

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)	
HEARING AID SPECIALISTS,)	
)	
Petitioner,)	
vs.)	Case Nos. 00-1208
)	00-1209
DONALD CONLEY,)	00-1433
)	
Respondent.)	
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RECOMMENDED ORDER

A hearing was held in this case in New Port Richey, Florida, on August 10, 2000, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gary L. Asbell, Esquire
Agency for Health Care Administration
2727 Mahan Drive
Building 3, Mail Stop 39
Tallahassee, Florida 32308

For Respondent: Donald Conley, pro se
3377 Southwest Villa Place
Palm City, Florida 34990

STATEMENT OF THE ISSUE

The issue for consideration in this case is whether Respondent's license as a hearing aid specialist in Florida should be disciplined because of the matters alleged in the Administrative Complaints filed herein.

PRELIMINARY MATTERS

By Administrative Complaint dated December 10, 1998, the Agency for Health Care Administration (Agency), on behalf of the Board of Hearing Aid Specialists (Board), charged the Respondent, Donald Conley, with failing to permit the purchaser of hearing aid instruments to cancel the purchase for a valid reason within 30 days, thereby being guilty of misconduct, fraud, deceit, negligence, or incompetence in the practice of dispensing hearing aids in violation of Section 484.056(1)(h), Florida Statutes; by failing to show the serial number of the hearing aids and the signature of the buyer on the receipt; and by failing to have a medical waiver signed.

On April 22, 1999, the Agency filed a second Administrative Complaint against the Respondent for failing to provide a refund for a returned hearing aid to a second client within 30 days of delivery; by failing to have a medical waiver signed; and by failing to have the serial number of the hearing aids or the signature of the party receiving them on the receipt therefor, in violation of Sections 484.056(1); 455.624(1), and 484.051(2) Florida Statutes.

On June 21, 1999, the Agency filed a third Administrative Complaint against the Respondent alleging that he failed to provide a refund within 30 days of return of the hearing aids; and for failing to include a serial number on a receipt for a hearing aid delivered to a purchaser, in violation of Section

484.056(1), Florida Statutes. The Respondent subsequently requested formal hearing as to all three Administrative Complaints, and this hearing ensued. No evidence was presented regarding the allegations contained in the third Administrative Complaint, and subsequent to the hearing, the Petitioner voluntarily dismissed the Administrative Complaint in that case.

At the hearing, the Petitioner presented the testimony of Stanley R. Williamson, a former client of the Respondent; Michelle H. Pfister, a licensed hearing aid specialist, former associate of the Respondent, and purchaser of the Respondent's hearing aid practice; and, by deposition filed after hearing, that of Katherine Sadilek, a former client. The Petitioner also introduced Petitioner's Exhibits 1 through 9 and 11. Petitioner's Exhibit 10 was identified but was rejected. Respondent testified in his own behalf but did not offer any exhibits.

A Transcript of the proceedings was furnished on August 23, 2000. Subsequent to the receipt thereof, only the Petitioner submitted matters in writing. These were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to the issues herein, the Board of Hearing Aid Specialists has been the state agency in Florida responsible for the licensing of hearing aid specialists and the regulation of the hearing aid provider profession in Florida.

The Respondent has been a licensed hearing aid specialist in this state, holding license number AS 00010006.

2. Stanley I. Williamson is an 84-year-old blind and arthritic retiree who has worn hearing aids since the early 1980's. He has known Mr. Conley since that time and has purchased his hearing aids from the Respondent both when the Respondent was working for other suppliers and when he went into business for himself.

3. In the summer of 1997, Mr. Williamson went to the Respondent to get the wax cleaned out of his hearing aids. Mr. Williamson did not feel he needed new aids at the time. However, on June 6, 1997 Respondent Mr. Conley called him and tried to sell him some new aids. Mr. Williamson told the respondent he didn't want new aids because his were working well, but Mr. Conley suggested he bring them in anyway. Mr. Williamson went to the Respondent's office and tried the new ones the Respondent showed him but decided he did not want them because he felt they did not work properly. Nonetheless, on that same day, June 6, 1997, Mr. Williamson took them, signed a contract for the new aids, and gave the Respondent a check for \$1,095. At that time, the Respondent told Mr. Williamson he could bring the aids back within 30 days if they were not acceptable.

4. The Argosy hearing aids Mr. Williamson got from the Respondent on June 6 did not work properly, and when Mr. Williamson complained, the Respondent agreed to get him another

pair. Mr. Williamson picked up this second pair of aids at the Respondent's office, Conley's Hearing Aid Center in Clearwater on June 20, 1997. At that time Mr. Williamson signed a second contract and gave the Respondent a second check for \$1,095.

