well settled that where a judgment has been entered upon a default, the essential allegations of the complaint upon which the judgment was entered are competent evidence in another proceeding as judicial admissions. (Citations.)

22. In light of the holding in *Bohn, supra*, Respondent is deemed to have admitted that, at the La Habra facility, he was:

(1) conducting a massage establishment without approval of a conditional use permit as required by La Habra Municipal Code Section 5.28.020; (2) employing individuals who [did] not have massage technician permits and/or allowing such individuals to provide massage services at the [La Habra facility], in violation of La Habra Municipal Code Section 5.28.020; (3) employing individuals, and/or allowing such individuals to conduct illegal acts of prostitution at the [La Habra facility]; [and] (4) allowing or engaging in unlicensed massage services and/or illegal acts of prostitution, resulting in significant health and safety risks to members of the public receiving such services or acts, as well as such acts or services being injurious to the general public health and welfare and being indecent and offensive . . . (Exhibit 12, AGO 0260, ¶ 28.)

23. Respondent closed the La Habra facility on May 23, 2007.

24. At the administrative hearing, Respondent admitted that he had known about the Internet advertisements but, because "Lisa" had placed the advertisements, he had been unaware of the provocative photographs appearing on them. That testimony was not credible because Respondent also testified that he had criticized "Lisa" for using the photographs in the advertisements. Accepting that statement as true, Respondent did nothing to terminate the use of the photographs in his advertising even though, as the owner and operator of the facility, he had the authority to do so.

The Stanton Facility

25. On March 13, 2006, an Application for Business Certificate was filed with the City of Stanton for the Stanton facility under the business name of A.O. Acupuncture Center, located at 12235 Beach Boulevard in Stanton, California. The name of the business owner was listed as Hong Guang Service, Inc. The application was signed by Hong Guang Ao. Appended to the police report received in evidence (Exhibit 7), is a copy of the Application for Business Certificate. Next to the name "Hong Guang Service, Inc." on the line for the business owner, the name "Dr. Chao Pang" appears in parentheses. Respondent's name appears to be in a handwriting different from any other appearing on the application, and it appears to have been written with a different instrument from that used for the remainder of the application. No evidence was offered as to when or by whom Respondent's name was written on the application.

26. The City of Stanton never issued a business certificate to either A.O. Acupuncture Center, Hong Guang Service, Inc., Hong Guang Ao or Respondent. A check with the Stanton Business License Bureau showed no record of a business at 12235 Beach Boulevard and no business license with that address.

27. The Articles of Incorporation of Hong Guang Service, Inc. show Hong Guang Ao as the incorporator and Hong G. Ao as the agent for service of process. Respondent's name does not appear in the articles of incorporation.

28. On April 25, 2006, officers from the Orange County Sheriff's Department conducted an undercover operation at the Stanton facility. Upon entering the facility, the undercover officer saw what appeared to him to be an acupuncturist license in the name of "Chao Dang." A subsequent check with the Board showed no licensee by that name.

29. The officer paid for and received a massage. Near the end of the massage, the masseuse offered, and did, masturbate the officer in exchange for an additional \$40. She hugged the officer and kissed him on the side of the neck as he was leaving.

30. On May 3, 2006, officers from the Orange County Sheriff's Department conducted another undercover operation at the Stanton Clinic. Once again, the masseuse offered to masturbate the undercover officer, and did so in exchange for money.

31. The same day, officers from the Orange County Sheriff's Department executed a search warrant at the Stanton facility. Among the items they found were the business certificate application referred to above, an acupuncture license issued by the Board in Respondent's name, and a document from the Council of Colleges of Acupuncture and Oriental Medicine in Respondent's name.

32. One of the women working in the Stanton facility on May 3, 2006, told officers she believed the business was owned by a woman named "Helen," and that "Helen" had hired her. The officers identified "Helen" as Yuan Liu. The officers later obtained a copy of the lease agreement for the Stanton facility. It indicated that the agreement was made by and between Landmark West Enterprises and Liu Yuan dba "Acupuncture treatment office."

33. On September 14, 2006, in the Superior Court of California, County of Orange, West Justice Center, in Case No. OCSO 06-075706, Respondent was charged with violating section 5.16.200(B) of the Stanton Municipal Code (employing non-licensed technicians in a massage establishment), a misdemeanor. Those charges were subsequently dismissed before trial.

