

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| DEPARTMENT OF HEALTH, BOARD OF |) | |
| HEARING AID SPECIALISTS, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Case No. 02-1360PL |
| |) | |
| GAGE DAVEY, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this proceeding on June 4, 2002, in New Port Richey, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Gage Davey, pro se
6521 Berea Lane
New Port Richey, Florida 34653

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsections 484.056(1)(g) and (h), Florida Statutes (1999), respectively, by committing fraud, deceit, negligence,

incompetence, or misconduct in the dispensing of a hearing aid and by failing to provide a sales receipt and other required information; and, if so, what penalty, if any, should be imposed against Respondent's license as a hearing aid specialist. (All chapter and section references are to Florida Statutes (1999) unless otherwise stated.)

PRELIMINARY STATEMENT

On July 10, 2000, Petitioner filed an Administrative Complaint against Respondent. Respondent timely requested an administrative hearing.

At the hearing, Petitioner presented the testimony of three witnesses and submitted three exhibits for admission in evidence. Respondent testified in his own behalf and submitted one exhibit for admission in evidence.

The identity of the witnesses and exhibits and any attendant rulings are set forth in the Transcript of the hearing filed on July 10, 2002. At the request of Petitioner, the ALJ extended the time for filing the proposed recommended orders ("PROs") until August 6, 2002. Petitioner timely filed its PRO on July 23, 2002. Respondent did not file a PRO.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating the practice of hearing aid specialists in Florida

pursuant to Chapter 484. Respondent is licensed as a hearing aid specialist in Florida pursuant to license number AS0002712.

2. The Administrative Complaint involves the sale and service of an original pair of hearing aids and replacement hearing aids to a single customer. The record identifies the customer as C.P. in order to preserve the customer's confidentiality.

3. C.P. is an elderly gentleman who is hearing impaired. C.P.'s wife accompanied and assisted C.P. in most of his dealings with Respondent.

4. On February 16, 1999, Respondent performed a free hearing test on C.P. at Elfers Optical and Hearing Company (Elfers). Elfers is located on State Road 54 in New Port Richey, Florida. C.P. had heard of Respondent from a friend and responded to a newspaper advertisement by Elfers for a free hearing test.

5. Respondent advised C.P. that C.P. needed two hearing aids. Respondent concluded that C.P. needed a hearing aid for each ear for balance.

6. Respondent recommended programmable hearing aids for several reasons. Respondent represented that programmable hearing aids could be programmed for hearing needs that change over time and therefore would not have to be replaced. However, programmable hearing aids are more expensive than others.

7. C.P. stated that he wanted to think about it. C.P. left the office and subsequently made an appointment for a return visit on February 19, 1999.

8. When C.P. returned to Elfers on February 19, 1999, Respondent was sick and not in the office. Ms. Phillys Strand (Strand), Respondent's employee, saw C.P. and his wife.

9. C.P. stated that he had decided to purchase the programmable hearing aids recommended by Respondent. Strand fitted C.P. for two hearing aids and had C.P. execute a contract for the purchase of two Philips Encanto II programmable hearing aids (Encantos) at the total price of \$3,832 (the contract). C.P. paid \$3,832 on February 19, 1999.

10. The contract states that there was a one-year warranty on the hearing aids. The one-year warranty covered replacement or repair but not a refund of the purchase price. The contract specifically states that C.P. had only 30 days from the date of delivery (the 30-day trial period) in which to obtain a refund of the purchase price.

11. Respondent delivered the Encantos to C.P. on March 1, 1999. C.P. returned to Elfers on March 3, 1999, complaining that the hearing aids hurt his ears. Respondent ground down the hearing aids, and C.P. left Elfers with the modified hearing aids.

12. C.P. returned to Elfers on March 10, 1999, and requested a refund from Respondent. C.P. explained that he had recently learned that he needed surgery on one of his ears to remove a cancerous lesion and would be unable to use the hearing aids before the expiration of the 30-day trial period for obtaining a refund.

13. On March 10, 1999, Respondent stated to C.P. that under Florida law C.P. had one year in which to obtain a refund. Neither Florida law nor the manufacturer provides a warranty that authorizes a refund for one year.

14. The provisions in the contract pertaining to a refund of the purchase price merely reflect the terms of the applicable section of Florida Statutes. In relevant part, the purchase contract provides:

Unless otherwise stated, the hearing aid is new and warranted for one year by dispenser The guarantee shall permit the purchaser to cancel 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. In the event of cancellation within the 30-day trial period, [Elfers] will retain \$150 plus 5% of total purchase price on monaural fitting, or \$200 plus 5% of total purchase price on binaural fitting for ear molds and services provided to fit the hearing aids, pursuant to 484.0512FS. . . .

