

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

In the Matter of the Amended Accusation)	Case No.: 1A-2009-204
Against:)	OAH No.: 2011080530
)	
MARIA HO PITTMAN, L.AC.)	
8011 GOLD PHEASANT CRT.)	
ELVERTA, CA 95626)	
)	
Acupuncture License No. AC 9840)	
)	
Respondent.)	
_____)	

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 APR 05 2013.

IT IS SO ORDERED MAR 06 2013.



AnYork Lee, Chair
Acupuncture Board
Department of Consumer Affairs
State of California

BEFORE THE
ACUPUNCTURE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
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In the Matter of the Amended Accusation
Against:

MARIA HO PITTMAN
Elverta, CA

Acupuncture License No. AC 9840

Respondent.

Case No. IA-2009-204

OAH No. 2011080530

PROPOSED DECISION

On October 23, 2012, in Sacramento, California, Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Maria Ho Pittman was present and was represented by John L. Fleeer, Esq.

Jansen Tan, Deputy Attorney General, appeared on behalf of complainant Janelle Wedge, Executive Officer of the Acupuncture Board (Board), Department of Consumer Affairs.

Evidence was received and complainant moved to amend the Accusation. The record remained open to allow complainant to file an Amended Accusation and to allow respondent to object to the Amended Accusation. The Amended Accusation was filed on October 30, 2012, and respondent's objection was filed on November 5, 2012. The matter was submitted and the record was closed on November 7, 2012. An Order was issued by the undersigned on November 26, 2012, granting the motion to amend and accepting the Amended Accusation as the operative pleading.

FACTUAL FINDINGS

1. On September 8, 2004, the Board issued Acupuncture License number AC-9840 to Maria Ho Pittman (respondent).

2. On July 14, 2011, Janelle Wedge, in her official capacity made and filed an Accusation against respondent. The Accusation was amended on October 30, 2012.

3. Respondent timely filed a Notice of Defense to the Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Background

4. Respondent is 53 years old. She immigrated to the United States from Hong Kong. She graduated from Sacramento State College with majors in physical therapy, dance and physical education. She continued with training for a teaching credential in physical education from Chapman University. She was licensed as a physical therapist in the State of California in 1989 and began working as a physical therapist, first at UCD Medical Center and then at American River Hospital/Mercy Hospital. She was hired by Kaiser Permanente (Kaiser) in 1996 and has been working as a physical therapist with Kaiser since that time. She is now a senior physical therapist at Kaiser-Roseville Occupational Medicine Department.

5. In 2001, respondent enrolled in acupuncture and Chinese medicine courses at the Academy of Chinese Culture and Health Sciences in Oakland. She attended three years full time and earned a Master's Degree in traditional Chinese medicine in 2004. She applied to the Board in September 2004 for an acupuncture license and was licensed. Respondent is also licensed to use herbal medicines.

6. Respondent began incorporating acupuncture into her physical therapy practice at Kaiser. She would do the prescribed physical therapy with patients and if the patient did not improve, she would recommend acupuncture as a supplement to the physical therapy. If the patient's physician approved acupuncture, she would provide treatments.

Patient B.R.'s Treatment

7. On September 30, 2009, B.R. had an appointment at 4:00 p.m. with respondent. B.R. arrived early and exercised a little. A little before 4:00 p.m., respondent took her into an acupuncture room and had her lie face down on the treatment table. Respondent inserted approximately 15 to 20 acupuncture needles in B.R.'s neck, right shoulder, back, buttocks and legs. Respondent turned a heat lamp on and left the room. Time passed, B.R. fell asleep and when she woke up she was in pain. She saw that it was 5:30 p.m. She began yelling respondent's name and then screamed for help. She yelled and screamed for about 30 minutes. She tried to use her cell phone to call for help, but there was no service. She was in a lot of pain, but was able to get up and approach a mirror in the room. Using the mirror to locate the needles, she pulled out all of the needles. At approximately 6:00 p.m. she had the needles out and left the treatment room. She found all the office lights were off and the office was closed. There was a yoga class starting at 6:00

p.m. in an adjoining office. A woman in the yoga class knew respondent and told her respondent had gone home.

