

BEFORE THE
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-2017-18

OAH No. 2017060431

ORDER OF DECISION

DECISION

The attached Decision of the California Acupuncture Board is hereby adopted
as its Decision in the above-entitled matter.

This Decision shall become effective on August 10, 2018.

IT IS SO ORDERED this 11th day of July, 2018.

By:



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

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DECISION

This matter was heard before a quorum of the Acupuncture Board (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.

Brian Kim, aka Byung Chang Kim, petitioner, represented himself.

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

1. On 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, in Case No. D-1A-1998-25, alleging specific violations of the Business and Professions Code, relating to prostitution activity at three acupuncture businesses petitioner owned in 1997 in Orange, in 1998 in Lakewood, and in 2000 in Costa Mesa. As detailed in the amended accusation, after investigations at each of these locations, police discovered and detailed the prostitution activity. On June 16, 1997, according to the amended accusation, a City of Orange detective interviewed petitioner about his knowledge of prostitution activities

at his City of Orange acupuncture business, which he denied knowing about. On June 16, 1997, the detective also interviewed petitioner's unlicensed "partner." That person told the detective that petitioner was at the business only three or four times a week and patrons seeking acupuncture treatment must make an appointment at least a day in advance.

3. On August 7, 2001, petitioner entered into a Stipulated Surrender of License and Order. The board adopted the Stipulated Surrender of License on August 21, 2001, and petitioner's license was revoked effective September 21, 2001.

4. In the Stipulated Surrender of License and Order, petitioner admitted the truth of the third cause for discipline in the amended accusation and that cause existed to revoke his license. The third cause for discipline stated that petitioner violated Business and Professions Code section 119, subdivision (e), knowingly permitting unlawful use of his license, when he permitted his license to be used to facilitate prostitution in violation of Penal Code section 647, subdivision (b), and he 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's 2005 Conviction for Battery

5. 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 one count of misdemeanor battery, in violation of Penal Code section 242 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 restricted drugs or associated paraphernalia; and stay away from places where such users, buyers, or sellers congregate.

In 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.

Petitioner's 2011 Petition for Reinstatement

6. In 2011, petitioner applied for reinstatement of his license. In a decision dated December 13, 2011, effective January 12, 2012, the board denied petitioner's application.

Petitioner's Testimony and Evidence

7. In support of his petition, petitioner submitted a narrative statement and certificates documenting that he completed education courses relating to the acupuncture field between 2017 and 2018. Petitioner also submitted letters from two licensed acupuncturists who supported his reinstatement petition and a report from a psychologist

who has evaluated and treated him. The two reference letters and the psychologist's report were admitted as administrative hearsay.

8. Petitioner wants to return to the acupuncture profession in order to treat people and help them recover from their ailments. He described acupuncture as his calling and where he has found the most professional fulfillment. If his license is reinstated, petitioner stated that he wants to open a small acupuncture business with other acupuncturists in California.

Petitioner denied any involvement in the prostitution activities that resulted in the loss of his license. He explained that the prostitution activity occurred while he was in China. This was incorrect. On June 16, 1997, a detective interviewed petitioner in the City of Orange regarding prostitution activity that police discovered at his business on this date. Regardless of his June 16, 1997, statement to police, petitioner testified that he gave his acupuncture license to an unlicensed person he knew while he was in China, and this person engaged in the prostitution activity. He denied that he knew about the prostitution activities. He said his mistake was that he did not manage his license appropriately and that he allowed this unlicensed person to use his license. He added that he was "naïve" regarding the consequences of allowing an unlicensed person to use his license.

At this hearing, petitioner testified that he did not see his mistake as allowing an unlicensed person to use his license but that his mistake was that he took the advice of an attorney to surrender his license in the first place. He testified that "the biggest mistake he made in his life" was that he agreed to surrender his license. Petitioner said he did so under the advice of his attorney who told him that he would be able to have his license reinstated "very soon."

Regarding petitioner's 2005 battery conviction, petitioner also did not accept full responsibility and suggested that the victim was to blame. As he detailed in his narrative statement, in 2003 he began a relationship with a woman 16 years younger than him, whom he met, as summarized in the board's decision denying his 2011 petition for reinstatement, at a health store he operated where he sold Asian herbal dietary medicines. The relationship deteriorated, and he did not want to marry her. She then accused him of sexual assault.

9. Regarding evidence of rehabilitation, petitioner stated that he is active in his church and does volunteer work related to the church's mission. The exact nature of this work with his church was unclear however. He wrote in his narrative statement that every year he joined the church's "medical mission" team to do unspecified volunteer work. This work included work in Mexico, the Dominican Republic, Haiti and Peru. He did not explain what the "medical mission" does or his role on this team.

Petitioner submitted letters from two acupuncturists who recommend his reinstatement: Bon Hwang, L.Ac., Ph.D., and Young Mun Kim, L.Ac. Their letters were admitted as administrative hearsay.

In his letter dated January 9, 2017, Mr. Kim stated that he was a fellow student with petitioner at University in China in 1995 and has maintained intermittent contact with him over the years. He stated that petitioner expressed regret to him about his bad judgment that resulted in the loss of his license and petitioner is deeply sorry because of the loss of his license. Mr. Kim recommended that petitioner's license be reinstated. Mr. Kim, however, did not state that he knew the reasons petitioner's license was revoked. As a result, his statement is given little weight as evidence of petitioner's rehabilitation.

Dr. Hwang wrote, in a letter dated January 10, 2017, that he met petitioner in 1992 as a fellow acupuncture student in Los Angeles. Dr. Hwang appeared to be aware of the reasons petitioner lost his license. He stated that petitioner acknowledged to him that he made mistakes, that petitioner is committed to returning to the field of acupuncture, and he is sad that he has lost his license. Dr. Hwang referenced as evidence of petitioner's rehabilitation his unspecified work as part of a medical team. Dr. Hwang recommended that petitioner's license be reinstated. Dr. Hwang's statements are also given little weight as evidence of petitioner's rehabilitation. Dr. Hwang's personal knowledge of petitioner appeared to be limited to occasional meetings over the years.

Petitioner submitted a report from Kyung So, Ph.D., a licensed psychologist, dated April 5, 2016, which was admitted into evidence as administrative hearsay. According to the report, on March 15 and 16, 2016, petitioner underwent a psychological evaluation with Dr. So. Dr. So administered a psychological assessment of petitioner and summarized petitioner's history, including the circumstances of his 2005 battery conviction. Dr. So recommended that petitioner continue psychotherapy. In his narrative statement petitioner stated that through 12 sessions he has had with Dr. So, he came to realize "there was immaturity in some areas of my personal character," he had "issues in setting boundaries through his personal life and as well as in the professional field." He said these issues led him to make wrong decisions, with the result that he lost his license and went through a divorce. Dr. So's report is considered to the extent it supplements and explains petitioner's statement regarding his recognition of the issues that led to the loss of his license.

Petitioner also submitted numerous certificates of education that documented courses he has completed in acupuncture between 2002 and 2018. These certificates substantiated petitioner's testimony that he is dedicated to the field of acupuncture and wants to return to the practice of acupuncture. Petitioner also took an ethics course.

10. As detailed later in this decision, petitioner failed to accept responsibility for the conduct that resulted in the loss of his license and presented minimal evidence of rehabilitation to warrant reinstatement of his license.

The Attorney General's Recommendation

11. The Attorney General recommended that petitioner's application be denied based on the nature and severity of his misconduct and his failure to take responsibility for his conduct.

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 authorizes a person whose license has been revoked to petition for reinstatement after three years have elapsed from the effective date of the surrendered or revoked license.

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.) A person seeking reinstatement of a revoked license must present strong proof of rehabilitation, and the showing must be sufficient to overcome the former adverse determination. The standard of proof is clear and convincing evidence. (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d, 308, 315-316.).

Applicable Statutes Regarding Petitioner's Discipline

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

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.

6. Penal Code section 647, subdivision (b), provides that a person who solicits or agrees to engage in any act of prostitution is guilty of disorderly conduct, a misdemeanor.

Case Law Relating to Rehabilitation

7. 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

8. Petitioner failed to take full responsibility for the conduct that led to the loss of his license in 2000. His testimony that he made a mistake when he entrusted an unlicensed person with his license while he was in China minimized his role in the prostitution activity that occurred under his license as detailed in the amended accusation which he accepted as true. This effort to distance himself from the criminal conduct that occurred over a three year period is made most evident by the fact that on June 16, 1997, a City of Orange detective interviewed petitioner and asked him whether he was aware prostitution was occurring at his business, which the police discovered that day. His unlicensed "partner" was also interviewed on June 16, 1997. At that time petitioner told the detective he was not aware of such activity. Thus, on June 16, 1997, after a detective informed him of prostitution activity occurring at his business, petitioner knew, or should have known, that his license was being used to facilitate prostitution. Notwithstanding this notice, petitioner continued to allow an unlicensed person to use his license to facilitate prostitution activity in 1998 and 2000 at two other locations.

Notably, petitioner did not testify that his mistake was in allowing his license to be used to facilitate prostitution, but, instead, testified that his "biggest mistake" was that he surrendered his license based on the advice of his attorney who told him he would soon be

able to get his license reinstated. His emphasis here was on the personal cost to him of the loss of his license, a sentiment he repeated in his narrative statement, his evaluation with Dr. So, and his statements to the two acupuncturists who wrote letters on his behalf.

Petitioner submitted minimal evidence of rehabilitation. He did not detail his work with his church except to state that he works on the medical team in foreign countries each year. Petitioner did not submit letters from persons who know him through his church, or from other persons who can attest to his character. The letters from the two acupuncturists who supported his petition are given little weight as evidence of his rehabilitation as found above.

The only evidence petitioner offered that he has gained any insight into the conduct that led to the loss of his license is in his narrative statement regarding his therapy with Dr. So. However, considering the nature and severity of the conduct at issue, his subsequent battery conviction after he surrendered his license, and his failure to acknowledge his role in the illegal prostitution conduct, the insights he obtained from his therapy and his desire to work as a licensed acupuncturist are insufficient reasons to conclude that petitioner is sufficiently rehabilitated such that it is not in the public interest to reinstate his license.

9. 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, petitioner failed to present clear and convincing evidence that he is sufficiently rehabilitated to warrant reinstatement of his 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 ___ day of _____, 2018.

Dated: _____

By: _____
AMY MATECKI, M.D., L.Ac.
Board President
California Acupuncture Board