STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF HEARING AID SPECIALISTS,	)	
Petitioner,	)	
vs.	)	Case Nos. 03-0402PL
	)	03-0403PL
KENT BROY,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice a final hearing was held in these two consolidated cases on May 19, 2003, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings by means of a televideo connection between West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Diane L. Guillemette, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

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

STATEMENT OF THE ISSUES

The issues in these two consolidated cases concern whether Respondent committed several violations alleged in two separate

administrative complaints and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

At the final hearing in these cases, Petitioner presented the testimony of one witness[1] and offered 11 exhibits. Objection to Petitioner's Exhibit 9 was sustained. Petitioner's other exhibits were all received. Petitioner also attempted to make arrangements for a second witness to testify at the final hearing, but at the time of the hearing the whereabouts of the second witness could not be determined.[2]

Respondent testified on his own behalf and also had two exhibits marked for identification. Respondent's Exhibit 1 was received in evidence. Respondent's Exhibit 2 was not offered. Respondent did not call any additional witnesses.

At the conclusion of the final hearing Petitioner was allowed ten days within which to file a written statement as to the reasons one of its witnesses did not appear. Petitioner was also allowed ten days within which to file a motion seeking to reopen the record of the hearing to receive the testimony of the witness who could not be found on May 19, 2003.

On May 23, 2003, Petitioner filed a written statement setting forth the reasons for the failure of witness M. G. to appear on May 19 and requesting that the hearing be reconvened for the purpose of receiving the testimony of M. G. On June 2,

2003, Respondent filed a motion in opposition to Petitioner's request that the hearing be reconvened.

By means of an order issued on June 3, 2003, the request that the hearing be reconvened was denied and the parties were advised that the deadline for filing their respective proposed recommended orders would be June 18, 2003. Thereafter, both parties filed proposed recommended orders containing proposed findings of fact and conclusions of law.[3] The parties' proposals have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to these consolidated cases, Respondent was a licensed hearing aid specialist in the State of Florida, having been issued license number AS 2169.

2. On or about February 8, 2001, S. K. visited Respondent's business located at 3971 Jog Road, Suite 7, Greenacres, Florida, in order to buy hearing aids. On that day S. K. purchased two Audibel brand hearing aids. The invoice provided to S. K. clearly indicates that he was purchasing Audibel brand hearing aids. There is no mention of Beltone anywhere on the invoice.

3. The two hearing aids purchased by S. K. on February 8, 2001, were delivered to S. K. on February 23, 2001. Hearing aids of the type purchased by S. K. are specially manufactured

to address the specific needs of each patient. Accordingly, the hearing aids must be manufactured after the contract is entered into. At the time of the delivery of the hearing aids, S. K. was provided with an invoice that contained the name of the manufacturer, the serial numbers of the hearing aids, and the two-year warranty by Audibel.

4. S. K. returned several times for adjustments to the new Audibel brand hearing aids. On March 20, 2001, the hearing aids were sent to the factory to change the volume control to a screw set control. The repair agreement document filled out by Respondent on March 20, 2001, contains the Beltone name and logo in one corner, but does not otherwise mention Beltone. The hearing aids were returned to S. K. on March 29, 2001.

5. Sometime thereafter, S. K. decided to spend the summer in Connecticut. Before leaving for Connecticut, S. K. asked Respondent's secretary for the name of a Beltone dealer near his Connecticut address. The secretary provided the requested information.

6. S. K. mistakenly thought he had purchased Beltone brand hearing aids from Respondent until June 24, 2001, when S. K. visited a Beltone dealer in Connecticut for adjustments.

7. On or about June 24, 2001, a Beltone dealer in Connecticut wrote a letter to Respondent on S. K.'s behalf requesting a refund for S. K.

8. Respondent did not state or imply to S. K. that Respondent was selling Beltone brand hearing aids to S. K. To the contrary, Respondent specifically told S. K. that Respondent was selling Audibel brand hearing aids to S. K.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these two consolidated cases. Sections 120.569 and 120.57(1), Florida Statutes.

