

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
HEARING AID SPECIALISTS,)
)
Petitioner,)
)
vs.) Case No. 02-0220PL
)
GARY P. SEGRETARIO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to Section 120.57(1), Florida Statutes, a formal administrative hearing was held on March 25, 2002, in Sarasota, Florida, before William R. Pfeiffer, a duly-appointed Administrative Law Judge, of the Division of Administrative Hearings.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

The issue presented in this case is whether Respondent, Gary Segretario, committed the violations alleged in the Amended

Administrative Complaint, and, if so, what penalty should be imposed by Petitioner.

PRELIMINARY STATEMENT

On or about December 27, 2000, Petitioner filed a four-count Administrative Complaint alleging that Respondent (1) failed to provide a refund to patient D.V. in violation of Section 484.056(1)(h), Florida Statutes; (2) committed misconduct in the practice of hearing aid dispensing in violation of Section 484.056(1)(g), Florida Statutes; (3) made false and misleading representations to a patient in violation of Section 484.056(1)(k), Florida Statutes; and (4) implied to a patient that a hearing aid would improve or preserve hearing in violation of Section 484.056(1)(q), Florida Statutes.

At the hearing, Petitioner presented the testimony of four witnesses and offered 16 exhibits of which 15 were admitted into evidence. Respondent testified and presented testimony from four witnesses and entered two exhibits into evidence.

Both parties submitted Proposed Recommended Orders which were considered.

FINDINGS OF FACT

1. Respondent, Gary Segretario, is and at all times material hereto was a licensed hearing aid specialist in the state of Florida, holding license number AS2321.

2. Petitioner, Department of Health, Board of Hearing Aid Specialists, is the state agency charged with the authority and duty to regulate the practice of hearing aid dispensing within the state of Florida.

3. In June 1997, purportedly in response to increasing misconduct by various hearing aid specialists, the Board of Hearing Aid Specialists issued an emergency rule amending Rule 61G-9-6.010, Florida Administrative Code, and changing the justification for the purchaser's refund from a measured improvement in the purchaser's hearing to failure of the purchaser to obtain satisfaction from the hearing aid. In 1999, the Florida Legislature created Section 484.0512(3), Florida Statutes, and added a 30-day refund provision into the Statute when the purchaser has a valid reason as defined by the Board's Rule.

4. On April 24, 1998, in response to a telephone solicitation, patient D.V. presented to Hearing Care 2000 in Daytona, Florida, for the purpose of a hearing examination. On that date, patient D.V. was tested by Respondent and his assistant Eric Collins, a licensed hearing aid specialist trainee.

5. Following the testing, Respondent recommended and patient D.V. agreed to purchase a hearing aid for his left ear. There is insufficient evidence to conclude that Respondent

advised patient D.V. that he would lose his hearing if he did not purchase a hearing aid. The contract provided for a 30-day refund of the hearing aid purchase.

6. On or about April 29, 1998, Respondent received the hearing aid from the manufacturer and contacted patient D.V. An appointment for delivery of the hearing aid was scheduled for May 1, 1998. After patient D.V. missed the appointment, another appointment was scheduled for May 15, 1998.

7. On May 15, 1998, Respondent presented the hearing aid to D.V. At the time of delivery, patient D.V. complained of feedback and Respondent immediately placed a vent plug in the hearing aid. Patient D.V. departed Respondent's office with the hearing aid in his possession on May 15, 1998.

8. On or about May 19, 1998, patient D.V. returned to Respondent's office complaining of feedback. To cure the problem, Respondent forwarded the hearing aid to the manufacturer for a soft coat finish.

9. Three days later on May 22, 1998, patient D.V. returned for the hearing aid, was again tested, scored 100 percent without feedback, and took possession of the aid. To ensure satisfaction, a follow-up appointment was scheduled for May 29, 1998; however, patient D.V. failed to appear.

10. On June 29, 1998, patient D.V. entered Respondent's office and demanded a refund. Upon being denied, patient D.V.

physically attacked trainee Collins, threw the hearing aid at the receptionist, and eventually departed.

11. The evidence deduced at Hearing indicates that patient D.V. physically maintained possession of the hearing aid from May 15, 1998, through May 19, 1998, and May 22, 1998, through June 29, 1998, a total of 43 days, before requesting a refund.

12. The following day, on June 30, 1998, Respondent's wife, Barbara Segretario, advised patient D.V. via letter that he was no longer permitted within the Daytona office.

13. Shortly thereafter, patient D.V. contacted his credit card company and disputed the hearing aid charge apparently alleging that he never signed the credit card slip. Cathy Gionfriddo, an employee at Hearing Care 2000, forwarded a copy of patient D.V.'s signed credit card slip and signed contract to the credit card company for signature comparison.

14. Following the lengthy dispute process, the credit card company ruled in favor of Hearing Care 2000. Thereafter, patient D.V. filed a small claims action against Respondent, wherein the small claims judge ruled in favor of patient D.V. and awarded him a \$450.00 judgment. Patient D.V. received the money in April 2000.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter pursuant to Section 120.57(1), Florida Statutes.

16. Petitioner is the state agency charged with the authority and duty to regulate the practice of hearing aid dispensing within the state of Florida.

17. Statutes authorizing disciplinary action are penal in nature and must be strictly construed. Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981).

18. Petitioner has the burden of proving the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osbourne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

19. Pursuant to Section 484.0512, Florida Statutes, a person selling a hearing aid in Florida must provide the purchaser with a 30-day trial period and money back guarantee if the purchaser is not satisfied. Section 484.0512(1), Florida Statutes, clarifies the 30-day period and provides that a refund shall be tolled during any periods the hearing aid is being repaired, remade, or adjusted.

20. Section 484.056(1)(h), Florida Statutes, provides for disciplinary action against a hearing aid specialist who has violated the 30-day money back guarantee.

21. In the case at hand, Petitioner alleges that Respondent failed to timely provide patient D.V. with a refund thereby violating the Statute. As a result of the violation, Petitioner alleges that Respondent has also violated Section 484.056(1)(g), Florida Statutes, by engaging in fraud, deceit, or misconduct in the practice of dispensing hearing aids.

22. Petitioner further alleges that Respondent, by failing to provide patient D.V. with a refund, has violated Section 484.056(1)(k), Florida Statutes, using a guarantee or representation that is misleading, deceitful, or untrue.

23. And finally, Petitioner alleges that Respondent stated or implied to patient D.V. that the use of a hearing aid would improve or preserve his hearing or prevent the progression of a hearing impairment in violation of Section 484.056(1)(q), Florida Statutes.

24. Petitioner has failed to provide clear and convincing evidence that patient D.V. timely sought a refund thereby entitling him to the money. In fact, patient D.V.'s testimony was inconsistent and incredible. The evidence demonstrates that the 30-day refund period had expired on or about June 21, 1998,

prior to patient D.V.'s request for a refund and subsequent aggressive episode.

25. Specifically, the hearing aid was initially delivered to patient D.V. on May 15, 1998. It was sent to the lab for a soft coat on May 19, 1998, and reclaimed by patient D.V. on May 22, 1998. Thereafter, it was in patient D.V.'s possession until June 29, 1998, when he returned to Hearing Care 2000, accosted Eric Collins, and demanded a refund.

26. Petitioner has failed to prove that Respondent violated the 30-day refund requirement within Section 484.0512, Florida Statutes, and therefore, did not demonstrate that Respondent violated Subsections 484.056(1)(h), (g), and (k), Florida Statutes.

27. Finally, regarding Petitioner's allegation that Respondent implied to patient D.V. that his hearing would deteriorate in the absence of the hearing aid device, there was no credible evidence presented that Respondent or his assistant made any representations. While patient D.V. claims that the statement was made by "someone" other than Respondent, there is no clear and convincing evidence to support the allegation.

RECOMMENDATION

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

RECOMMENDED that the Board of Hearing Aid Specialist issue a Final Order dismissing the Administrative Complaint filed against Respondent.

DONE AND ENTERED this 11th day of September, 2002, in Tallahassee, Leon County, Florida.

WILLIAM R. PFEIFFER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 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 should be filed with the agency that will issue the Final Order in this case.