

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Early
Termination of Probation by:

KYUNG KIM, L.Ac.,

Petitioner.

Case No. PETR-1A-2014-221

OAH No. 2018041310

DECISION

This matter was heard before a quorum of the Acupuncture Board on June 28, 2018, in San Diego, California. Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, presided over the hearing.

Kyung Kim, L.Ac., petitioner, represented herself.

Michael J. Yun, Deputy Attorney General, represented the Attorney General's Office, pursuant to Government Code section 11522.

The matter was submitted on June 28, 2018, and decided in closed session.

FACTUAL FINDINGS

License, Disciplinary History and Petition for Penalty Relief

1. On March 26, 2012, the board issued petitioner Acupuncture License No. AC 14723.

2. On June 15, 2016, an accusation was filed against petitioner, in Case No. 1A-2014-221. The accusation alleged that respondent was convicted of a crime substantially related to the qualifications, functions and duties of an acupuncturist and she engaged in unprofessional conduct due to her conviction on December 3, 2014, for driving under the influence of alcohol (DUI) in violation of Vehicle Code section 23152, subdivision (b).

As a result of her conviction, petitioner was placed on informal probation for three years with terms and conditions that required her to enroll and complete a First Offender

Drinking Driver Program, pay fines and fees, and not drive with any measurable amount of alcohol.

The facts and circumstances of petitioner's conviction are summarized in the accusation as follows: On December 2, 2014, a Torrance, California, police officer on routine patrol noticed that a vehicle was involved in a traffic collision. The officer found petitioner near the car and she displayed signs of alcohol intoxication. Due to her limited English language proficiency, the officer did not administer field sobriety tests to her. Petitioner nevertheless consented to have her blood drawn and tested for alcohol. The lab result showed a 0.20 percent blood alcohol concentration, which was well over twice the legal limit.

In the narrative statement she submitted in support of her petition, petitioner described her conduct on December 2, 2014, as follows: she had a "few sips of beer while celebrating my friend's birthday," she drove her car near her residence and collided with a parked car.

Petitioner complied with the terms of her informal criminal probation and completed probation.

3. On October 10, 2016, petitioner entered into a Stipulated Settlement and Disciplinary Order. In the Stipulated Settlement and Disciplinary Order, petitioner admitted the truth of the allegations in the accusation. On February 8, 2017, the board adopted the Stipulated Settlement and Disciplinary Order. Pursuant to the terms of the Stipulated Settlement, petitioner's license was placed on probation for two years under terms and conditions that require her to abstain from drugs and alcohol; submit to biological fluid testing; attend twelve-step meetings; comply with the board's surveillance program; obey all laws; submit quarterly reports; and reimburse the board its costs of investigation and enforcement in the amount of \$2,347.50. Petitioner has complied with the terms of her disciplinary probation.

4. On February 8, 2018, petitioner filed the petition for penalty relief. In connection with her petition she included a detailed narrative statement, and two verified recommendations from two licensed acupuncturists.

Petitioner's Testimony and Evidence

5. Petitioner briefly testified concerning why she wants the board to terminate her probation early. Her testimony tracked the narrative statement she submitted in support of her petition, which she signed under penalty of perjury, and which was received into evidence.

Petitioner wants to terminate her probation early for several reasons. Most notably, her 80-year-old mother has a serious illness and lives in South Korea and petitioner wants to travel to South Korea to be with her. Petitioner also wants her probation terminated early

because she does not feel she can use the best of her abilities as an acupuncturist to treat her patients while she is on probation. She stated that she wants to more fully concentrate on her acupuncture practice by having her probation terminated early. In addition, petitioner is also the official programmer for the San Diego Korean Film Festival, and while she has been on probation she has been unable to produce the festival. It was not clear, however, from her narrative statement how the terms of her probation has made it difficult for her to produce the film festival.

Petitioner emphasized that due to her arrest and conviction for driving under the influence and the courses she took in connection with her criminal probation, she learned how serious alcohol addiction and abuse is, and she expressed remorse for her conduct. She wrote that as a result of driving under the influence that day, she marred her honor and integrity and her “title as an acupuncturist vanished in one night.”

Petitioner stated that she complied with the terms of her criminal and disciplinary probations, which was, for the most part, accurate. However, on June 9, 2017, she failed to check in for biological fluid testing. The board asked her to explain why she failed to check in on that date and she explained that she forgot because she had “emergency patients” that date.¹

Since her conviction petitioner is enrolled in a doctorate program with her topic concerning how addiction can be healed through psychoanalysis and acupuncture. She is also actively involved in the American Integrative Medicine Institute and the Southern California Acupuncturists Union. In addition, between March 2014 and January 21, 2018, she has taken and completed numerous acupuncture education programs.