10. At all times material to these cases, Rule 64B6-7.005, Florida Administrative Code, read as follows:

> A hearing aid specialist shall not make or permit to be made a false or misleading communication about the hearing aid specialist or the hearing aid specialist's services. A communication is false or misleading if it:
>
> (1) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (2) Is likely to create an unjustified expectation about results the hearing aid specialist can achieve.

11. At all times material to these cases, Section 484.051(2), Florida Statutes (2000), read as follows:

> (2) Any person who fits and sells a hearing aid shall, at the time of delivery, provide the purchaser with a receipt containing the seller's signature, the address of her or

> his regular place of business, and her or his license or trainee registration number, if applicable, together with the brand, model, manufacturer or manufacturer's identification code, and serial number of the hearing aid furnished and the amount charged for the hearing aid. The receipt also shall specify whether the hearing aid is new, used, or rebuilt and shall specify the length of time and other terms of the guarantee and by whom the hearing aid is guaranteed. When the client has requested an itemized list of prices, the receipt shall also provide an itemization of the total purchase price, including, but not limited to, the cost of the aid, earmold, batteries and other accessories, and any services. Notice of the availability of this service shall be displayed in a conspicuous manner in the office. The receipt also shall state that any complaint concerning the hearing aid and guarantee therefor, if not reconciled with the licensee from whom the hearing aid was purchased, should be directed by the purchaser to the Department of Health. The address and telephone number of such office shall be stated on the receipt.

12. At all times material to these cases, Section 484.056(1), Florida Statutes (2000), read as follows, in pertinent part:

> (1) The following acts relating to the practice of dispensing hearing aids shall be grounds for both disciplinary action against a hearing aid specialist as set forth in this section and cease and desist or other related action by the department as set forth in s. 456.065 against any person owning or operating a hearing aid establishment who engages in, aids, or abets any such violation:
>
> * * *

(g) Proof that the licensee is guilty of fraud or deceit or of negligence, incompetency, or misconduct in the practice of dispensing hearing aids.
(h) Violation or repeated violation of this part or of chapter 456, or any rules promulgated pursuant thereto.

* * *

(k) Using, or causing or promoting the use of, any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or other representation, however disseminated or published, which is misleading, deceiving, or untruthful.

* * *

(n) Representation, advertisement, or implication that a hearing aid or its repair is guaranteed without providing full disclosure of the identity of the guarantor; the nature, extent, and duration of the guarantee; and the existence of conditions or limitations imposed upon the guarantee.

13. In a case of this nature, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Proof greater than a mere preponderance of the evidence must be presented by Petitioner to meet its burden of proof. 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, 294

(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 . . . .").

14. 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). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

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

16. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] 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 [in the charging instrument] 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).

17. Turning first to the allegations of the administrative complaint in DOAH Case No. 03-0402PL (the case involving patient S. K.), Petitioner concedes that Counts IV and V of the administrative complaint should be dismissed because the greater weight of the evidence is other than as alleged in those two counts.

18. Count I of the administrative complaint in Case No. 03-0402PL alleges that Respondent has violated Section 484.056(1)(g), Florida Statutes (2000), "by committing fraud, deceit, or misconduct in the practice of hearing aid dispensing." Petitioner describes its theory of the basis for this allegation as being: ". . . in that his business premises and dealings with S. K. lead S. K. to believe that the hearing aids he had purchased were Beltone brand hearing aids." The evidence in this case is simply insufficient to support such a view of the matter.[4] There is no clear and convincing evidence in the record of this case that Respondent committed fraud, deceit, or misconduct in the practice of hearing aid dispensing.[5] Accordingly, Count I of the administrative complaint in DOAH Case No. 04-0402PL should be dismissed.

