BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: BONG GOO CHUNG, L.Ac. 500 South Lake Street, Apt. 206 Los Angeles, California 90057 Acupuncture License Number AC12161, Respondent.	Case No.: 1A-2010-83 OAH No.: 2011091047

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 JUL 24 2012.

IT IS SO ORDERED JUN 25 2012.

ACUPUNCTURE BOARD
STATE OF CALIFORNIA

By _____

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PROPOSED DECISION

This matter came on for hearing before Richard J. Lopez, Administrative Law Judge of the Office of Administrative Hearings, at Los Angeles, California, on April 13, 2012.

Wendy Widlus, Deputy Attorney General, represented the Complainant.

Respondent appeared in person and represented himself.

Oral and documentary evidence and evidence by way of official notice was received.

At the request of Complainant the record was held open for receipt of documentary evidence of costs incurred by Complainant. Respondent filed said documents on May 24, 2012 and the same was marked and received as Exhibit 6 in evidence. Complainant's post-hearing trial brief filed on May 24, 2012 was incorporated into Exhibit 1. Respondent filed documentary evidence on May 24, 2012 which was marked and received Exhibit A, as administrative hearsay. The matter was deemed submitted on May 25, 2012.

The Administrative Law Judge now finds, concludes and orders as follows:

FACTUAL FINDINGS

Parties

1. Janelle Wedge, Complainant herein, brought the Accusation in her official capacity as the Executive Officer of the Acupuncture Board (Board).

2. On November 7, 2007, the Board issued Acupuncture License number AC12161 to Bong Goo Chung, L.Ac., Respondent herein. The Acupuncture License expired on January 31, 2011 and was delinquent until January 18, 2012 when it was renewed.

Procedure

3. All pre-hearing jurisdictional requirements have been met by the parties. Administrative proceedings before the Department are conducted in conformity with the provisions of the California Administrative Procedure Act, chapter 5, commencing with Government Code section 11500, *et seq.*

DUI Convictions

4. On Friday, February 29, 2008, at approximately 1:50 a.m., LAPD officers assigned to South Traffic Crime Task Force Driving Under the Influence Detail were driving 60-65 miles per hour on the 110 freeway when they noticed Respondent driving at an excessive speed. Respondent's vehicle passed their vehicle and straddled the double yellow lines into oncoming traffic, creating a clear and present danger to others. The officers activated their vehicle's emergency lights and siren in an attempt to get Respondent to pull his car over. Respondent continued to drive requiring the use of the police vehicle's public address system to order Respondent to cease driving. Respondent pulled over onto the shoulder of an island divider. When Respondent got out of his car the officers saw that Respondent displayed objective signs of alcohol intoxication. At first Respondent denied he had been drinking. Respondent then said he had three beers earlier at a restaurant. Officers administered a series of standardized physical field sobriety tests to Respondent and then asked Respondent to perform them as directed. Respondent was unable to perform the tests.

5. Respondent was arrested for being under the influence of alcohol. After the reading of the chemical test admonition by one of the arresting officers, Respondent chose to provide a sample of his breath to be tested for the presence and amount of alcohol. After the directions to take the breath test were explained to him, Respondent unsuccessfully attempted the breath test eight times, but blew insufficient air into the machine to be tested. Respondent refused to provide a blood sample to test the presence and amount of alcohol in his system. Subsequent to the arrest Respondent was subjected to criminal proceedings resulting in the misdemeanor set forth in Finding 6.

6. On July 2, 2008, in proceedings entitled *People of the State of California v. Bong Goo Chung,* then pending in the Superior Court of California, Case Number 8MP03342, after a plea of nolo contendere, Respondent was convicted of violating Vehicle Code section 23152, subsection (a), a misdemeanor, which provides that "It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle." (DUI 1).

7. On Friday, May 7, 2010, at approximately 12:27 a.m., while on probation for DUI 1, LAPD officers assigned to West Traffic Driving Under the Influence Task Force were driving on Wilshire Boulevard when they noticed Respondent driving his vehicle which was repeatedly crossing over the double yellow lines into oncoming traffic lanes thus creating a clear and present danger to others. The officers initiated a traffic stop to investigate. Respondent told the officers he did not know why he had been stopped. Respondent denied he had been drinking. When Respondent got out of his vehicle the officers observed that Respondent displayed objective signs of alcohol intoxication. When questioned by the officers about alcohol usage Respondent again denied he had been drinking. Officers demonstrated a series of standardized physical field sobriety tests to Respondent and then asked Respondent to perform them as directed. Respondent was unable to perform the tests.

8. Respondent was arrested for being under the influence of alcohol. After the reading of the chemical test admonition by one of the arresting officers, Respondent chose to provide a sample of his breath to be tested for the presence and amount of alcohol. After the directions to take the breath test were explained to him, Respondent completed the breath test. The Intoxometer measured Respondent's blood alcohol content[1] as being .19, over two times the legal limit of alcohol. Subsequent to the arrest Respondent was subjected to criminal proceedings resulting in the misdemeanor set forth in Finding 9.

9. On January 25, 2011, after a plea of nolo contendere in proceedings entitled *People of the State of California v. Bong Goo Chung,* then pending in the Superior Court of California, Case Number 0MP06591, Respondent was convicted of violating Vehicle Code section 23152, subsection (b), a misdemeanor, which provides that "It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." (DUI 2). Respondent further admitted that he had sustained a prior misdemeanor conviction (DUI 1) for a violation of Vehicle Code section 23152, subsection (a) as set forth in Finding 6.

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[1] Blood Alcohol Content or blood alcohol concentration (abbreviated BAC) is the concentration of alcohol in a person's blood. BAC is most commonly used as a metric of intoxication for legal or medical purposes. It is usually expressed in terms of volume of alcohol per volume of blood in the body.

Substantial Relationship

10. The convictions set forth in Findings 6 and 9, when combined, evidence to a substantial degree present or potential unfitness of a licensed acupuncturist to perform the functions authorized by his license in a manner consistent with the public health, safety or welfare. Accordingly, the convictions are substantially related to the qualifications, functions or duties of a licensed acupuncturist.

Consequent Conduct

11. The conduct set forth in Findings 4 and 7, separately and in combination, is unprofessional conduct, in that Respondent used alcoholic beverages in a manner dangerous to himself and the public when he operated a vehicle under the influence of alcohol. Respondent's said conduct, is unprofessional conduct in that it impairs his ability to engage in the practice of acupuncture with safety to the public.

Aggravation

12. The two times he drank to excess leading to the misdemeanors – February 29, 2008 and May 7, 2010 – are close in time. The impact of the first arrest should have provided the necessary jolt to avoid any subsequent criminal action as the result of excessive alcohol consumption. Additionally, Respondent's conduct leading to DUI 2 violated the terms and conditions of the probation meted out for DUI 1.

Rehabilitation

13. As a result of the DUI 1 the Court placed Respondent on three years probation and ordered him to serve one day in county jail, pay a $390.00 fine plus penalty assessments which totaled $1,782.00, enroll in and complete a three month alcohol program and not drive a motor vehicle with any measurable amount of alcohol in his blood. The Court also warned Respondent that being under the influence of alcohol or drugs, or both, impairs his ability to safely operate a motor vehicle and it is extremely dangerous to human life to drive while under the influence of alcohol.

14. As a result of DUI 2 on February 14, 2011, the Court placed Respondent on five years probation and ordered him to serve thirty days in county jail, pay a $390.00 fine plus penalty assessments which totaled $1,821.00, enroll in and complete a 18 month second offender alcohol program and not drive a motor vehicle with any measurable amount of alcohol in his blood. Once again the Court warned Respondent that being under the influence of alcohol or drugs, or both, impairs his ability to safely operate a motor vehicle. The Court stated:

> The defendant was advised and understood that being under the influence of alcohol or drugs, or both, impairs his/her ability to safely operate a motor vehicle and it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. Defendant was further advised that if he/she continues to drive while under the influence of alcohol or drugs, or both and as a result of his/her driving, someone is killed the defendant can be charged with murder.

15. Respondent, 33 years of age, has worked sporadically under his license having last worked as an acupuncturist three years ago. He is presently employed by Asiana Trading as a jewelry salesman. There is no record of any other conviction. Respondent, is presently in conformity to society's norms and rules of civil behavior. However, given his recent conviction (DUI 2) and his recent dangerous conduct (Finding 7) he failed to establish a record of rehabilitation as is demonstrated by the Findings which follow.

16. Respondent remains on probation for DUI 2 and has yet to fulfill all terms and conditions of same. A specific condition of probation mandates:

> Abstain from the use of alcoholic beverages, including beer and wine and stay out of places where they are the chief items of sale.

Respondent did not establish that he is in compliance with that abstinence condition. He proffered no documentation of sobriety or voluntary attendance at Alcoholics Anonymous (AA) or like 12-Step program. There was no testimony from an AA sponsor. He has no present AA sponsor. He has never had an AA sponsor.

17. There is no evidence that the crimes set forth in Findings 6 and 9 (DUI 1 and DUI 2) have been expunged. Respondent will not be eligible to petition for expungement until successful completion of probation which is three years distant.

18. Respondent presented no character witnesses on his behalf as to a change in attitude and a change in social relationships since the time of DUI 2. There was no evidence as to any adjustment in the social habits and attitudes of Respondent since the time of DUI 2 by any person so qualified to give that evidence.