8 B.R. was one of three patients respondent had been treating at the same time that day. B.R. was scheduled for a 20 to 40 minute treatment. After respondent inserted the needles into B. R., she left B.R.'s treatment room and shut the door intending to return in 20 to 40 minutes. By the time she finished with the other two patients she was "utterly exhausted." She usually finishes for the day at 5:45 p.m. and sets her patients' next appointments because the other staff has left by then. She did not schedule her patients this time because she was so exhausted. She left the office, completely forgetting that B.R. was in the treatment room.

9. That evening, B.R. was in a lot of pain, especially around her shoulders which were red from heat. She was very upset. The next day at around noon she returned to the office to ask respondent what had happened. Respondent looked at her inquisitively and did not know why she was there. B.R. told her that she had left her in the treatment room and that she was sore. Respondent remembered what had happened, apologized and offered to schedule an appointment. When B.R. asked her what she was going to do about what she had done, respondent referred B.R. to Kaiser Member Services. B.R. did not return to respondent. She treated with her primary physician who gave her muscle relaxants for muscle swelling and pain. It took a couple of months for her body to stop hurting and stop feeling like it was on fire.

10. After B.R. told respondent what had happened, respondent finished treating her morning patients. She then went to her supervisor, Michael Berg, to report what had happened. Michael Berg is a Nurse Practitioner and the Director of Occupational Medicine and Employee Health Services for Kaiser-North Valley. Respondent explained to Berg that she had left B.R. in a treatment room and gone home for the evening. He told her it was unacceptable to leave the patient in a room with needles inserted and he gave her a verbal warning as a form of disciplinary action. The evidence is equivocal as to whether Berg told respondent to amend or document her progress/charting notes to reflect that she had left the needles in the patient. Berg told her that in the future she should record in the progress notes the number of needles she inserts and the number she removes. Respondent filled out a Responsible Reporting Form which Kaiser uses to record circumstances surrounding an incident and gave it to Berg. Berg informed his superiors of the incident.

Patient B.R.'s Charting

11. Respondent had not had time to document patient progress notes on September 30, 2012. On October 1, after she had submitted her Responsible Reporting Form to Berg and finished treating her patients, she began her charting for September 30. She saved B.R.'s chart for last, finished and signed it at 8:23 p.m. In pertinent part, the chart note reads:

9/30/09

SUBJECTIVE: Patient reported that she has been feeling better but still has soreness in low back. Feeling swollen in sacral area. She thought she pulled her left shoulder muscles today when attending to a teenager patient when she had to restrain the patient at times. Patient has good relaxation with acupuncture from last course of therapy and would like to continue with acupuncture treatment.

OBJECTIVE: Check left shoulder range of motion is WNL with pain at left upper trapezius. Patient was seen for therapeutic exercises for 15 mins doing bike for 10 mins and lumbar stretches. Myofascial release times 20 mins to cervical paraspinals, upper trapezius muscles and lumbar paraspinals, both hip release. Acupuncture-bilateral GB 20, 21, left S1 10, 11, UB 23, 25, Sp 6. Infrared to relax.

ASSESSMENT: Patient tolerates well with treatment with good relaxation and decreased myofascial tightness and pain.

PLAN: Continue with current treatment plan. Increased stretching exercises and strengthening exercises as tolerated.

Respondent's Defenses

12. On July 21, 2010, Senior Board Investigator Regina Rikard interviewed respondent about the incident and about her charting of B.R.'s treatment. Respondent admitted she had left patient B.R. with acupuncture needles inserted for over an hour and a half, and had forgotten about her and left for the day. Rikard asked her why she made no record in the progress notes regarding leaving the patient in the room with needles inserted. Respondent explained that when she began her charting for B.R.'s September 30th visit she wanted the notes to read as if she had written them on September 30th. On that date, she did not yet know that she had left the patient in the room with needles, so her notes did not reflect that.

