

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

In the Matter of the Petition for
Reinstatement of a Surrendered License:

BRIAN KIM, aka BYUNG CHANG KIM,

Petitioner.

Case No. PRRL-1A-2011-150

OAH No. 2011110133

DECISION

This matter was heard before a quorum of the Acupuncture Board (Board)¹ on November 17, 2011, in Sacramento, California. Administrative Law Judge Linda A. Cabatic, State of California, Office of Administrative Hearings, presided over the hearing.

Janssen Tan, Deputy Attorney General, represented the Attorney General's Office, pursuant to Government Code section 11522.

Petitioner Brian Kim, aka Byung Chang Kim was present and was represented by his attorney, Albert Chang.

Evidence was received, and the matter was submitted for decision on November 17, 2011.

FACTUAL FINDINGS

1. On or about September 1, 1995, the Board issued to petitioner Acupuncture License No. AC 5207.
2. On October 25, 2000, a First Amended Accusation was filed against petitioner, alleging specific violations of the Business and Professions Code. On August 27, 2001, petitioner entered into a Stipulated Surrender of License and Order, admitting that he violated Business and Professions Code section 119, subdivision (e),² when he permitted his

¹ Board members present for the hearing were Robert Brewer, Chair; Charles Kim, Vice-Chair; An York Lee, Paul Weisman, and George Wedemeyer.

² Business and Professions Code section 119, subdivision (e) provides:

license to be used to facilitate prostitution in violation of Penal Code section 647, subdivision (b),³ and operated a business where massages were performed without a permit in violation of section 5.56.02 of the City of Orange Municipal Code. Petitioner agreed cause existed for revocation. Petitioner voluntarily surrendered his Acupuncture License for the Board's formal acceptance.

3. On or about October 6, 2003, petitioner was charged with four counts of felony rape, in violation of Penal Code section 261, subdivision (a)(2). On January 28, 2005, the charges were reduced to misdemeanor battery, in violation of Penal Code section 242⁴ and petitioner pled nolo contendere to that charge. The court suspended his sentence and placed petitioner on summary probation for a period of three years, with specified conditions. Petitioner was ordered to stay away from the victim; pay a fine of \$100 and restitution to the victim in the amount of \$50; obey all laws; not associate with persons known to be narcotic or drug users or sellers; not use or possess any narcotics, dangerous or

Any person who does any of the following is guilty of a misdemeanor:

[¶ . . . ¶]

(e) Knowingly permits any unlawful use of a license issued to him or her.

³ Penal Code section 647, subdivision (b) provides:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

[¶]

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

⁴ Penal Code section 242 provides "A battery is any willful and unlawful use of force or violence upon the person of another."

restricted drugs or associated paraphernalia; and stay away from places where such users, buyers, or sellers congregate.

Petitioner stated at the hearing that in 2003, he operated Diet 1025, which he claimed was a health store and not a clinic. He used a steam machine that he brought back from Korea, which he used to help with the dietary processes of his clients. He stated that there is nothing in the store that related to acupuncture. It was at his store that he met the victim of the battery, who was one of his clients.

4. On August 23, 2006, petitioner's probation was terminated pursuant to Penal Code section 1203.3, and the case was dismissed pursuant to Penal Code section 1203.4.

5. Petitioner provided certificates of the acupuncture courses he took from 1997 to February 2011. Petitioner stated that he subscribes to magazines and has read books pertaining to acupuncture. He paid for the full costs of investigation and enforcement of the original Accusation. Petitioner goes on annual missions to China with his church.

6. Petitioner stated he has not been involved in any other criminal actions. Since 2003, petitioner has operated a silk screen printing and design business called Milky Brown. He submitted a letter of recommendation from Pal Keun Song, who is an acupuncturist. Mr. Song has known petitioner for a "very long time." Mr. Song stated petitioner told him that he allowed others to use his license while he was in China and they used it for unlawful purposes. Mr. Song believes that petitioner is an honest and humble person who hopes to be an acupuncturist again.