5. On June 24, 1997, the Respondent had Mr. Williamson, who was still not satisfied with the performance of the Argosy aids, sign a third contract with his company under which the Respondent agreed to provide a pair of 3M Single Pro hearing aids for a total price of \$3,390. The Respondent gave Mr. Williamson credit for the two prior payments of \$1,095 each, and Mr. Williamson gave the Respondent an additional check for \$1,200.

6. According to Mr. Williamson, the 3M aids, which the Respondent delivered on July 8, 1997, also did not work to his satisfaction, so after just a few days, on July 10, 1997, he exchanged them for a different pair of 3M aids, Dual Pro. The sales receipt for the aids that the Respondent gave to Mr. Williamson on July 10, 1997 did not contain the buyer's signature, nor did it list the serial numbers for the hearing aids provided.

7. Mr. Williamson thought he was getting the top of the hearing aid line but in fact, the Dual Pro aid was the middle line. According to a pamphlet he saw later, the top of the line is called Multi Pro; the middle, Dual Pro; and the bottom, Single Pro. Though a new contract was signed reflecting the Dual Pro aids, there was no additional charge. The Respondent guaranteed

all hearing aids sold to Mr. Williamson to be acceptable or, if returned within 30 days of purchase, a full refund would be given.

8. The Dual Pro aids also did not work to Mr. Williamson's satisfaction, and he returned them to the Respondent on or about August 4, 1997, an act witnessed by the Respondent's associate, Michelle Pfister. None of the hearing aid sets was kept by Mr. Williamson for more than 30 days.

9. Mr. Williamson contends that when he returned the second pair of Argosy aids and received the 3M Single Pro aids in exchange, he asked Mr. Conley for a refund. At that time, Mr. Conley said he didn't have the money. When Mr. Conley delivered the Single Pro aids, and again when he delivered the Dual Pro aids, Mr. Williamson asked for a refund instead. Each time the Respondent claimed he didn't have the money.

10. On October 4, 1997, Mr. Williamson wrote to Conley's Hearing Aid Center, the Respondent's business, and threatened recoupment action if the Respondent did not return the money he had paid for the aids he had returned. The hearing aids Mr. Williamson purchased were all returned to the Respondent, but no refund was ever made. According to Ms. Pfister, the returned hearing aids were subsequently sent back to the manufacturer for credit. The credit was not to her account with the manufacturer, however, and she does not know who received it.

11. Ms. Pfister, also a licensed hearing aid specialist since 1998, bought Conley's Hearing Aid Center from the Respondent on July 27, 1997. At the time of the purchase, Ms. Pfister was not employed by the Respondent, but she had worked for the Respondent on and off since 1995. On June 26, 1997, the Respondent signed a form to sponsor Ms. Pfister as a hearing aid specialist trainee and served as her sponsor until she passed the examination and was licensed on June 23, 1998.

12. Respondent continued to work on the premises after the sale until Ms. Pfister was licensed. When Ms. Pfister took over the business, the sales contract called for all hearing aids on site to be sold to her as inventory. She also received a statement from the Respondent that there were no unresolved issues with clients, and she did not assume any liabilities incurred by the business prior to her take over. When she assumed active management of the practice, Ms. Pfister received all of the Respondent's patient files.

13. Katherine Sadilek is a 93-year-old retiree who purchased a pair of pre-owned 3-M Model 8200 hearing aids from the Respondent on April 8, 1997 for \$1,800. The aids were paid for in full on April 9, 1997. The receipt for this sale that the Respondent gave to Ms. Sadilek did not contain the serial numbers of the aids, nor did it describe any of the terms and conditions of the sale or a guarantee.

14. Ms. Sadilek returned the aids to the Respondent exactly 30 days after the purchase date because she was not satisfied with them. The Respondent did not refund her money but agreed to try to re-sell them for her. He offered her \$100.00 for them, which she refused. The Respondent retained the aids and never returned them to Ms. Sadilek or paid her for them.

15. A review of the documentation relating to the sales to both clients show them to be devoid of any information showing any improvement to the clients' hearing as a result of the hearing aids sold to them by the Respondent. A showing of improvement is required to form the basis for non-refund of amounts paid for hearing aids. The Respondent filed for bankruptcy in December 1998.

16. The Respondent was licensed as a hearing aid specialist in Indiana in 1970 and in Florida in 1978. He has practiced in Florida for almost 20 years without any complaints being filed against him except those in issue here.