Petitioner credibly stated that she accepts responsibility for her conduct and understands the impact her conduct has had on her ability to practice acupuncture. Further, based on her testimony and the record, petitioner understands the board’s concerns regarding her ability to practice acupuncture safely as a result of her DUI conviction.

6. Petitioner submitted letters from two acupuncturists who recommend that the board terminate her probation early: David Chang Kim, L.Ac, and Chongyub Kim, L.Ac. Their letters were admitted as administrative hearsay.

David Chang Kim, L.Ac., is a professor of acupuncture and mentor to petitioner who has known her for ten years. He described petitioner as dedicated and devoted to the field of acupuncture and to her patients. Mr. Kim also described petitioner’s work on a dissertation

¹ A July 5, 2017 test result was mentioned in the hearing. This test result revealed that petitioner had high Nitrites and Oxidants in her system. Enforcement Analyst Cricket Borges in an email to petitioner expressed concern that these substances may be used to “mask” alcohol in her system but the substances are not banned and petitioner was not in violation of her probation. It is noted that petitioner responded promptly in an email to address Ms. Borges’s concerns.

focusing on “Energy-Blood Balance and Acu-Psychoanalysis.” He was aware of petitioner’s DUI conviction. Mr. Kim recommended that the board terminate her probation early. His statement is considered to the extent it supplements petitioner’s testimony that she is dedicated to the field of acupuncture.

Chongyub Kim, L.Ac., has known petitioner for 25 years and is petitioner’s brother-in-law. He also described petitioner as dedicated to the field of acupuncture and to her patients. He was aware of petitioner’s DUI conviction and said that she is regretful for her conduct and she recognizes how serious her lack of judgment was. He noted that it is difficult for her to travel to Korea to see her ill mother while she is on probation. Mr. Chongyub Kim recommended that the board terminate her probation early. His statement is considered to the extent it supplements petitioner’s statements that she regrets her conduct, is dedicated to the field of acupuncture and to her patients, and wants her probation terminated early so that she can visit her mother in Korea.

The Attorney General’s Recommendation

7. The Attorney General did not make a recommendation regarding the petition.

LEGAL CONCLUSIONS

1. Business and Professions Code section 4928.1 provides:

Protection of the public shall be the highest priority for the Acupuncture Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with the other interests sought to be promoted, the protection of the public shall be paramount.

2. California Code of Regulations, title 16, section 1399.469, incorporates the Board’s Disciplinary Guidelines by reference. These Guidelines identify the following rehabilitation criteria:

1. Nature and severity of the act(s) or offense(s).
2. Total criminal record.
3. The time that has elapsed since commission of the act(s) or offense(s).
4. Whether the licensee has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.

5. If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.
6. Evidence, if any, of rehabilitation submitted by the licensee or registration holder.

3. Pursuant to Business and Professions Code section 4960.5 a person whose license has been placed on probation may petition the board for termination of probation after one year for a term of probation less than three years. A person seeking early termination of probation must present strong proof of rehabilitation, and the showing of rehabilitation must be sufficient to overcome the board's former adverse determination. (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d, 308, 315-316.) The standard of proof is clear and convincing evidence. (*Ibid.*)

Case Law Relating to Rehabilitation

4. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.)

Evaluation of Evidence of Rehabilitation and Disposition

5. Protection of the public is the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. Consistent with the factors under the board's guidelines, a majority of the board found that petitioner presented clear and convincing evidence that she is sufficiently rehabilitated that it is in the public interest to terminate her probation early.

This conclusion to grant the petition is reached for the following reasons: Petitioner's conduct, while serious, appears to be an isolated event in her life. She took her probation very seriously and has complied with the terms of her probation. Petitioner credibly stated that she is regretful for her conduct, understands the impact her conduct has on her ability to practice acupuncture safely, and she accepts responsibility for her conduct. Two acupuncturists who know her well substantiated petitioner's testimony.

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ORDER

The Petition for Early Termination of Probation filed by Kyung Kim, L.Ac. is granted.

This decision shall become effective on the 17th day of August, 2018.

Dated: July 18, 2018

By: 

AMY MATECKI, M.D., L.Ac.
Board President
Acupuncture Board