STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF HEARING AID SPECIALISTS,	)	
Petitioner,	)	
vs.	)	Case No. 01-0226PL
LEONARD P. ZINNI,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on March 28, 2001, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gary L. Asbell, Esquire
Agency for Health Care Administration
Post Office Box 14229, Mail Stop 39
Tallahassee, Florida 32317-4229

For Respondent: Leonard P. Zinni, pro se
106 Harbourside Circle
Jupiter, Florida 33477

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On January 19, 2000, Petitioner filed an Administrative Complaint against Respondent, a Florida-licensed hearing aid specialist, alleging that Respondent engaged in the following conduct:

> 4. On April 1, 1997, the Respondent, on behalf of Advanced Hearing Center, Inc., dispensed a pair of Starkey hearing aids to patient W. J. in Palm Beach County, Florida for a contract price.
>
> 5. Respondent delivered the hearing aids to the patient on April 8, 1997.
>
> 6. At the initial visit on April 1, 1997 and prior to selling the hearing aids, Respondent noticed wax and white fungus in the patient's ear.
>
> 7. Despite noticing this problem and talking about it, the Respondent continued to fit and sell the hearing aids.
>
> 8. Respondent failed to obtain a medical clearance or waiver for the wax and mold problem.
>
> 9. Respondent failed to perform pure tone audiometric testing by bone to determine the type of and degree of hearing deficiency prior to or during the fitting and selling of the hearing aids.

> 10. Respondent failed to provide a refund to the patient although it was demanded within 30 days of delivery.

According to the Administrative Complaint, Respondent "violated Section 484.0501(1)(a), Florida Statutes, and [S]ection 484.056(1)(h), Florida Statute[s], by failing to use pure tone audiometric testing by air and bone to determine the type of and degree of the patient's hearing deficiency" (Count I); "violated Section 484.0501(4), Florida Statutes, and [S]ection 484.056(1)(h), Florida Statutes, by failing to obtain medical clearance for the wax and fungus condition prior to fitting the hearing aids" (Count II); and "violated Section 484.0512(1), Florida Statutes, and [S]ection 484.056(1)(h), Florida Statutes, by failing to provide the patient a refund" (Count III).

Through the submission of a completed Election of Rights form dated September 15, 2000, Respondent "dispute[d] the . . . allegations of fact contained in the Administrative Complaint" and requested "a hearing involving disputed issues of material fact, pursuant to Sections 120.569 and 120.57(1), Florida Statutes, before an administrative law judge appointed by the Division of Administrative Hearings." On January 17, 2001, the matter was referred to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct the hearing Respondent had requested.

As noted above, the final hearing was held on March 28, 2001. Six witnesses testified at the hearing: Bonnie Shaffrick, an investigator with the Agency for Health Care Administration; Patient W. J.; F. J., Patient W. J.'s wife; Richard Skelly, a Florida-licensed hearing aid specialist who gave expert testimony on behalf of Petitioner; Respondent; and Deputy George Gasparini of the Palm Beach County Sheriff's Office. In addition to the testimony of these six witnesses, seven exhibits, Petitioner's Exhibits 1 through 4, and Respondent's Exhibits 1 through 3, were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the undersigned established a deadline (20 days from the date of the filing of the hearing transcript with the Division) for the filing of proposed recommended orders.

A Transcript of final hearing (consisting of two volumes) was filed with the Division on April 19, 2001. Respondent and Petitioner filed their Proposed Recommended Orders on April 17, 2001, and May 9, 2001, respectively. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at the final hearing and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since February 15, 1993, a Florida-licensed hearing aid specialist. He holds license number AS2453.

2. For the past seven years, Respondent has owned Advanced Hearing Center, Inc. (Advanced Hearing), a hearing aid business located in North Palm Beach, Florida.

3. W. J. is a hearing impaired hearing aid wearer.

4. He and his wife of 32 years, F. J., reside in Florida (on Singer Island in Palm Beach County) part of the year (generally, January through the middle of April) and in New Jersey the remainder of the year.

5. In late March of 1997, toward the end of their stay in Florida that year, W. J. contacted Respondent by telephone at Advanced Hearing to inquire about getting the hearing aid for his left ear repaired.

6. W. J. had not had any previous dealings with Respondent.

7. He had learned that Respondent was a hearing aid specialist upon reading the advertisement for Advanced Hearing in the Yellow Pages, and was "impressed" that Respondent had a Ph.D.

8. During their telephone conversation, Respondent invited W. J. to visit Advanced Hearing with his wife. He told W. J.

that, during the visit, he would look at the hearing aid that needed repair and, in addition, give W. J. a free hearing test.

9. W. J., accompanied by his wife, visited Advanced Hearing on Tuesday, April 1, 1997.

10. While waiting to see Respondent, W. J. was asked to read written "testimonials" from satisfied patients of Respondent's.

11. W. J. and his wife were subsequently escorted to Respondent's office, where they remained for the duration of the visit.

12. While in Respondent's office, W. J. filled out a medical history form. The information that W. J. provided on the form indicated that he did not have any significant medical problems warranting referral to a medical doctor.

13. Respondent then used a video otoscope to examine W. J.'s ear canals. The ear canals were "normal looking" and, although there was some wax buildup, the eardrums were visible.

14. As he performed the otoscope examination, Respondent explained to the J.s what he saw. He told them about the wax buildup and cautioned that the lack of adequate "cerumen management" could lead to "abnormalities or infections or a fungus c[ould] grow," conditions which would require medical attention.

15. Inasmuch as W. J. had not reported any recent history of infection and the otoscope examination had not revealed any observable abnormality, Respondent proceeded to test W. J.'s hearing. He performed pure tone audiometric testing by air and by bone and recorded the results of such testing.

16. Respondent's office, where the testing was done, was a "certified testing room," within the meaning of Section 484.0501(6), Florida Statutes.

17. The air and bone tests revealed no significant difference or "gap" between W. J.'s air conduction hearing and his bone conduction hearing.

18. After the testing, Respondent informed the J.s that he was unable to repair W. J.'s old hearing aid (for his left ear), and he suggested that they purchase new, "upgrade[d]" hearing aids for W. J. if they could afford to do so.

19. Respondent recommended the Starkey Sequel Circuit, the "pinnacle product" of "one of the largest [hearing aid] manufacturers in the world" (Starkey), because he believed that it would help alleviate the "problems with distortion and loud noise" that W. J. had reported that he was experiencing.

20. Respondent informed the J.s that he could sell them this Starkey product at a "great price."

21. The J.s told Respondent that they were reluctant to purchase new hearing aids in Florida because they were planning

on returning to their residence in New Jersey shortly, and that, in any event, they were interested in Siemens Music, not Starkey Sequel Circuit, hearing aids.

22. Respondent replied that the Starkey Sequel Circuit was comparable to the Siemens Music and that any Starkey dealer would be able to service Starkey Sequel Circuit hearing aids purchased from his business.

23. After considering Respondent's comments and discussing the matter with his wife, W. J. signed a written agreement to purchase Starkey Sequel Circuit hearing aids from Advanced Hearing for $3,800.00.

24. W. J. paid the full purchase price, by credit card, before leaving. On the credit card receipt that W. J. received were written the words, "no refunds."

25. The "purchase agreement" that W. J. signed had a "guarantee date" of "2 yrs." and contained the following provisions:

> Within a period of one year after delivery patient may have these instruments serviced at Advanced Hearing Center, Inc. without any cost under the terms of the guarantee issued by the manufacturer. As the degree of satisfaction is dependent upon user, motivation, diligent adherence to instructions, and proper use of this prosthesis, all warranties are confined to those issued by the manufacturer. Examination, test, and other representations are non-medical and for the sole purpose of fitting hearing aids.

I hereby acknowledge that I have been provided information concerning the advantages of telecoils, "t" coils, or "t" switches; which included the increased access to telephones and assistive listening systems. I have been provided in writing with the terms and conditions of the 30-day trial period and money back guarantee; with notice of my right to cancel the purchase within 30 days of receipt of the hearing aid(s) for a valid reason based on a failure to achieve a specific measured performance such as sound improvements or improved word discrimination. It shall be the responsibility of the person selling the hearing aid(s) to maintain the audiometric documentation necessary to establish the measured improvement. If the hearing aid must be repaired, or adjusted during the 30-day[] trial period, the running of the 30-day trial period is suspended one day for each 24 hour period that the hearing aid is not in the purchaser's possession. A repaired, remade, or adjusted hearing aid must be claimed by the purchaser within three working days after notification of availability. In the event of cancellation within the 30-day trial period, the seller may retain a charge not to exceed $150.00 on a monaural fitting (one hearing aid) and $200.00 on a binaural fitting (two hearing aids) for earmolds and services provided to fit the hearing aids. In addition, the purchaser may be charged a cancellation fee not to exceed 5% of the total purchase price. If the hearing system improves word discrimination, which the seller has the right to test and document, no refund will be issued. If a problem arises you should return immediately to the office listed above. In the event a complaint concerning a hearing aid and/or guarantee cannot be reconciled, you may contact the Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, FL 32399-0783. Telephone Number (904) 488-6602.

> I understand that this purchase agreement comprises the entire agreement and no other agreement of any kind, verbal understanding or promise whatsoever will be recognized or be binding upon Advanced Hearing Center, Inc.
>
> THE USE OF A HEARING AID WILL NOT RESTORE NORMAL HEARING, NOR WILL IT PREVENT FURTHER HEARING LOSS.

26. After the "purchase agreement" was signed, Respondent made earmolds to send to Starkey.

27. The earmolds, along with a manufacturer's order form that Respondent had completed, were subsequently sent to Starkey. On the order form, Respondent provided information concerning the results of the air conduction testing, but not of the bone conduction testing, he had performed on W. J.

28. The J.s left Advanced Hearing following their April 1, 1997, visit without taking a copy of the signed "purchase agreement" with them.

29. At their request, Respondent mailed them a copy of the "purchase agreement," which they received sometime on or about Saturday, April 5, 1997, along with the following cover letter, dated April 1, 1997:

> Thank you both for coming to Advanced Hearing Center and mutually deciding to purchase your new hearing system. I am confident that the Starkey Sequels will improve your hearing, especially since it minimizes distortion of louder sounds as we thoroughly discussed.

> Your custom order is being processed and we will notify you when it comes in to set an appointment for the fitting and pick up of your new instruments.
>
> Also enclosed please find another copy of the purchase agreement.

30. It was not long after the J.s had left Advanced Hearing on April 1, 1997, that they started having second thoughts about the purchase they had made.

31. The next morning (April 2, 1997), they telephoned Respondent and advised him of their "doubts" and concerns regarding the purchase.

32. Respondent "talked it out" with them, and, at the end of the conversation, the J.s expressed their willingness to "accept the delivery" of the hearing aids.

33. W. J., again accompanied by his wife, returned to Advanced Hearing on Tuesday, April 8, 1997, to be fitted with the new hearing aids.

34. He had not seen a medical doctor since his last visit to Advanced Hearing.

35. When Respondent first fitted W. J. with the new hearing aids, W. J. told Respondent that he heard a whistling noise.

36. Respondent thereupon removed the hearing aids and, using a "metal probe," took wax out of both of W. J.'s ears.

37. He then again fitted W. J. with the new hearing aids. This time W. J. did not hear any whistling noise or other feedback.

38. Respondent proceeded to test and measure W. J.'s hearing.

39. The audiometric test results, which were reduced to writing and placed in the patient file Respondent maintained on W. J., revealed that, with the new hearing aids, W. J. enjoyed a significant improvement in hearing.

40. Following the testing, the J.s accepted delivery of new hearing aids.

41. Respondent provided the J.s with a copy of the "purchase agreement" that W. J. had signed during his previous visit to Advanced Hearing, on which Respondent had added the serial numbers of the new hearing aids and the date of delivery (April 8, 1997).

42. W. J. left Advanced Hearing on April 8, 1997, wearing the new hearing aids.

43. Sometime after leaving Advanced Hearing, W. J. began hearing the same whistling noises that he had heard when Respondent had first fitted him.

44. After returning to New Jersey on April 9, 1997, the J.s brought the new hearing aids to a New Jersey audiologist to be serviced.

45. The New Jersey audiologist told the J.s that to correct the whistling problem new earmolds would have to be made. She further advised the J.s that she "would have to charge [them] a considerable amount of money" to make these earmolds.

46. Respondent was not furnished a signed written request from W. J. requesting that Respondent release to the New Jersey audiologist the records in the file Respondent maintained on W. J. Accordingly, Respondent never sent the New Jersey audiologist these records.

47. On May 1, 1997, the J.s shipped the new hearing aids back to Respondent, along with a letter (dated that same day, May 1, 1997), in which they demanded a "full refund" based upon their claim that the hearing aids neither fit nor worked properly.

48. On May 5, 1997, Respondent refused delivery of the package containing the hearing aids and the letter.

49. Thereafter, on or about May 6, 1997, W. J. filed a complaint against Respondent with Petitioner.

50. The J.s re-sent to Respondent the May 1, 1997, letter requesting a "full refund." The letter was delivered to Respondent on May 9, 1997.

51. Respondent refused to provide the refund that the J.s had demanded because he believed that, inasmuch as he had the

audiometric documentation necessary to establish that the hearing aids significantly improved W. J.'s hearing, the J.s did not have a "valid reason," under the existing law, to void their purchase of the hearing aids.

52. Respondent did agree, however, to pay for a qualified person in New Jersey to make earmolds for W. J. so that the problem with the hearing aids could be corrected. He also offered to take the hearing aids back and exchange them for Siemens Music hearing aids. Neither of these offers, though, was acceptable to the J.s.

53. Unsuccessful in their efforts to obtain a refund from Respondent, the J.s sought redress from their credit card company.

54. The credit card company sent the J.s the following letter, dated May 30, 1997:

> This is in reference to the billing error from ADVANCED HEARING CTR in the amount(s) of $3,800.00.
>
> Based on the information you have provided, we have removed the item(s) from dispute and issued a credit to your current account.
>
> Please be advised that the merchant has the opportunity for rebuttal. If this occurs, we may need to contact you for further information if deemed necessary to support your case. However, if the merchant can provide documentation that proves the charge(s) to be valid, we will have no alternative but to place the charge(s) back

> on your account. If this is necessary, we will send you a written explanation. . . .

55. Respondent, on behalf of Advanced Hearing, took advantage of the "opportunity for rebuttal" provided by the credit card company.

56. The matter was finally resolved in October of 1997, with the credit card company siding with the J.s.

57. The end result of the dispute resolution process was that the J.s were made whole and $3,800.00 was "charged back" to Advanced Hearing's account.

58. In early December of 1997, Respondent discovered that there were several files missing from his office. He suspected a disgruntled former employee whom he had recently terminated. (The employee's personnel file was among the missing files.)

59. Respondent contacted the Palm Beach County Sheriff's Office, which investigated the matter.

60. The deputy that conducted the investigation found no signs of forced entry.

61. No arrests were made as a result of the investigation.

62. Following the completion of the investigation, Respondent found that there were other files, including W. J.'s patient file, that were missing.

63. Respondent made an effort to recreate the documentation that was in W. J.'s file. He contacted Starkey

and obtained, over the telephone, the test result information that he had included on the manufacturer's order form he had sent to Starkey. He recorded this information on an Audiometric Case History and Tests form that he uses in his practice. On the form, he wrote that this was "partial information obtained from manufacturer."

64. In January of 1998, Respondent's secretary inadvertently charged the J.s' credit card account $3,800.00. The mistake was subsequently rectified.

65. Sometime in 1998, the J.s mailed to Respondent the hearing aids they had purchased from Advanced Hearing the year before.

66. This time Respondent accepted delivery.

67. The hearing aids were "not in working order" when they were received by Respondent.

CONCLUSIONS OF LAW

68. Petitioner is statutorily empowered to take disciplinary action against Florida-licensed hearing aid specialists based upon any of the grounds enumerated in Section 484.056(1), Florida Statutes. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension; imposition of an administrative fine not to exceed $1,000 for each count or separate offense; issuance of a reprimand; placement on probation for a period of

time and subject to such conditions as Petitioner may specify, including, but not limited to, requiring the licensee to attend continuing education courses or to work under the supervision of another licensee; and restriction of the licensee's authorized scope of practice. Section 484.056(2), Florida Statutes.

69. Section 484.056(1)(h), Florida Statutes, authorizes Petitioner to take disciplinary action against a licensed hearing aid specialist for "[v]iolation or repeated violation of [Chapter 484, Part II, Florida Statutes], or any rules promulgated pursuant thereto."

70. The following are among the provisions of Chapter 484, Part II, Florida Statutes:

> Section 484.0501(1)(a)
>
> (1) The following minimal procedures shall be used in the fitting and selling of hearing aids:
>
> (a) Pure tone audiometric testing by air and bone to determine the type and degree of hearing deficiency.
>
> Section 484.0501(4)
>
> (4) The following medical clearance shall be obtained: If, upon inspection of the ear canal with an otoscope in the common procedure of a hearing aid fitter and upon interrogation of the client, there is any recent history of infection or any observable anomaly, the client shall be instructed to see a physician, and a hearing aid shall not be fitted until medical clearance is obtained for the condition noted. If, upon return, the condition noted

is no longer observable and the client signs a medical waiver, a hearing aid may be fitted. Any person with a significant difference between bone conduction hearing and air conduction hearing must be informed of the possibility of medical correction.

Section 484.0512

(1) A person selling a hearing aid in this state must provide the buyer with written notice of a 30-day trial period and money-back guarantee. The guarantee must permit the purchaser to cancel the purchase for a valid reason as defined by rule of the board within 30 days after receiving the hearing aid, by returning the hearing aid or mailing written notice of cancellation to the seller. If the hearing aid must be repaired, remade, or adjusted during the 30-day trial period, the running of the 30-day trial period is suspended 1 day for each 24-hour period that the hearing aid is not in the purchaser's possession. A repaired, remade, or adjusted hearing aid must be claimed by the purchaser within 3 working days after notification of availability. The running of the 30-day trial period resumes on the day the purchaser reclaims the repaired, remade, or adjusted hearing aid or on the fourth day after notification of availability.

(2) The board, in consultation with the Board of Speech-Language Pathology and Audiology, shall prescribe by rule the terms and conditions to be contained in the money-back guarantee and any exceptions thereto. Such rule shall provide, at a minimum, that the charges for earmolds and service provided to fit the hearing aid may be retained by the licensee. The rules shall also set forth any reasonable charges to be held by the licensee as a cancellation fee. Such rule shall be effective on or before December 1, 1994. Should the board fail to adopt such rule, a licensee may not charge a

> cancellation fee which exceeds 5 percent of the total charge for a hearing aid alone. The terms and conditions of the guarantee, including the total amount available for refund, shall be provided in writing to the purchaser prior to the signing of the contract.
>
> (3) Within 30 days after the return or attempted return of the hearing aid, the seller shall refund all moneys that must be refunded to a purchaser pursuant to this section.

71. Except for Subsection (3) of Section 484.0512, Florida Statutes (which was added to the statute by Chapter 99-397, Laws of Florida, effective July 1, 1999), the foregoing provisions of Chapter 484, Part II, Florida Statutes, have been in effect at all times material to the instant case.

72. Pursuant to Section 484.044, Florida Statutes, Petitioner has the "authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of [Chapter 484, Part II, Florida Statutes] conferring duties upon it."

73. Rule 64B6-6.001, Florida Administrative Code, is one such rule Petitioner has adopted. Since September 14, 1997, its effective date, it has provided as follows:

> 64B6-6.001 Thirty-Day Trial Period.
>
> (1) A person selling a hearing aid(s) in the State of Florida must provide the purchaser with written notice of the 30-day trial period and money-back guarantee as provided in section 484.0512, F.S. The terms and conditions of the guarantee as well as the total amount available for

refund shall be provided in writing to the purchaser prior to the signing of the contract.

(2) The guarantee shall permit the purchaser to cancel the purchase for a valid reason within 30 days of the receipt of the hearing aid(s). A valid reason shall be defined as failure by the purchaser to achieve satisfaction from use of the hearing aid(s), so long as the hearing aid(s) is returned to the seller within the 30-day trial period in good working condition.

(3) If the hearing aid must be repaired, remade, or adjusted during the 30-day trial period, the running of the 30-day trial period is suspended one day for each 24-hour period that the hearing aid is not in the purchaser's possession. A repaired, remade, or adjusted hearing aid must be claimed by the purchaser within three working days after notification of availability. The running of the 30-day trial period resumes on the day the purchaser reclaims the repaired, remade, or adjusted hearing aid or on the fourth day after notification of availability.

(4) In the event of cancellation within the 30-day trial period, the seller may retain a charge not to exceed $150 on a monaural fitting, and $200 on a binaural fitting for ear molds and services provided to fit the hearing aid. In addition, the purchaser may be charged a cancellation fee not to exceed 5% of the total purchase price.

74. Rule 64B6-6.001, Florida Administrative Code, was formerly Rule 61G9-6.0010, Florida Administrative Code. Rule 61G9-6.0010 was adopted effective October 24, 1994, and was identical to the current version of the rule, except for Subsection (2), which provided as follows:

> The guarantee shall permit the purchaser to cancel the purchase for a valid reason within 30 days of receipt of the hearing aid(s). A valid reason shall be based upon a failure of the purchaser to achieve a specific measured performance such as sound improvement, improved speech reception threshold or improved word discrimination based upon documented audiometric testing. It shall be the responsibility of the person selling the hearing aid(s) to maintain the audiometric documentation necessary to establish the measured improvement. Failure on the part of the seller to document a represented measured improvement shall constitute a valid reason for a mandatory money-back guarantee.

75. It is undisputed that, in the instant case, the determination of whether the J.s had a "valid reason" to "cancel [their] purchase" must be based upon the provisions of the former (pre-September 14, 1997) version of the rule, which were in effect at the time the J.s sought to "cancel the purchase." See Childers v. Department of Environmental Protection, 696 So. 2d 962 (Fla. 1st DCA 1997)("The version of a statute in effect at the time grounds for disciplinary action arise controls."); and Hector v. Department of Professional Regulation, Florida Real Estate Commission, 504 So. 2d 469 (Fla. 1st DCA 1987)("[W]e find the Commission's order of reprimand has no statutory basis, because the conduct which the Commission seeks to discipline was not subject to Commission discipline when it occurred.").

76. "No revocation [or] suspension . . . of any [hearing aid specialist's] license is lawful unless, prior to the entry

of a final order, [Petitioner] has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." Section 120.60(5), Florida Statutes.

77. The licensee must be afforded an evidentiary hearing if, upon receiving such written notice, the licensee disputes the alleged facts set forth in the administrative complaint. Sections 120.569(1) and 120.57, Florida Statutes.

78. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal

or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

79. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

80. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific factual allegations made in the administrative complaint. Due process prohibits an agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the agency's administrative complaint or other charging instrument. See

Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

81. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

82. In the Administrative Complaint issued in the instant case, Petitioner has alleged that Respondent, in his dealings with W. J., "violated Section 484.0501(1)(a), Florida Statutes, and [S]ection 484.056(1)(h), Florida Statute[s], by failing to use pure tone audiometric testing by air and bone to determine the type of and degree of the patient's [W. J.'s] hearing

deficiency" (Count I); "violated Section 484.0501(4), Florida Statutes, and [S]ection 484.056(1)(h), Florida Statutes, by failing to obtain medical clearance for the wax and fungus condition prior to fitting the hearing aids" (Count II); and "violated Section 484.0512(1), Florida Statutes, and [S]ection 484.056(1)(h), Florida Statutes, by failing to provide the patient [W. J.] a refund" (Count III).

83. The record evidence fails to clearly and convincingly establish that Respondent committed any of these alleged violations.

84. While Petitioner presented prima facie proof of Respondent's guilt of these violations, such proof was overcome by the testimony Respondent gave in his own defense, which was internally consistent, plausible, and believable. Testifying with apparent candor and sincerity, Respondent was a convincing, persuasive, and credible witness despite his obvious interest in the outcome of the proceeding. Notwithstanding its self-serving nature, the exculpatory testimony of a respondent, like that given by Respondent in the instant case, may be considered and relied upon as competent substantial evidence, even if it is uncorroborated and contrary to the evidence adduced by the licensing agency. See Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993)("It would be an anomalous situation indeed if the testimony of the one against whom a complaint is lodged could

never form the basis for competent substantial evidence."); Florida Publishing Company v. Copeland, 89 So. 2d 18, 20 (Fla. 1956)("There is no doubt that the testimony of the plaintiff, although uncorroborated, '. . . if reasonable on its face, and believed and accepted by the jury as true can carry the burden of proof.'"); Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So. 2d 607, 609-10 (Fla. 1st DCA 1993)(expert testimony of applicant for licensure was not incompetent and could be relied upon "as competent substantial evidence to support [hearing officer's] conclusions"); and Raheb v. Di Battisto, 483 So. 2d 475, 476 (Fla. 3d DCA 1986)("We are not persuaded, as urged, that the testimony of the plaintiff . . . should have been rejected by the trial court as inherently incredible; it was the trial court's function, not ours, to weigh the testimony and evidence adduced in the cause based on its observation of the bearing, demeanor, and credibility of the witnesses appearing in the cause.").

85. With respect to Count I, the undersigned has credited Respondent's testimony that he conducted both air and bone tests on W. J. (as well as his explanation as to why he was unable to produce documentation that bone testing was done). Accordingly, the undersigned has concluded that Respondent did not violate Section 484.0501(1)(a), Florida Statutes, as alleged by Petitioner.

86. With respect to Count II, the undersigned has credited Respondent's testimony that, although he observed some wax buildup in W. J.'s ear canals, W. J. did not have a "wax and fungus condition" requiring medical attention.[1] Accordingly, the undersigned has concluded that Respondent did not violate Section 484.0501(4), Florida Statutes, as alleged by Petitioner.

87. With respect to Count III, the undersigned has credited Respondent's testimony that the tests he performed on W. J. on April 8, 1997, revealed that the hearing aids the J.s had purchased significantly improved W. J.'s hearing. The undersigned has also credited Respondent's testimony that the test results were documented and maintained by Respondent until early December of 1997,[2] when it was discovered that W. J.'s patient file was missing.[3] Accordingly, the undersigned has concluded that the J.s did not have a "valid reason," within the meaning of former Rule 61G9-6.0010, Florida Administrative Code, to "cancel [their] purchase" of the hearing aids and that therefore Respondent did not violate Section 484.0512(1), Florida Statutes, by refusing to refund the $3,800.00 the J.s had paid (by credit card) for the hearing aids when he was requested to do so by the J.s.

88. In view of the foregoing, the Administrative Complaint issued against Respondent should be dismissed in its entirety.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Board enter a final order dismissing the Administrative Complaint issued against Respondent in its entirety.

DONE AND ENTERED this 29th day of May, 2001, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2001.

ENDNOTES

1/ While the J.s testified that Respondent had made comments to them indicating that he believed that W. J. had such a condition, it appears that the J.s either misunderstood or failed to accurately recall what Respondent had actually told them.

2/ This was after the J.s had already received a full refund from their credit card company.

3/ There has been no showing that the disappearance of the documentation was the result of any failure on Respondent's part to have acted in a manner consistent with what a reasonably

prudent hearing aid specialist would have done under similar circumstances to maintain the documentation.

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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.

[1] While the J.s testified that Respondent had made comments to them indicating that he believed that W. J. had such a condition, it appears that the J.s either misunderstood or failed to accurately recall what Respondent had actually told them.

[2] This was after the J.s had already received a full refund from their credit card company.

[3] There has been no showing that the disappearance of the documentation was the result of any failure on Respondent's part to have acted in a manner consistent with what a reasonably prudent hearing aid specialist would have done under similar circumstances to maintain the documentation.