17. The Respondent attributes most of his problems to his marriage dissolution in 1979, the settlement relating to which caused his financial problems and his bankruptcy. He claims he offered to make periodic payments to Mr. Williamson but Mr. Williamson refused that offer.

18. The Respondent is 61 years old and presently receiving worker's compensation. Though he is not presently in the hearing

aid business, he hopes to be in the future and needs to keep his license to earn a living.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

20. The Board seeks to discipline the Respondent's license as a hearing aid specialist because of misconduct alleged regarding his treatment of Mr. Williamson and Ms. Sadilek. With regard to both clients, it is alleged he received returned hearing aids within the time specified for their return and refund, yet failed to refund the sums paid for the aids as he was bound to do. It is further alleged, as to both clients, that the sales receipts he gave them failed to contain required information such as serial numbers of the aids, the name of the purchaser, and the terms and conditions of the guarantee. If proven, these allegations would constitute violations of various provisions of Sections 484.056(1), 484.051(2), and 455.624, Florida Statutes.

21. The Petitioner has the burden to establish the Respondent's guilt of the offenses alleged by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

22. The evidence is both clear and convincing that both clients alleged the Respondent sold hearing aids to them under a

guarantee of satisfaction which provided for a complete refund if they were returned as unsatisfactory within a period of 30 days from the date of sale. The evidence clearly establishes that both clients returned the aids within 30 days of the date of sale, advised the Respondent they were not satisfied, and repeatedly requested the refund guaranteed to them under the terms of the sale. Neither received a refund after repeated requests therefor, and the Respondent retained the aids, returning them to the manufacturer for credit. This constitutes a clear violation of Section 484.0512(2) and, thereby, Section 484.056(1)(h), Florida Statutes.

23. The evidence also clearly establishes that the sales receipts furnished to both clients failed to include the required information to include such items as the serial numbers of the instruments and the signature of the party receiving them. The evidence also clearly establishes that the Respondent failed to have Mr. Williamson sign a medical waiver, as is required by Section 484.624(1), Florida Statutes.

24. Rule 64B-7.002, Florida Administrative Code, contains guidelines for the assessment of penalties against licensees shown to have violated provision of the statute regarding criteria for practice as hearing aid specialists. The penalty range for each violation of Section 484.056(1)(h), Florida Statutes, extends from a "reprimand to revocation and an administrative fine of from \$500.00 to \$1,000.00." Each

violation of Section 484.051(2), Florida Statutes, authorizes a penalty of from a "reprimand to 6 months suspension and an administrative fine of \$500.00 to \$1,000.00." Consideration of factors both in aggravation and mitigation of the offenses proven is authorized.

25. The evidence of record shows that the Respondent consistently failed to refund the moneys paid by Mr. Williamson for hearing aids he determined to be unsatisfactory. Though Williamson sought refund for each of the three sets of aids he was given, the sequence should be considered and treated as one incident. Therefore, the Respondent faces assessment of two penalty sets as a result of his treatment of the two clients involved. The same approach is appropriate regarding the failure to include required information on the sales receipts. Therefore, under the circumstances of these consolidated cases, the Respondent faces a maximum penalty of revocation and an administrative fine of from \$2,000 to \$4,000.

26. The Petitioner seeks to impose a penalty which includes a revocation of the Respondent's license and an administrative fine of \$3,000. The Petitioner claims that the fact that the clients lost a combined total of \$5,190, with Mr. Williamson losing \$3,390 and Ms. Sadilek losing \$1,800, constitutes aggravation justifying an increased penalty.

27. To be sure, the financial loss to the Respondent's clients is matter in aggravation, especially when viewed in the

light of their repeated unsuccessful requests for reimbursement. On the other hand, the Respondent has been in practice for an extended period, and the Petitioner presented no evidence of prior misconduct. The Respondent seeks to re-enter practice as a hearing aid specialist, and with the problems of his failed marriage behind him, there is little reason to believe he cannot do so successfully and safely. Therefore, revocation of his license is deemed excessive. A substantial administrative fine, as suggested by Petitioner, is appropriate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Board of Hearing Aid Specialists enter a final order suspending the Respondent's license for a period of six months and thereafter placing it under probation for a period of three years under such terms and conditions as may be deemed appropriate by the Board. It is also recommended that the Board impose an administrative fine of \$3,000, and assess appropriate costs of investigation and prosecution.

DONE AND ENTERED this 12th day of September, 2000, in
Tallahassee, Leon County, Florida.

ARNOLD H. POLLOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 12th day of September, 2000.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.