15. On March 10, 1999, C.P. properly tendered the Encantos to Respondent in accordance with the requirements of the contract and Section 484.0512. C.P. had a valid reason, within the meaning of the contract and applicable law, for the failure to achieve satisfaction with the Encantos. C.P. properly requested a refund within the 30-day trial period that began on March 1, 1999, when Respondent delivered the Encantos to C.P.

16. On March 10, 1999, Respondent had actual knowledge that C.P. had properly tendered the Encantos for a valid reason and properly requested a refund. Respondent had actual knowledge of the falsity of the statement that Florida law allowed C.P. one year in which to obtain a refund. Respondent had actual knowledge that neither Florida law nor any warranty amends the 30-day trial period prescribed in the contract and Section 484.0512 for obtaining a refund. In any event, Respondent had constructive knowledge that his statements to C.P. were false.

17. The misrepresentation by Respondent on March 10, 1999, induced C.P. to retain the Encantos. The false statements by Respondent on March 10, 1999, induced C.P. to unknowingly allow the lapse of his statutory and contractual right to a refund. Respondent had actual, or constructive knowledge, of the effect of Respondent's false statement to C.P.

18. C.P. underwent surgery on March 24, 1999, and could not wear the Encantos again until May 21, 1999. When C.P. began wearing the Encantos again on May 21, 1999, the left hearing aid hurt his ear. C.P. compared the two hearing aids and discovered that the left hearing aid was longer than the right.

19. On May 27, 1999, C.P. and his wife returned to Respondent. Respondent made a new impression, using a substance different from that used by Strand for the initial impression, and told C.P. that Respondent would send the impression to the manufacturer for a new set of hearing aids. C.P. and his wife would be traveling in New York when Respondent received the new hearing aids, and Respondent agreed to mail the new hearing aids to C.P. in New York.

20. C.P. received the new hearing aids while he was in New York. C.P. heard a "swishing" noise in the new hearing aids when people around him were talking.

21. C.P. advised Respondent of the bothersome noise. Pursuant to Respondent's instructions, C.P. returned the hearing aids to Respondent.

22. C.P. received hearing aids directly from the manufacturer on July 21, 1999, while C.P. was still in New York. The hearing aids created a pulsating sound. The volume wheel did not work, and the left hearing aid fell out of C.P.'s ear on at least one occasion.

23. Respondent told C.P. that Respondent would have Betty Lou Gage (Gage), Respondent's assistant, locate a hearing aid specialist in New York where C.P. could take the hearing aids. On August 6, 1999, C.P. took the hearing aids to Genesee Hearing Aid in Buffalo, New York (Genesee), pursuant to Gage's instructions. Genesee advised C.P. that they did not work on Phillips programmable hearing aids and charged C.P. \$15.

24. On September 30, 1999, C.P. and his wife went to Respondent's office. C.P. complained that the hearing aids were whistling and falling out of his ears.

25. While C.P. was in Respondent's office on September 30, 1999, C.P. requested a refund of the purchase price for a valid reason and tendered the hearing aids to Respondent in good condition. The tender and request for refund was within the one-year period previously represented by Respondent as required by Florida law.

26. Respondent advised C.P. that the warranty was over. Respondent asked C.P. if C.P. wanted Respondent to send the hearing aids back to the manufacturer and have the manufacturer make the hearing aids automatic. C.P. agreed.

27. On October 21, 1999, C.P. returned to Respondent's office for the new hearing aids. The toggle switch used for adjusting hearing aids was still on the outside of the hearing

aids, but C.P. accepted the hearing aids anyway. Respondent advised C.P. not to wear the hearing aids while hunting.

28. C.P. did not wear the hearing aids in November 1999 because he was hunting in New York. In December 1999, C.P. asked his wife to check the serial numbers on the hearing aids. C.P. and his wife discovered that the hearing aids were not Encantos.

29. When C.P. and his wife returned to Florida, they went to Hearx, the provider of hearing aids under C.P.'s new insurance policy with Humana. A specialist at Hearx examined the hearing aids and confirmed that the hearing aids were not Phillips programmable hearing aids. Rather, they were half-shell conventional hearing aids with a retail value that ranged from \$700 to \$900.

30. C.P. telephoned Elfers on January 19, 2000. A representative at Elfers advised C.P. that C.P. would need to speak to Respondent and that Respondent was no longer employed at that location. The representative advised C.P. to try reaching Respondent at the Holiday office.

31. C.P. and his wife found Respondent at the Holiday office. C.P. advised Respondent that the hearing aids were not the Encantos C.P. had purchased and requested a refund. The request for refund was made within the one-year period represented by Respondent on March 10, 1999, in which C.P. could

request a refund. C.P. also requested the telephone number for Phillips. Respondent told C.P. that Phillips was out of business and left the office.