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19. In his testimony Respondent routinely understated the gravity of his offenses. He is not fully aware that his conduct giving rise to each DUI placed his life at risk and risked the lives of others. Respondent's testimony did not establish that he has accepted full responsibility for his DUIs or taken steps to deal with his alcohol abuse. He has only done the minimum necessary to comply with the order of the criminal court and the requirements of probation.

20. Respondent's driving privilege are restricted by the Department of Motor Vehicles and remain restricted in that, at present, he is a risk to others on the highways.

Costs

21. It was established that the following costs for the investigation and enforcement of this case were incurred by the Board.

Office of the Attorney General legal fees and costs: $7,395.00.

22. Respondent has experienced extraordinary expenses related to his convictions and in providing for day to day daily living expenses in this time of the Great Recession.[2] In sum, Respondent is under economic hardship.

LEGAL CONCLUSIONS

Applicable Law

1. Business and Professions Code (Code) section 4955 provides in pertinent part:

> The board may deny, suspend, or revoke, or impose probationary conditions upon, the license or any acupuncturist if he or she is guilty of unprofessional conduct.
>
> Unprofessional conduct shall include, but not be limited to, the following:

[2] The financial crisis of year 2007 to the present triggered by a liquidity shortfall in the United States banking system caused by the overvaluation of assets. Some economists claim it has ended. Other economists claim it persists and will continue to persist given the number of citizens unemployed or underemployed.

(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.

2. Code section 4956 provides:

> A plea or verdict of guilty or a conviction following a plea of nolo contendere made 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.

3. Code section 490 provides in pertinent part:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

(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) A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. An 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 section 1203.4 of the Penal Code.

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4. Code section 4959 provides:

(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.

Violations

5. Respondent's license is subject to disciplinary action under Business and Professions Code (Code) section 4955 for unprofessional conduct pursuant to Code section 4955, subdivision (b) and Code section 490, in that he was convicted of violating Vehicle Code section 23152, subsection (a), by reason of Finding 6 combined with Findings 10 and 11.

6. Respondent's license is subject to disciplinary action under Code section 4955 for unprofessional conduct pursuant to Code section 4955, subdivision (b) and Code section 490, in that he was convicted of violating Vehicle Code section 23152, subsection(b), by reason of Finding 9 combined with Findings10 and 11.

7. Respondent license is subject to disciplinary action under Code section 4955, for unprofessional conduct pursuant to Code section 4955, subdivision (a), by reason of Finding 11.

Costs

8. Business and Professions Code section 4959 provides, in pertinent part, that the entity bringing a proceeding for discipline may request the Administrative Law Judge hearing the matter to direct a licentiate found to have committed a violation of the applicable licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the proceeding. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the Administrative Law Judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Board must not assess the full costs where it would unfairly penalize the Respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the Board must consider a Respondent's subjective good faith belief in the merits of his or her position and whether the Respondent has raised a colorable

challenge; the Board must consider Respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a Respondent engaged in relatively innocuous misconduct.

9. In this case, the actual costs of investigation and enforcement of this matter are $7,395.00, as set forth in Finding 21. However, taking into account that Respondent did not contest the charges but used the hearing process to obtain a reduction of any penalty and Respondent's financial hardship set forth in Finding 22 and diminished ability to pay full costs a reduction from the actual costs is appropriate. Therefore, taking into consideration the factors in *Zuckerman* the reasonable costs of investigation and enforcement are $1,000.00.

Licensing Considerations

10. The Board's Disciplinary Guidelines, (undated but printed from the Board's website on April 3, 2012) were reviewed and considered by the Administrative Law Judge to determine the appropriate level of discipline warranted. Additionally, the objective of a disciplinary proceeding is to protect the public[3], the licensed profession, maintain integrity, high standards, and preserve public confidence in acupuncturists. The purpose of proceedings of this type is not to punish Respondent. In particular, the statutes relating to licensees of the Board are designed to protect the public from any potential risk of harm. The law looks with favor upon those who have been properly rehabilitated.

11. Respondent's last DUI conviction is recent and he is still on probation. The offenses constitute a pattern of alcoholic abuse resulting in antisocial and dangerous behavior. Given Respondent's pattern of abuse Respondent has yet to be properly rehabilitated as is demonstrated by Finding 16 through 20. Accordingly, the Order which follows is consistent with the Board's duty to protect the public interest.

ORDER

1. Acupuncture License Number AC12161 previously issued by the Board to Bong Goo Chung, L.AC. is hereby revoked.

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[3] *Camacho v. Youde* (1975) 95 Cal.App3d, 165: *Clerical v. Department of Motor Vehicles* (1990) 224 Cal.App.3rd 1016, 1030-1031; *Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 816.

2. Respondent shall pay, as costs, the sum of $1,000.00 to the Board at its Sacramento address within sixty (60) days of the effective date of this Decision.

Dated: June 13, 2012

RICHARD J. LOPEZ
Administrative Law Judge
Office of Administrative Hearings

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