13. At hearing, respondent again acknowledged her culpability in leaving B.R. She further explained her charting. After talking with B.R. and Berg, treating patients and filling out the Responsible Reporting Form, she was "so stressed" she "could not think straight." At about 8:00 p.m. she filled out the chart putting in the locations where the needles were placed and the treatment she provided. She did not mention having left the patient in the treatment room because at the time she was "reasoning how do I approach this?" She thought she was supposed to chart for circumstances at the time of treatment, as if she was charting on the same day as the treatment. For instance, she left the start and end times incomplete because she did not finish the treatment. If she had charted the same day, there would be no end time. She also thought that since she had completed the Responsible Reporting Form, she had reported the incident completely.

14. Respondent also testified that if Berg had told her to note the incident in the progress report she would have done so. Although she “honors [Berg’s] memory” she does not remember them discussing the progress notes at all. In fact she wishes he had given her direction, but she had to rely on what made sense to her. She thinks she “got hung up with the time” and was “reasoning in chronological order.” When asked on cross-examination whether she considered writing an addendum to her progress notes explaining the incomplete treatment, she explained that once Kaiser opens an investigation she would not be able to go back and do an addendum.

Breach of Standard of Care

15. Alejandro J. Katz, OMD. L. Ac. QME, testified on behalf of complainant. Dr. Katz received a Doctorate Degree in Medicine in 1976 from the School of Medicine University of Buenos Aires, Argentina. He was licensed as an acupuncturist in Argentina in 1979 and in California in 1984. He received a Doctorate Degree in Oriental Medicine from SAMRA University in 1983. He has been a qualified medical examiner for the Industrial Medical Council of California since 2000. Dr. Katz has significant qualifications and experience in acupuncture, particularly in pain management.

16. Dr. Katz opined that it was an extreme deviation from the standard of care to leave needles in a patient resulting in her having to remove the needles herself, and to fail to provide aftercare and discharge the patient. He explained that after needles are removed by the acupuncturist, aftercare is required. The patient needs to be assessed as to whether there is bleeding or infection. Any bleeding or infection needs to be cleaned, the patient should be instructed to do some exercises and then released. Dr. Katz explained the importance of the acupuncturist being present to remove the needles and provide aftercare. The positioning of the needle and the location of the needle may cause the needle to be pushed into a muscle and may cause soreness or the needle to go through a lung and collapse the lung (pneumothorax). The patient may develop a hematoma or peritonitis. The patient may accidentally push needles in and may have to be referred for urgent care. A more common situation is that approximately 20 percent of patients who get up off the treatment table have lowered blood pressure and can fall and hit their heads or hurt other parts of their body. For these reasons it is the standard of care to have a professional take the needles out and in aftercare verify that the patient tolerated the removal well.

17. Dr. Katz opined that it is a deviation from the standard of care for respondent to fail to chart that she had left the patient without removing acupuncture needles and providing aftercare and discharge. He explained that a situation like this needs to be charted, principally because treaters may eventually have to look at the note to ascertain what secondary effects or complications the patient may have experienced. He provided an example of a patient experiencing a collapsed lung. The progress notes should reflect the location of any needles that were placed and any complications that arose. The progress notes should reflect the aftercare and must be clear as to what happened.

18. Dr. Katz did not opine that it was an extreme departure from the standard of care for respondent to fail to chart that she had left the patient without removing acupuncture needles and providing aftercare.

19. Dr. Katz's opinions were persuasive and were supported by the evidence. Respondent's counsel argued that an extreme departure from the standard of care is "recklessness and something other than the completely unintentional thing that happened here." There is no merit to this argument. Respondent presented no authority for the novel proposition that the state of mind or intent of the licensee dictates whether the deviation from the standard of care is extreme.

20. There was some discussion at hearing about whether it was an "aggravating" factor that respondent had not complied with the instruction her supervisor, Mr. Berg, gave her to chart the incident in her progress notes. The evidence was not clear and convincing on this point. Rather, the evidence suggests that Berg was mistaken. Respondent credibly denied she was given this instruction and she would have no reason to disregard her superior's instruction. Berg documented the remainder of their discussion but did not document this instruction. Regardless of whether the instruction was given, there is no authority for finding an "aggravation" of an act of simple or gross negligence, and clearly an action under the Business and Professions Code cannot be based on simply a violation of a superior's order, but requires a violation of statute or regulation.