7. Petitioner also submitted a letter of recommendation from Wung Gyu Whang. Mr. Whang is an acupuncturist and petitioner's friend. Mr. Whang is aware that petitioner voluntarily surrendered his license and that petitioner wants to be an acupuncturist. Mr. Whang believes petitioner can be a "great" acupuncturist again.

8. When asked if he had taken ethics courses, petitioner stated he did not know what ethics courses were and no one told him he had to take ethics courses.

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. Business and Professions Code section 4960.5, which contains the provisions of law dealing with reinstatement of licenses for acupuncturists, provides, in pertinent part:

(a) A person whose license or registration has been revoked, suspended, or surrendered, or who has been placed on probation, may petition the board for reinstatement or modification of penalty, including modification or termination of probation, after a period of not less than the following minimum periods has elapsed from the effective date of the decision ordering that disciplinary action:

(1) At least three years for reinstatement of a license revoked or surrendered.

[¶] . . . [¶]

(b) The board may require an examination for that reinstatement.

3. California Code of Regulations, title 16, section 1399.469, incorporates the Board's Disciplinary Guidelines by reference. With respect to petitions for reinstatement, these Guidelines provide that:

The Board will consider the following criteria of rehabilitation:

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.

4. In a proceeding for the restoration of a revoked license, the burden at all times rests on the petitioner to prove that he has rehabilitated himself and is entitled to have his license restored, and not on the board to prove to the contrary. (*Flanzer v. Board of Dental*

Examiners (1990) 220 Cal.App.3d 1392, 1398.) It goes without saying that the pertinent issues in the inquiry are petitioner's activities since revocation of his license and his present qualifications, ability and learning. (*Ibid.*) Statutes relating to licensed professions seek to maintain integrity and high standards, and preserve public confidence in holders of professional licenses. (*Clerci v. Dept. of Motor Vehicles* (1990) 224 Cal.App.3d 1016.)

6. Here, petitioner surrendered his license and stipulated to the fact that cause existed for revocation of his acupuncture license. (Finding 2.) Approximately three years after he surrendered his license, he was charged with a crime and pled to misdemeanor battery. He has not had any other criminal charges filed against him since 2003. (Finding 3.) Petitioner completed his probation and his conviction was expunged in 2006. (Finding 4.) He has taken courses in acupuncture since he had surrendered his license up to the present time and subscribes to magazines. (Finding 5.) Petitioner also goes on annual mission trips with his church. (Finding 6.)

7. While petitioner submitted two letters of recommendation, neither letter demonstrated a change in attitude or behavior of petitioner since his crimes. Neither letter provided sufficient evidence to demonstrate that petitioner is a changed person who now understands that what he did was wrong, or that he has made adequate efforts to ensure that he will not engage in wrongful behavior in the future.

Although petitioner has taken courses in acupuncture and participates in annual missions with his church, he has not taken any courses to ensure he understands the obligations associated with his license to his clients, or with respect to the professionalism and integrity required of licensees. (Finding 8.)

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.)

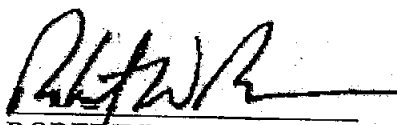
8. Statutes relating to license professions seek to maintain integrity and high standards, and preserve public confidence in holders of professional licenses. (*Clerci v. Dept. of Motor Vehicles* (1990) 224 Cal.App.3d 1016.) Petitioner did not describe any activities, call any witnesses, or provide any letters of recommendations from friends or relatives, or from his church demonstrating changed behavior and reliability that would assist in determining his rehabilitation. Protection of the public is the highest priority for the Acupuncture Board in exercising its licensing, regulatory, and disciplinary functions. Here, given the paucity of evidence with respect to rehabilitation, it would be contrary to the public interest and welfare to reinstate petitioner's license.

ORDER

The Petition for Reinstatement of Surrendered License filed by Brian Kim, aka Byung Chang Kim, is DENIED.

This decision shall become effective on the 12th day of January, 2012.

Dated: DEC 13 2011

By: 
ROBERT BREWER
Board Chair
California Acupuncture Board