34. Complainant failed to prove, by clear and convincing evidence, that Respondent owned, operated or controlled the Stanton facility at any time up to and including May 3, 2006. The documents bearing Respondent's name, which were found in the Stanton facility do not constitute clear and convincing evidence of ownership or control. Since the business license had not yet been issued, the documents may have been placed there in anticipation of opening the business. Even if Complainant had established that Respondent was in some way involved with the Stanton facility at a relevant time, she did not establish that he was operating the business under the guise of an acupuncture clinic. Therefore, he would not have been using his acupuncture license in connection with the illegal activity.

///

///

///

///

///

Costs

35. Pursuant to Business and Professions Code sections 125.3 and 4959, the Board requested reimbursement of its cost of investigation.⁸ Evidence of investigative costs was submitted in the form of three declarations by Les Williams, a supervising investigator with the Department of Consumer Affairs. Those declarations are summarized below:

a. According to a declaration dated October 3, 2008, during fiscal year 2006-2007, Mr. Williams billed 10 hours at an hourly rate of \$175. During fiscal year 2007-2008, he billed 28 hours at an hourly rate of \$190, for a total of \$7,070. The hours are broken down as follows: Investigation = 12 hours; Travel = 5 hours; Report Preparation = 21 hours.

b. According to a declaration dated October 17, 2008, during fiscal year 2007-2008, Mr. Williams billed 30 hours at an hourly rate of \$190, for a total of \$5,700. No reference is made to fiscal year 2006-2007. The hours are broken down as follows: Investigation = 12.25 hours; Travel = 2 hours; Report Preparation 15.75 hours.

c. According to another declaration, also dated October 17, 2008, during fiscal year 2007-2008, Mr. Williams billed 36.5 hours at an hourly rate of \$190, for a total of \$6,935. No reference is made to fiscal year 2006-2007. The hours are broken down as follows: Investigation = 22 hours; Travel = 1.5 hours; Report Preparation = 12 hours.

36. Nothing in any of the three declarations by Les Williams indicates that one or more of the declarations is intended as a supplement to the other(s), and no explanation was offered at the hearing for the three disparate declarations. Two of the declarations are dated the same day, and they follow the first declaration by only two weeks. Given the lack of explanatory information, it is inferred that a later declaration is intended to supersede the earlier one, but which of the two October 17, 2008 declarations is accurate remains a mystery.

37. Business and Professions Code section 4959, subdivision (a) states:

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.

///

⁸ No evidence of prosecution costs was offered.

38. California Code of Regulations, title 1, section 1042, states in relevant 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.

39. The costs referenced in the two October 17, 2008 declarations do not appear unreasonable. However, the ambiguity raised by the two declarations bearing the same date precludes a finding of the actual costs. Because Complainant failed to establish which declaration controls, the October 17, 2008 declaration bearing the \$5,700 total shall be deemed the correct reflection of the actual costs of investigation.

///

///

///

///

///

///

40. This action involves allegations of permitting, aiding and abetting the practice of prostitution by unlicensed massage therapists, and the failure to register three places of practice. Complainant sustained her burden of proof as to two of those facilities⁹, but not as to the third. No evidence was offered to show that a disparate amount of investigation time was required for one or two of those facilities. Therefore, a reduction of one-third of the requested costs of investigation is deemed a reasonable amount as an offset for the unproven allegations. Complainant will recover investigative costs of \$3,800.19.

LEGAL CONCLUSIONS

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause exists to discipline Respondent's Acupuncture license, pursuant to Business and Professions Code section 4955, subdivision (j), for violation of law by a person working on work premises, as set forth in Findings 4 through 24.
2. Cause exists to discipline Respondent's Acupuncture license, pursuant to Business and Professions Code section 731, for aiding and abetting the violation of Penal Code section 647, subdivision (b) on work premises, as set forth in Findings 4 through 24.
3. Cause exists to discipline Respondent's Acupuncture license, pursuant to Business and Professions Code section 4961, for failure to register a place of practice, as set forth in Findings 4, 10 and 11.
4. Cause exists to order Respondent to pay the costs claimed under Business and Professions Code sections 125.3 and 4959, as set forth in Findings 35 through 40.