32. Jeff Ruff, another employee at the Holiday office, offered to try a new substance to put a seal around the hearing aids for a better fit. C.P. left the hearing aids with Ruff and obtained a receipt.

33. C.P.'s wife telephoned Phillips, provided the serial numbers for the Encantos, and asked whether Respondent had returned the Encantos. The representative for Phillips stated that Respondent had returned the Encantos on October 8, 1999, and that Phillips had sent the half-shell conventional hearing aids back to Respondent. The serial numbers of the half-shell conventional hearing aids sent to Respondent matched those on the hearing aids that C.P.'s wife checked in December 1999.

34. The market value of the half-shell conventional hearing aids is more than \$2,000 less than that of the Encantos. Respondent should have refunded the difference in market value to C.P. Respondent did not refund the difference in market price to C.P. Respondent did not provide C.P. with any written documentation, including a sales receipt, for the half-shell conventional hearing aids; did not provide C.P. with a warranty for the half-shell conventional hearing aids; did not advise C.P. that Respondent had changed the hearing aids provided to

C.P.; and did not advise C.P. of the difference in market value between the Encantos and half-shell conventional hearing aids.

35. Respondent has not refunded any money to C.P. Respondent has not otherwise made restitution for the harm suffered by C.P.

36. This is not Respondent's first offense. Petitioner has previously disciplined Respondent's license in two cases in which Respondent either allowed the 30-day trial period to lapse before taking action requested by the customer or refused to refund the entire amount of the purchase price. Petitioner imposed administrative fines in those two cases that totaled \$1,000; required Respondent to pay costs of \$805; and required Respondent pay a refund to the customer in the amount \$544.

37. A substantial period of time has not lapsed since Respondent's previous discipline. Petitioner entered a final order in the previous two cases on April 15, 2002.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the parties and the subject matter. The parties received adequate notice of the administrative hearing. Section 120.57(1).

39. Petitioner has the burden of proof. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in Administrative Complaint and the reasonableness of any penalty. Department of Banking and

Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1st DCA 1987).

40. Petitioner satisfied its burden of proof. Petitioner showed by clear and convincing evidence that Respondent dispensed both the Encantos and conventional hearing aids, within the meaning of Section 484.041(3); and committed fraud, deceit, and misconduct in the practice of hearing aid dispensing in violation of Section 484.056(1)(g). Respondent had either actual or constructive knowledge that: C.P. did not have one year in which to obtain a refund of the \$3,832 that C.P. paid for the Encantos; Respondent replaced the Encantos with substantially less expensive conventional hearing aids; did not inform C.P. of the change in hearing aids; and did not refund the difference in purchase price to C.P. If it were determined that Respondent did not have the culpable knowledge required to be guilty of fraud, deceit, and misconduct, Respondent is guilty of negligence and incompetence.

41. Petitioner showed by clear and convincing evidence that Respondent violated Section 484.056(1)(h) by failing to provide C.P. with a sales receipt for the half-shell conventional hearing aids. Respondent also failed to provide

C.P. with any other written documentation of the sale of the second pair of hearing aids, including a written warranty or written documentation of the serial numbers.

42. Florida Administrative Code Rule 64B6-7.002(2)(u) and (v) authorizes a range of penalties for the violations committed by Respondent in this case. The Rule authorizes Petitioner to discipline Respondent's license with a penalty that ranges from a reprimand to revocation of Respondent's license and to impose an administrative fine in an amount that ranges from \$500 to \$1,000. Rule 64B6-7.002(3) authorizes Petitioner to deviate from the penalties described in the preceding paragraph if the facts and circumstances in a particular case demonstrate aggravating circumstances.

43. Petitioner showed by clear and convincing evidence the presence of aggravating circumstances that warrant license discipline greater than those generally authorized in Rule 64B6-7.002(2). First, Respondent's fraud, deceit, misconduct, negligence, and incompetence were not limited to a single isolated event but continued for several months. Second, Respondent's violations resulted in substantial financial harm to C.P. Third, Respondent has not made restitution to C.P. Fourth, this is not the first offense by Respondent. Fifth, the previous offenses by Respondent involve similar facts to those

in this case. Finally, the previous offenses by Respondent are recent and are not removed in time from the current offense.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a Final Order finding Respondent guilty of violating Subsections 484.056(1)(g) and (h); revoking Respondent's license; assessing an administrative fine of \$2,000 and the costs of investigation and prosecution; requiring Respondent to make restitution to C.P. in the amount of \$3,832; and requiring Respondent to pay all fines, costs, and restitution within 30 days of the date of the Final Order.

DONE AND ENTERED this 6th day of September, 2002, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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this 6th 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.