21. The evidence of Berg's instruction was also intended to buttress complainant's argument that respondent knowingly failed to document the incident and that this knowing failure constituted gross negligence.¹ However, Dr. Katz did not testify that the failure to document the incident constituted gross negligence, only a deviation from the standard of care (Findings 17 and 18) which at the most would constitute an act of simple negligence. The Amended Accusation does not allege simple negligence.

Corrections and Rehabilitation

22. Shortly after Berg reported the incident to his superiors, quality control assessments were made and protocols were put in place to prevent staff from forgetting a patient. Respondent was involved in the development of these protocols. The protocols directed that when a therapist leaves a treatment room the doors are to remain ajar and timers are set which are loud enough to be heard throughout the treatment areas. Each treatment room has a call light which is accessible to the patient within the room and staff have a protocol to follow to make sure all rooms are empty before leaving the facility.

23. Respondent has no discipline to her acupuncture license other than this action. She has had no discipline to her physical therapist license. She stopped performing acupuncture on Kaiser physical therapy patients about a year ago, but continues to do

¹ See Amended Accusation, First Cause For Discipline, paragraph 18 B, alleging gross negligence.

acupuncture outside of Kaiser, on friends or people referred to her, without compensation. She will perform acupuncture at Kaiser again "if they let me."

24. Respondent has kept current with her continuing education requirements. There is no evidence that she has taken a record-keeping course or other courses that may be relevant to her errors, such as a time management or stress management course.

25. Respondent's work history has been exemplary, according to her supervisor Berg, and her professional reviews state that she fully meets expectations and has been successful in her performance. Respondent submitted in evidence two declarations, one from Wenzhou Zhong, a licensed acupuncturist, and one from Rupina Mann, M.D. Mr. Zhong wrote that from 2001 through 2004 he was respondent's classmate at the Academy of Chinese Culture and Health Sciences. He wrote that respondent was an experienced physical therapist at the time and that she often got the highest grades in their classes. She did not hesitate to share her learning and clinical experience with others. He believes she is very responsible towards her patients and is dedicated to helping patients relieve their pain. He noted that she has discussed with him the September 30, 2009 incident, acknowledged her mistake. They have discussed ways in which she could assure that such a mistake will never happen again.

26. Dr. Mann wrote that he recently retired from a practice at Kaiser in Roseville and has known respondent for approximately 10 years. He wrote that she "is one of the best physical therapists I have ever known. She is extremely conscientious, hard-working and committed to her patients. She takes a great interest in her patients' condition and their welfare. She routinely stays late, works through lunch and generally goes well above and beyond her duties to take care of Kaiser patients." He believes that she is diligent, reliable, and honest, and that she has "great integrity." He wrote that he is aware of the unfortunate incident giving rise to the accusation and that the incident is "in no way" characteristic of respondent's conduct.

Appropriate Discipline

27. Respondent's counsel maintains that respondent made a one-time mistake which could not possibly happen again, and that discipline of any sort is not warranted to protect the public. He argued that, "Probation is absolutely not the remedy for something that will not happen again." Counsel did not address respondent's failure to chart the incident accurately, except to maintain that the incident was recorded in the Kaiser Responsible Reporting Form and on B.R.'s physician's notes several days later when she visited her physician. Complainant counters that respondent seriously endangered her patient and caused her harm, and that monitoring and course work are necessary to prevent future incidents.

28. It is an important consideration that three years have passed since respondent's conduct. She has practiced physical therapy full time for these three years and acupuncture for part of this time, without untoward events. Many protocols are in place to prevent a

reoccurrence of forgetting a patient. However, there was no evidence that respondent put into practice any techniques to alleviate the stresses of her highly demanding work schedule or to help her cope with the stresses that twice led her to act out of "exhaustion." Also critical is the fact that three years after the fact respondent continues to express confusion and lack of clarity on her duties to chart correctly and thoroughly, including the duty to include addenda to progress notes.