19. Count II of the administrative complaint in DOAH Case No. 03-0402PL alleges that Respondent has violated Section 484.056(1)(k), Florida Statutes (2000), "by using, causing or promoting the use of any representation that is misleading,

deceiving, or untruthful." And Count III of the administrative complaint in DOAH Case No. 03-0402PL alleges that Respondent has violated Section 484.056(1)(h), Florida Statutes (2000), "by violating Rule 64B6-7.005(1), Florida Administrative Code, by making misleading representations about his services." Although alleged to constitute separate violations of additional statutory and rule provisions, the alleged conduct which forms the basis for the allegations in Counts II and III is essentially the same alleged conduct that forms the basis for the violation alleged in Count I. Reduced to their simplest terms, all three of these counts allege that Respondent misled S. K. and misrepresented facts to S. K. so as to deceive S. K. into believing that he was purchasing Beltone brand hearing aids when, in fact, Respondent was selling another brand of hearing aids to S. K. Counts II and III fail for the same reason as Count I; namely, there is no clear and convincing evidence that the Respondent misled S. K., misrepresented any material facts to S. K., or deceived S. K. Accordingly, Counts II and III of the administrative complaint in DOAH Case No. 03-0402PL should also be dismissed.

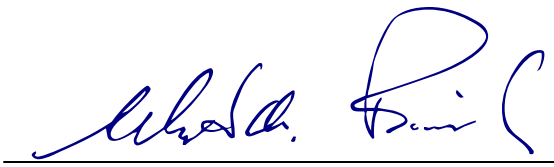
20. The remaining case is more quickly and easily disposed of. The administrative complaint in DOAH Case No. 03-0403PL (the case involving the patient identified as M. G.) should be dismissed because M. G. failed to testify and there was no other

persuasive evidence submitted in support of the allegations of the administrative complaint in that case.[6]

RECOMMENDATION

On the basis of the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the Board of Hearing Aid Specialists enter a Final Order concluding that all counts in both Administrative Complaints in these two consolidated cases should be dismissed because the evidence is insufficient to prove the violations alleged by clear and convincing evidence.

DONE AND ENTERED this 24th day of July, 2003, in Tallahassee, Leon County, Florida.



MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2003.

ENDNOTES

1/ The witness who appeared at the hearing at the request of the Petitioner was S. K., the patient mentioned in the Administrative Complaint in DOAH Case No. 03-0402PL.

2/ The witness who could not be located on May 19, 2003, was M. G., the patient mentioned in the Administrative Complaint in DOAH Case No. 03-0403PL.

3/ Respondent filed a motion seeking an enlargement of time within which to file his proposed recommended order, but then filed his proposed recommended order prior to any ruling on his motion. Respondent's proposed recommended order has been treated as timely-filed.

4/ There is reason to wonder why Respondent had a Beltone sign or logo at his business premises and there is reason to wonder why the Beltone name or logo appeared on Respondent's repair agreement form (see Petitioner Exhibit 4), but wondering why is quite a different thing than being clearly convinced.

5/ In this regard it must be noted that the testimony of the patient S. K. was unreliable and unpersuasive. S. K. did not appear to have a clear recollection of the specific details of his interactions with Respondent. By way of example, at the final hearing S. K. did not recognize Respondent and inquired as to who Respondent was and why Respondent was at the hearing.

6/. Petitioner concedes as much in its proposed recommended order where it suggests the following as the recommended disposition of the administrative complaint in DOAH Case No. 03-0403PL: "Since no evidence was submitted in regards to the complaint involving M. G. that that complaint be dismissed."

COPIES FURNISHED:

Diane L. Guillemette, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

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

Susan Foster, Executive Director
Board of Hearing Aid Specialists
Department of Health
Division of Medical Quality Assurance Boards
4052 Bald Cyress Way, Bin C08
Tallahassee, Florida 32399-1701

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

William W. Large, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Dr. John O. Agwunobi, Secretary
Department of Health
4052 Bald Cypress Way, Bin A00
Tallahassee, Florida 32399-1701

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.