Respondent Superior

5. The masseuses working in the Covina and La Habra facilities were Respondent's employees who performed illegal acts in the course and scope of their employment. Vicarious liability has long been applicable in an administrative proceeding, and Respondent is vicariously liable for his employees' actions.

///

⁹ Complainant did not prove that the masseuses in the Covina facility were not licensed. However, she did prove they were engaged in prostitution. The acts of prostitution in the Covina and La Habra facilities, and the hiring of unlicensed massage therapists in the La Habra facility, were substantially related to the functions and duties of an acupuncturist. (Bus. & Prof., Code, § 4955, subd. (j).)

6. In *Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797, the Court stated:

The owner of a license is obligated to see that the license is not used in violation of the law. (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360 [185 Cal. Rptr. 453, 650 P.2d 328].) "If a licensee elects to operate his business through employees he must be responsible to the licensing authority for their conduct in the exercise of his license and he is responsible for the acts of his agents or employees done in the course of his business in the operation of the license." (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192 [71 Cal.Rptr. 357].)

7. The doctrine of vicarious liability in administrative proceedings was also discussed in *Camacho v. Youde* (1979) 95 Cal.App.3d 161 [157 Cal.Rptr. 26]. In that case, the agricultural pest control license of an aerial crop dusting business was disciplined for the negligent acts of its agent pilot, even though the licensee was himself free of negligence. The Court stated:

A licensee must be responsible for his employees' conduct in pursuing the business for which his license is required (Citation). . . . A licensed pharmacist may be disciplined by the pharmacy board if his employees engage in unlawful conduct in the operation of the pharmacy even though he has no knowledge of such activity (Citation).

A licensee authorized to sell alcoholic beverages is subject to discipline against his license for the misconduct of his employees in conducting the licensed business although he has no knowledge thereof. (Citations.) He is subject to license suspension, for example, when his bartender hires females to solicit drinks from customers (Citation).

///

///

///

///

///

///

///

These and other cases cited by appellant predicate discipline on the doctrine of respondeat superior. Respondent urges a violation of due process if his license is suspended when he is "entirely innocent of wrong." However, the objective of an administrative proceeding relating to a possible license suspension is to protect the public; to determine whether a licensee has exercised his privilege in derogation of the public interest. "Such proceedings are not for the primary purpose of punishing an individual. [Citation.] Hence, such proceedings are not criminal in nature." (Citation.) It is necessary for the Department of Food and Agriculture to effectively regulate the dangerous business of pest control. Safety in the application of pesticides must be assured by fixing responsibility for that safety on the licensee. The record shows the pesticide mixture here involved consisted of lannate and thiodan, both capable of causing illness or poisoning because of their toxicity. If respondent were correct, effective regulation would be impossible. He could contract away the daily operations of his business to independent contractors and become immune to disciplinary action by the licensing authority.

[¶] . . . [¶]

We view the duties of a licensee . . . to be nondelegable to either an independent contractor or to an employee (Citation) . . .
Id. at 163-165.

Aiding and Abetting

8. Respondent was not present in either the Covina or the La Habra facility during the undercover operations. However, he is liable for aiding and abetting his employees' misconduct regardless of whether was aware of it.

9. A showing of guilty knowledge or intent is not necessary to establish a violation of Business and Professions Code section 731, subdivision (a). In *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, the Court stated:

The fundamental goal of statutory construction is to ascertain the intent of the Legislature to effectuate the purpose of the law. To determine that intent, we must look first to the statutory language itself, giving words their usual and ordinary meaning. [Citations.] We are not authorized to insert qualifying provisions and exceptions which have not been included by the Legislature, and may not rewrite a statute to conform to an intention which does not appear in the statutory language. [Citations.] (*Id.* at 1582.)

10. Business and Professions Code section 731, subdivision (a) states:

Any person licensed, certified, registered, or otherwise subject to regulation pursuant to this division who engages in, or who aids or abets in, a violation of Section 266h, 266i, 315, 316, or 318 of, or subdivision (a) or (b) of Section 647 of, the Penal Code occurring in the work premises of, or work area under the direct professional supervision or control of, that person, shall be guilty of unprofessional conduct. The license, certification, or registration of that person shall be subject to denial, suspension, or revocation by the appropriate regulatory entity under this division.

11. Nowhere in Business and Professions Code section 731, subdivision (a) are the words “knowingly,” “intentionally,” “willfully,” or any other words indicating knowledge or intent used. In order to effectuate the Legislature’s intent, the statute must be interpreted by its plain meaning, without the addition of any modifiers or qualifiers. Complainant was not required to establish that Respondent knew he was aiding or abetting his unlicensed employees in committing prostitution, or that he intended to do so.

12. A similar result was reached in *Khan v. Medical Board* (1993) 12 Cal.App.4th 1834 [16 Cal.Rptr.2d 385]. In interpreting Business and Professions Code section 2264, a statute prohibiting aiding or abetting the unlicensed practice of medicine, and one similar in language to section 731, the Court stated:

This interpretation of the words of the statute is supported by its purpose, which is protection of the public. . . . It is the responsibility of the medical practitioner to contact the licensing agency and ensure the existence of the license of those in his or her employ. That is the apparent and reasonable intent of the Legislature. Otherwise, practitioners could protect themselves from discipline by the Medical Board by remaining ignorant of the true facts. (*Id.* at 1845.)

///

///

///

///

///

///

Actual and Constructive Knowledge

13. It appears to be no coincidence that both the Covina and the La Habra facilities were almost completely devoid of indicia of an acupuncture practice at the time of the undercover operations, and that Respondent was not present in the facilities during those operations, later admitting to one police officer that he had not been in the facility for approximately one month. Respondent was not credible in his testimony that he practiced acupuncture in his clinics every day. That testimony was belied by his admission to the police officer and by the lack of acupuncture records and equipment in the two facilities. Respondent was the sole proprietor in his facilities. He offered no reason why it was necessary for him to carry all of his equipment back and forth with him in a bag. However, regardless of whether he performed acupuncture in the Covina and/or La Habra facility, or whether he had actual knowledge of prostitution occurring in his facilities, he is charged with constructive knowledge of that activity. In *Sime v. Malouf* (1949) 95 Cal.App.2d 82, the Court stated:

As to the claim of constructive knowledge, the issue was whether plaintiff had notice of facts sufficient to put a prudent man upon inquiry and if so, whether an inquiry, reasonably conducted, would have disclosed to him the true state of affairs. [Citations.] (*Id.* at 104.)

14. Respondent's absence from the Covina and La Habra facilities, the lack of indicia of acupuncture, the presence of female masseuses in the two facilities, the locked facility requiring a telephone call to gain entrance, the number of massages given compared to the amount of acupuncture provided, and the lack of patient records, placed Respondent on constructive, if not actual, notice of the illegal activity occurring in his facilities. He either condoned it, ignored it, or failed to investigate or inquire about it.

15. Respondent insists that, at all times, he was a legitimate practitioner of acupuncture who was harassed by the police, and that his employees were properly licensed and experienced. That position was belied by the overwhelming weight of the evidence which Respondent, erroneously, claimed was inadmissible. Further, Respondent bore the burden on that issue (Evid. Code, § 500), which he could have sustained by offering employment and licensing documentation on his employees. His failure to do so is viewed with distrust. (Evid. Code, § 412.) Respondent's failure to accept responsibility for the illegal conduct in his facilities bodes poorly for his future performance as a Board licentiate, and is antithetical to public protection.

///

///

///

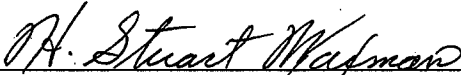
16. Either actually or constructively, Respondent allowed prostitution to occur in his Covina facility. After an undercover operation exposed that activity, Respondent moved to the La Habra facility and permitted the same activity to occur at that location. In addition, he failed to comply with a statutory mandate to notify the Board of his places of practice, and he permitted unlicensed massage therapists to work in at least one of his facilities. Given Respondent's recalcitrance, he is not a suitable candidate for a probationary license. In this case, the public safety, welfare and interest can be protected only by the revocation of Respondent's acupuncture license.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Acupuncture license number AC 10529, issued to Chao Pang, L.Ac., is revoked.
2. Within 90 days of the effective date of this Decision, Respondent shall reimburse the Board the sum of \$3,800.19 for its costs of investigation.

DATED: June 4, 2009


H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings