

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
HEARING AID SPECIALISTS,)
)
Petitioner,)
)
vs.) Case Nos. 01-3536PL
) 01-3537PL
ROBERT F. DAVIDSON, AS,) 01-3538PL
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in the above cases in accordance with Subsection 120.57(1), Florida Statutes, on November 8, 2001, in Clearwater, Florida, before Fred L. Buckine, 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, Mall Stop 39
Tallahassee, Florida 32308

For Respondent: E. Raymond Shope, Esquire
1404 Goodlette Road North
Naples, Florida 34102

STATEMENT OF THE ISSUE

The issue in these cases is whether Respondent committed the violations alleged in three Administrative Complaints, and,

if so, what appropriate disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On September 7, 2001, Petitioner, the Agency for Health Care Administration (Agency), on behalf of the Board of Hearing Aid Specialists (Board) filed three Administrative Complaints against Robert F. Davidson (Respondent), a Florida-licensed hearing aid specialist, alleging that Respondent engaged in the following misconduct:

Case No. 01-3536PL

Alleges Respondent sold a pair of hearing aids to patient C. L. D., for \$1,795.00 at Hearite Audiological, Inc., in Largo, Florida, on or about September 9, 1998. C. L. D. paid a \$500.00 deposit for the hearing aids. On or about September 21, 1998, the hearing aids were delivered to C. L. D. Patient C. L. D. found the hearing aids to be unsatisfactory and returned them for a refund on October 8, 1998. The refund request was made within thirty days of delivery. Respondent has not refunded C. L. D. her money.

Based on the foregoing, failing to refund patient C. L. D.'s money for the hearing aids within thirty days of delivery, Respondent has violated Subsection 484.0512(1), Florida Statutes, thereby violating Subsection 484.056(1)(h), Florida Statutes.

Case No. 01-3537PL

Alleges Respondent's last known address is 1044 Castello Drive, Suite 105, Naples, Florida 34103. On or May 21, 1998, the Respondent on behalf of Hearite Audiological, Inc. sold a pair of hearing aids to Patient J. C. for \$1,345.00 in Largo, Florida.

On June 5, 1998, Respondent delivered the hearing aids to the patient. On June 12, 1998, the patient, upon being dissatisfied with their use, returned the hearing aids for a refund. Although Hearite accepted the hearing aids, the patient never received a refund.

Based on the foregoing, Respondent's license to practice as a hearing aid specialist in the State of Florida is subject to discipline pursuant to Subsection 484.056(1)(h), Florida Statutes, for repeated violations of Chapter 484, Florida Statutes, Chapter 456, Florida Statutes, or any rule promulgated pursuant thereto, to wit: for violating Section 484.0512, Florida Statutes, for failure to provide refund for a hearing aid returned within thirty (30) days of delivery.

Case No. 01-3538PL

Alleges that on July 10, 1998, Respondent, on behalf of Hearite Audiological Inc. (Hearite), delivered a pair of hearing aids to patient R. L. in Largo, Florida, for which he paid

\$3,195.00. Another Hearite aid specialist had previously signed the sales contract on June 29, 1998.

The patient was dissatisfied with the use of the hearing aids and returned them to Hearite on July 13, 1998, for a refund. Hearite accepted the hearing aids back from the patient on July 13, 1998, and promised the patient a refund. Hearite subsequently went out of business. The patient R. L. never received a refund.

Based on the foregoing the Respondent has violated Subsection 484.056(1)(h), Florida Statutes, by failing to provide a refund for a hearing aid returned within 30 days of delivery in violation of Subsection 484.0512(1), Florida Statutes.

Respondent disputed the allegations in each Administrative Complaint and requested a formal hearing. On September 20, 2001, an Order was issued consolidating the cases for one hearing.

At the hearing, the Petitioner presented the testimony of five witnesses: C. L. D., Chris Vidalis, R. L., Michael T. Marks, and Richard L. Bush, and had thirteen Exhibits (P1-P13) admitted in evidence. Respondent testified in his own behalf and had five Exhibits (R1-5) admitted in evidence.

A Transcript of the proceedings was furnished on November 26, 2001. On December 12, 2001, Respondent's Counsel filed a Motion for Enlargement of Time for Filing Proposed Recommended Order due to his wedding plans over the holiday season. The Motion was unopposed, granted, and the time for filing proposed recommended orders extended to January 15, 2002. Petitioner and Respondent submitted Proposed Recommended Orders on January 14 and 15, 2002, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the observation of the witnesses and their demeanor while testifying, the documentary evidence received in evidence and the entire record compiled herein, the following relevant facts are made:

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 regulation of hearing aid providers in Florida. Section 455, Florida Statutes (1999).

2. Respondent, Robert F. Davidson, has been a licensed hearing aid specialist in this state, holding license number 0000740. From sometime in April and continuing through sometime in December 1998 Respondent was employed as a salaried store manager at Hearite Audiological ("Hearite"), a hearing aid

establishment located at 2700 East Bay Drive, Largo, Florida, 33771, and owned by George Richards and Paula Rogers.

Respondent engaged in testing the hearing of individuals and engaged in selling hearing aids to individuals for Hearite Audiological, Inc. To each individual Respondent sold a hearing aid, he provided that person with a written notice of the 30-day money back guarantee.

Case No. 01-3536PL

3. Patient C. L. D., a hearing impaired-person, visited Hearite on September 9, 1998, and entered an agreement to purchase a pair of hearing aids for \$1,795.00, paying \$500.00 deposit at that time. Patient C. L. D. was provided a sales receipt for her deposit signed by Respondent. On September 21, 1998, Respondent delivered the hearing aids to patient C. L. D. at Hearite and signed the receipt as the person who delivered the hearing aids to the patient.

4. Patient C. L. D., after using the hearing aids, became dissatisfied with them and returned the hearing aids to Respondent at Hearite on October 8, 1998. Respondent accepted the hearing aids from Patient C. L. D. and, pursuant to the terms of the sales contract, Respondent promised Patient C. L. D. a full refund of her \$500.00 deposit.

5. Despite repeated phone calls to Respondent and repeated attempts to obtain the refund, Patient C. L. D. has never

received her refund as promised, and Hearite was later sold to a new owner in January 1999.

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6. On May 26, 1998, hearing-impaired Patient J. C. aged 95 years, and now deceased, along with his daughter, Chris Vidalis, visited Hearite and purchased a hearing aid for \$1,345.00, paying \$500.00 deposit upon execution of the sales contract. On June 5, 1998, Patient J. C. paid the remaining \$845.00 and received his hearing aid.

7. On June 12, 1998, being dissatisfied with its use Patient J. C. returned the hearing aid and requested a refund. Respondent accepted the hearing aid and promised Patient J. C. a refund of \$1,345.00 within 120 days. Patient J. C.'s daughter, Chris Vidalis, who was with her father every time he visited Hearite, made numerous telephone calls and visits to Hearite in attempts to obtain the refund. The refund was never paid and Hearite was sold to a new owner in January 1999.

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8. On or about June 10, 1998, Patient R. L., after several unsolicited telephone calls from someone representing Hearite, visited Hearite for the purpose of having his hearing tested and possibly purchasing a hearing aid. After testing, Patient R. L. purchased a pair of hearing aids at Hearite for \$3,195.00. A

paid in full receipt signed by Al Berg was given to Patient R. L.

9. On or about July 10, 1998, Respondent delivered the hearing aids to Patient R. L. and signed the sales receipt as the licensee who delivered the hearing aids. Upon being dissatisfied with using the hearing aids Patient R. L. returned them to Hearite on July 13, 1998. Kelly Dyson, audiologist employed at Hearite, accepted the hearing aids and promised Patient R. L. a full refund of \$2,840.00, pursuant to the terms of the contract.

10. Patient R. L. made repeated attempts to obtain his refund as promised but has not received one. Hearite was sold to a new owner in January 1999.

11. Respondent's position, that each of the three patients herein above was aware or should have been aware that the sale of hearing aids, and, therefore, the guarantor of the refunds was Hearite Audiological, Inc., and, not himself, is disingenuous.

CONCLUSIONS OF LAW

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

12. The Board seeks to discipline the Respondent's license as a hearing aid specialist because of the misconduct alleged in each of the three administrative complaints herein filed.

13. Regarding his misconduct in treatment of clients, C. L. D., J. C., and R. L., it is alleged that they received hearing aids and returned them within the time specified for their return and refund. Respondent failed to refund the sums paid for the hearing aids as he was bound to do. If proven, these allegations would constitute violations of various provisions of Subsections 484.051(2), 484.0512(1), and 484.056(1)(h), Florida Statutes, and repeated violations of Chapter 455, Florida Statutes. Petitioner has the burden to establish the Respondent's guilt of the offenses alleged in the complaints by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

14. The evidence is clear and convincing that Respondent sold three clients hearing aids under guarantees 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. Petitioner has established that within thirty days of the date of each sale, each client returned the hearing aid, and, informed Respondent they were not satisfied, and, repeatedly requested the refund guaranteed under the terms of the sale.

Not one of the clients received a refund after repeated requests were made.

15. Respondent's conduct constituted violations of Subsection 484.0512(1), Florida Statutes, which provides, in part that:

(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. [EMPHASIS ADDED]

16. Respondent's conduct regarding these three patients could not have been accomplished without proper licensure.

17. Under Section 484.0521, Florida Statutes, Respondent, not Hearite Audiological, Inc., the business, is responsible for providing refunds due each patient.

18. First, the statutory scheme in Chapter 484, part II, Florida Statutes, does not provide for the "licensing" of business entities or jurisdiction over them by the Board of Hearing Aid Specialists to enforce the payment of refunds. It only provides jurisdiction over individuals who are, as is Respondent, licensed hearing aid specialists.

19. Second, Subsection 484.041(3), Florida Statutes (1997) (1999), defines the acts that are considered "dispensing hearing aids."

Section 484.041(3) provides:

(3) "Dispensing hearing aids" means and includes:

(a) Conducting and interpreting hearing tests for purposes of selecting suitable

hearing aids, making earmolds or ear impressions, and providing appropriate counseling.

(b) All acts pertaining to the selling, renting, leasing, pricing, delivery, and warranty of hearing aids.

20. In the cases of C. L. D. (01-3536) and J. C. (01-3537), Respondent signed the sales receipt and accepted the hearing aids back from these two purchasers. Likewise, in the case of R. L. (01-3538) Respondent conducted testing and delivered the hearing aids. These activities of Respondent involved the practice of hearing aid dispensing as above defined.

21. In each of the three cases in the proceeding, Respondent is charged in one count with violating Subsection 484.056(1)(h), Florida Statutes, by failing to pay a refund for hearing aids returned within 30 days of receipt by the purchaser. Petitioner has proven the charges of the three complaints by clear and convincing evidence that Respondent was obligated to pay the refund but failed to do so.

22. 64B6-7.002 Guidelines for Disposition of Disciplinary Cases.

(1) Purpose. The Board provides within this rule disciplinary guidelines which shall be imposed upon applicants or licensees whom it regulates under Chapter 484, F.S. The purpose of this rule is to notify applicants and licensees of the ranges of penalties which will routinely be imposed unless the Board finds it necessary

to deviate from the guidelines for the stated reasons given within this rule. The ranges of penalties provided below are based upon a single count violation of each provision listed; multiple counts of the violated provisions or a combination of the violations may result in a higher penalty than that for a single, isolated violation. Each range includes the lowest and highest penalty and all penalties falling between. The purposes of the imposition of discipline are to punish the applicants or licensees for violations and to deter them from future violations; to offer opportunities for rehabilitation, when appropriate; and to deter other applicants or licensees from violations.

(2) Violations and Range of Penalties. In Imposing discipline upon applicants and licensees, in proceedings pursuant to Section 120.57(1) and 120.57(2), Florida Statutes, the Board shall act in accordance with the following disciplinary guidelines and shall impose a penalty within the range corresponding to the violations set forth below. The verbal identification of offenses are descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included:

23. Rule 64B6-7.002(2)(v), Florida Administrative Code, contains guidelines for the assessment of penalties against licensees shown to have violated provisions of the statute criteria for practice of hearing aid specialists.

24. Rule 64B20-7.005, Florida Administrative Code, authorizes deviation from the normal penalty guidelines for aggravating and mitigating circumstances by the Board. Aggravating circumstances include consideration financial

exploitation and the amount of economic damage to the patient(s).

25. The penalty range for each violation of Subsection 484.056.(1)(h), Florida Statutes, extends from a "reprimand to revocation and an administrative fine of from \$500.00 to \$1,000.00." Consideration of factors both in aggravation and mitigation of the offenses proven is authorized when determining penalty.

26. The evidence proved Respondent consistently failed to refund the moneys paid by the three clients for hearing aids they determined to be unsatisfactory. Therefore, Respondent faces assessment of penalty for three incidents resulting from treatment of three clients.

27. Accordingly, under the circumstances of these consolidated cases, Respondent faces a maximum penalty of revocation and an administrative fine of \$1,500.00 to \$3,000.00.

28. To be sure, the financial loss to Respondent's clients is a matter of aggravation, especially when viewed in the light of their repeated unsuccessful requests for reimbursement.

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 requiring Respondent to pay the following

amounts: to Patient C. L. D., \$500.00, DOAH Case No. 01-3536PL; to Patient J. C. (or his estate) \$1,345.00, DOAH Case No. 01-3537PL, and to Patient R. L., \$2,840.00, DOAH Case 01-3537PL. Further that Respondent be fined \$1,000.00 and be required to pay the appropriate costs of investigation and prosecution. Further, ordered that Respondent's license be suspended and not reinstated until after all payments herein ordered are paid in full, and thereafter place Respondent on probation for a period of not less than one year under the terms and conditions deemed appropriate.

DONE AND ENTERED this 1st day of February, 2002, in Tallahassee, Leon County, Florida.

FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 1st day of February, 2002.

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 must be filed with the agency that will issue the Final Order in this case.