29. Thus, it is clear that respondent should at the very least be required to complete a record keeping course, a stress management course and an ethics course. It is not clear that respondent requires practice monitoring. Additionally, the evidence suggests that there are no other acupuncturists on duty at Kaiser-Roseville who could monitor her practice and that she is practicing acupuncture sporadically and independently. She would be unable to comply with probationary requirements to practice acupuncture for a minimum number of hours per month or to have a practice monitor.

30. It would be in the public interest to place respondent on probation for a minimum period to allow her the time necessary to complete coursework, without imposing conditions related to practice monitoring or minimum number of hours of practice.

Costs

31. The Prayer in the Amended Accusation requests that respondent be ordered to reimburse complainant for the reasonable costs of investigation and prosecution of this matter, pursuant to Business and Professions Code section 4959. However, no evidence of complainant's costs was introduced at hearing. Consequently, no order for reimbursement can issue.

LEGAL CONCLUSIONS

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

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

[¶...¶]

2. Business and Professions Code section 4955.2 provides in pertinent part:

The board may deny, suspend, revoke, or impose probationary conditions upon the license of any acupuncturist if he or she is guilty of committing any one of the following:

(a) Gross negligence.

[¶...¶]

3. As set forth in Findings 7, 8, 12, 13, 15 and 17, complainant established by clear and convincing evidence that respondent committed an act of gross negligence on September 29, 2009, in respect to her treatment of Patient B.R. Respondent is subject to discipline under Business and Professions Code section 4955 and 4955.2.

4. As set forth in Findings 11, 15, 17, 18, 20 and 21, complainant did not establish that respondent's failure to make a complete and accurate progress record of the September 29, 2009 treatment of Patient B.R. constituted gross negligence.

5. California Code of Regulations, title 16, section 1399.453, provides:

An acupuncturist shall keep complete and accurate records on each patient who is given acupuncture treatment, including but not limited to, treatments given and progress made as a result of the acupuncture treatments.

6. As set forth in Findings 7, 8, and 11 through 17, it was established by clear and convincing evidence that respondent is subject to discipline for violation of California Code of Regulations, title 16, section 1399.453 in respect to her October 1, 2009 progress note for Patient B.R.

ORDER

Acupuncturist License Number Ac 9840 issued to Maria Ho Pittman is REVOKED. However, revocation is stayed and the license is placed on probation for 18 months, on the following terms and conditions.

Coursework

Respondent shall take and successfully complete coursework in the following areas: record keeping/charting; ethics and stress management. Each class shall be not less than 20 hours in duration. All coursework shall be taken at the graduate level at a school or by a provider approved by the Board. Classroom attendance must be specifically required. Course content shall be pertinent to the violation and all coursework must be completed within the first 18 months of probation. The required coursework must be in addition to any continuing education courses that may be required for license renewal.

Within 90 days of the effective date of this decision, respondent shall submit a plan for the Board's prior approval for meeting the educational requirements. All costs of the coursework shall be borne by respondent.

Obey All Laws

Respondent shall obey all federal, state and local laws and all regulations governing the practice of acupuncture in California. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence.

Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Surveillance Program

Respondent shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Respondent shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) victims or complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert examiners.

Interview with the Board or Its Designee

Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

Changes of Employment

Respondent shall notify the Board in writing, through the assigned probation surveillance compliance officer of any and all changes of employment, location and address within 30 days of such change.

Tolling for Out-of-State Practice or Residence

In the event respondent should leave California to reside or to practice outside the State, respondent must notify the Board in writing of the dates of departure and

return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

Employment and Supervision of Trainees

Respondent shall not employ or supervise or apply to employ or supervise acupuncture trainees during the course of this probation. Respondent shall terminate any such supervisorial relationship in existence on the effective date of this probation.


Violation of Probation

If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stated. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No petition for modification or termination of probation shall be considered while there is an accusation or petition to revoke probation pending against respondent.

Completion of Probation

Upon successful completion of probation, respondent's license will be fully restored.

Dated: November 30, 2012



ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings