

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
HEARING AID SPECIALISTS,)
)
Petitioner,)
)
vs.) Case Nos. 03-0404PL
) 03-0405PL
DONALD STEPHENS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 5, 2003, in Lakeland, Florida, before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

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

Whether Respondent violated Subsections 484.051(2),
484.056(1)(g), 484.056(1)(h), 484.056(1)(k), 484.053(1)(f),
484.053(3), 455.624(1)(j), and 484.0512(1), Florida Statutes,¹

and Rule 64B6-6.010, Florida Administrative Code, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On April 25, 2001, Petitioner, Department of Health (Department), filed a four-count Administrative Complaint against Respondent, Donald Stephens (Stephens),² alleging that Stephens violated Subsections 484.0512(1), 484.056(1)(h), 484.051(2), and 484.056(1)(k), Florida Statutes, and Rule 64B6-6.010, Florida Administrative Code.³ The Department also filed a three-count Administrative Complaint against Stephens on April 25, 2001, alleging that Stephens violated Subsections 484.056(1)(g), 484.053(1)(f), 484.053(3), 484.056(1)(h), and 455.624(1)(j), Florida Statutes. Stephens filed an Answer to Complaint, answering the allegations contained in both Administrative Complaints. The cases were forwarded to DOAH, where the cases were assigned DOAH Case Nos. 04-0404PL and 04-0405PL, respectively. By Order of Consolidation dated February 17, 2003, the cases were consolidated.

The final hearing was scheduled for April 1, 2003. On March 18, 2003, Respondent filed Respondent's Motion for Continuance, which was granted. The final hearing was rescheduled for May 5, 2003.

The parties filed a Pre-Trial Stipulation and stipulated to certain facts in section (e) of the Pre-Trial Stipulation. Those facts have been included in this Recommended Order.

At the final hearing, Petitioner called Joseph Stephen Wright, J.F., and O.G. Petitioner's Exhibits 1 through 17 were admitted in evidence. Respondent testified on his own behalf. Respondent's Exhibit 2 was admitted in evidence.

Respondent proffered Respondent's Exhibit 1, relating to Respondent's discharge in bankruptcy. The parties briefed the issue of whether the discharge in bankruptcy could be considered in this proceeding. An order was entered on May 27, 2003, admitting Respondent's Exhibit 1 in evidence and allowing the testimony given at the final hearing on the issue of Respondent's discharge in bankruptcy.

Neither party ordered a transcript of the final hearing. At the final hearing the parties agreed to file their proposed recommended orders on or before June 2, 2003. Respondent filed his Proposed Recommended Order on June 2, 2003. Petitioner filed its Proposed Recommended Order on June 10, 2003, and did not request an extension of time to file its Proposed Recommended Order. On June 12, 2003, Respondent filed a Motion to Strike Petitioner's Proposed Recommended Order as being untimely filed. The Motion to Strike is GRANTED.

FINDINGS OF FACT

1. Stephens is and has been, at least since March 1999, a licensed Hearing Aid Specialist. His license number is AS 0002599.

2. On April 26, 1999, O.G. purchased a pair of hearing aids from Stephens. The total price of the hearing aids was \$3200. O.G. paid \$1600 using his Visa credit card on April 26. The hearing aids were delivered by Stephens to O.G. on May 14, 1999, at which time O.G. paid the remaining \$1600 by Visa credit card.

3. O.G. was not happy with the hearing aids and returned to Stephens' place of business, Hearing World, sometime in June 1999. Stephens convinced O.G. to try a different pair of hearing aids instead of getting a refund. O.G. agreed, and Stephens ordered a new pair of hearing aids, which Stephens delivered on June 30, 1999.

4. O.G. was not happy with the second pair of hearing aids and again returned them to Hearing World. Stephens persuaded O.G. to try another set of hearing aids. By letter dated July 26, 1999, Stephens advised as follows:

This letter is to confirm that:

When you receive your remade instruments on or before August 15, 1999, you will have 30 days to try them without penalty. Should you decide that you wish to return them for

a refund you may do so and receive a full refund of your investment.

Further, should you need an extension of the trial it will be granted based on your request before the original trial expires.

O.G. agreed to Stephens' proposition. The third set was delivered on August 14, 1999.

5. The third set of hearing aids was also unacceptable to O.G. Stephens ordered a fourth pair and delivered them to O.G. on October 1, 1999. O.G. was not satisfied with the fourth pair and asked for a refund. On November 19, 1999, O.G. received a letter from Stephens stating:

We are in receipt of your request for cancellation. I do accept this letter as your notice. We are very sorry that we were not able to satisfy your hearing needs. We are having a very difficult time financially at this time and will not be able to refund your money as timely as you would like. However, we do owe you a refund and will take care of it as soon as we are financially able to do so. The refund time is running about 8 weeks.

6. O.G. did receive \$300 from Stephens as part of the refund. Stephens made no further payments to O.G.

7. On February 15, 1999, Joseph Wright (Wright) applied to the Department for admittance to the hearing aid specialist training program and was approved for the training program period March 12, 1999, through September 11, 1999. The notice from the Department to Wright advising him that he was approved

for the training program stated: "A trainee may continue to function as a trainee until receipt of the examination grade results."

8. Stephens was Wright's sponsor. As part of the training program, Stephens taught Wright, using text books and hands-on training. Stephens showed Wright how to make molds and do fittings. As Wright progressed, he was allowed to make the molds and do fittings by himself. Wright would show the molds to Stephens after Wright completed them. If Wright had trouble fitting a client, Stephens would come and assist Wright. Generally Stephens was in the office when Wright did fittings.

9. After completing the six-month training program, Wright took the Hearing Aid Specialist Examination in September 1999. Wright did not pass the examination. On October 29, 1999, the Department mailed Wright the notice that he had not passed the examination. The evidence did not establish when Wright received the notification that he had failed the examination. Nor did the evidence establish when Stephens became aware that Wright had failed the examination.

10. At least by April 14, 2000, Wright was aware that he had failed the examination because on that date he again applied with the Department to enter the hearing aid specialist program under Stephens' sponsorship. Stephens was also aware by April 14, 2000, that Wright had failed the examination because

Wright's application included a signed statement from Stephens dated April 14, 2000, indicating that he would be Wright's sponsor. The Department admitted Wright to the training program for the period April 22, 2000, through October 21, 2000. The dates for his examination were January 19 and 20, 2001.

11. In February 2000, J.F. received an advertisement from Hearing World, advertising free hearing examinations. On March 2, 2000, J.F. went to Hearing World for the free examination. He did not see Stephens and was helped by Wright. J.F. signed a written purchase agreement to purchase two hearing aids from Hearing World for \$5,700. Wright performed the examination, made the molds for the hearing aids, and signed the purchase agreement on behalf of Hearing World. J.F. gave Wright a check for \$5,700 on March 2, 2000, as payment in full for the hearing aids.

12. On March 23, 2000, Wright delivered the hearing aids to J.F. and signed the purchase agreement as having delivered the hearing aids. Stephens was not physically present in the room with Wright and J.F. at the time the delivery was made. The purchase agreement did not contain the signature and license number of Stephens. The written purchase agreement provided:

The purchaser agrees to wear the hearing aid(s) for a period of 30 days from the date of delivery. In the event that the purchaser decides to return the hearing aid(s), they must be returned to the

specialist of record in new working order, on or before the 30th day of possession. Upon receipt of the hearing aid(s) Hearing World will refund the purchase price, less mold and dispensing fees (mold fee \$150 for one aid, \$200 for a set. In addition, a 5% of the purchase price-dispensing fee may be retained).

13. J.F. tried wearing the hearing aids but experienced vertigo when using them. He talked to Wright on April 3 and explained the problem he was having with the hearing aids and indicating he wanted to return the hearing aids for a refund. Wright explained to J.F. that only Stephens had the authority to make a refund. J.F. met with Stephens on April 12, 2000. Stephens explained that he had a cash flow problem and could not make a full refund at that time. It was agreed that J.F. would return one of the hearing aids and try to wear the other one.

14. On April 14, 2000, J.F. returned to Hearing World and explained to Stephens that the use of one hearing aid did not solve the vertigo problem that he was experiencing. J.F. returned the other hearing aid and asked for a complete refund. Stephens told J.F. that he did not have the funds to make a full refund and gave J.F. \$100. Stephens made no further payments to J.F. for the refund on the hearing aids.

15. Stephens filed a petition for bankruptcy on September 27, 2000. A Discharge of Debtor was entered on January 8, 2001, in In Re: Stephens, Donald Lane,

Case No. 00-14949-8W7, United States Bankruptcy Court Middle District of Florida, Tampa Division. J.F. and O.G. were listed as creditors holding unsecured nonpriority claims.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.569 and 120.57, Florida Statutes.

17. The Department has the burden to establish the allegations in the Administrative Complaints by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996).

18. In Count I of Case No. 03-0404PL, the Department alleges that Stephens violated Subsection 484.056(1)(h), Florida Statutes, which provides that a licensee is subject to disciplinary action for a violation of any part of Part II of Chapter 484, Florida Statutes, by violating Subsection 484.0512(1), Florida Statutes, by failing to refund the money O.G. paid for his hearing aids within 30 days of delivery of the hearing aids.

19. Section 484.0512(1), Florida Statutes, provides:

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.

20. The Department has established by clear and convincing evidence that Stephens violated Subsection 484.0512(1), Florida Statutes. O.G. had four different sets of hearing aids. Each time a new set of hearing aids was delivered, Stephens extended the refund time for another 30 days. O.G. received the last set of hearing aids on October 1, 1999, and returned them to Stephens the same month. Stephens acknowledged in a letter dated November 19, 1999, that O.G. had returned the hearing aids and was due a refund. O.G. received \$300 from Stephens and never received any further payment. Stephens failed to refund all monies to O.G. within 30 days of O.G.'s return of the hearing aids.

21. In Count II of the Administrative Complaint in Case No. 03-0404PL, the Department alleges that Stephens violated Subsection 484.051(2), Florida Statutes, by failing

to direct O.G. to the Department for any complaints.

Subsection 484.051(2), Florida Statutes, provides that at the time of delivery, any person who fits and sells hearing aids shall provide the purchaser with a receipt stating that any complaints, if not reconciled with the licensee from whom the hearing aid was purchased, should be directed by the purchaser to the Department.

22. In his Proposed Recommended Order, Stephens concedes that the Department established the violation in Count II by clear and convincing evidence. Stephens violated Subsection 484.051(2), Florida Statutes.

23. In Count III of the Administrative Complaint in Case No. 03-0404PL, the Department alleges that Stephens violated Subsection 484.056(1)(k), Florida Statutes, by using a guarantee in a misleading, untruthful, and deceitful way.

Subsection 484.056(1)(k), Florida Statutes, provides that a licensee may be disciplined for the following:

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.

24. The Department has failed to establish by clear and convincing evidence that Stephens violated Subsection 484.056(1)(k), Florida Statutes. The evidence does not

establish that Stephens was attempting to be deceitful, misleading, or untruthful. Each time that O.G. was not happy with his hearing aids, Stephens tried to get a pair of hearing aids that would work for O.G., and, each time he delivered a new pair, Stephens gave O.G. another 30-day trial period and promised a refund if the hearing aids were not satisfactory. Stephens did pay \$300 to O.G. but was unable to pay the remaining amount because he did not have the money. Eventually, Stephens' money problems led to his bankruptcy.

25. In Count IV of the Administrative Complaint in Case No. 03-0404PL, the Department alleges that Stephens violated Rule 64B6-6.010, Florida Administrative Code, and thereby violated Subsection 484.056(1)(h), Florida Statutes, by failing to provide the address of the Department on the sales receipt. Rule 64B6-6.010(1), Florida Administrative Code, provides:

The receipt required by Section 484.051(2), F.S., shall contain the address and telephone number of the Department of Health, Consumer Unit, 4052 Bald Cypress Way, Bin C#75, Tallahassee, Florida, 32399-3275, (888)419-3456. Failure to provide this address on the receipt shall be a violation of this rule subject to disciplinary action.

26. The Department has established by clear and convincing evidence and Stephens has conceded in his Proposed Recommended Order that Stephens violated Rule 62B6-6.010, Florida Administrative Code, and Subsection 484.056(1)(h), Florida

Statutes, by failing to include the address and telephone number of the Department on the sales receipt given to O.G.

27. In the Administrative Complaint in Case No. 03-0405PL, the Department alleges that Stephens allowed Wright, an unlicensed person, to practice hearing aid dispensing from March 2000 until April 22, 2000, in that Wright was neither a licensed hearing aid specialist or a licensed trainee. Additionally, the Department alleges that Stephens did not provide a sales receipt to J.F.

28. In Count I of the Administrative Complaint in Case No. 03-0405PL, the Department alleges that Stephens allowed an unlicensed person to practice hearing aid dispensing and violated Subsection 484.056(1)(g), Florida Statutes, which provides that a hearing aid specialist may be disciplined if there is "[p]roof that the licensee is guilty of fraud or deceit or of negligence, incompetency, or misconduct in the practice of dispensing hearing aids."

29. The Department has failed to establish by clear and convincing evidence that Stephens violated Subsection 484.056(1)(g), Florida Statutes. It was not established that Stephens knew at the time that Wright fitted and delivered the hearing aids to J.F. that Wright was no longer a trainee.

30. In Count II of the Administrative Complaint in Case No. 03-0405PL, the Department alleges that Stephens violated Section 484.056(1)(h), Florida Statutes, which provides that a licensee may be disciplined for a violation of Part II of Chapter 484, Florida Statutes. It further alleges that Stephens violated Subsection 484.053(1)(f), Florida Statutes, by knowingly employing an unlicensed person in the practice of dispensing hearing aids and Subsection 484.053(3), Florida Statutes, which provides for a penalty for a licensee who allows a sale of a hearing aid by an unlicensed person who is not a trainee or who fails to comply with the supervision requirements of Subsection 484.0445(2), Florida Statutes.

31. The Department has failed to establish by clear and convincing evidence that Stephens is guilty of a violation of Subsection 484.053(1)(f), Florida Statutes. Wright, as a trainee, was allowed to continue as a trainee until he received his examination results. The evidence does not establish that when Wright fitted J.F. for hearing aids and delivered the hearing aids to him that Wright had received the examination results or that Stephens was aware that Wright had received the examination results.

32. Subsection 484.0445(2), Florida Statutes, provides that a trainee shall perform the functions of a trainee only under the direct supervision of licensed hearing aid specialist.

Direct supervision means that the sponsor must give final approval of the work performed by the trainee and that the sponsor must be physically present at the time the hearing aid is delivered to a client.

33. Rule 64B6-8.001, Florida Administrative Code, provides that a sponsor of a hearing aid specialist trainee is responsible for the direct supervision of the trainee. Rule 64B6-8.001(3), Florida Administrative Code, defines "direct supervision" as follows:

A relationship in which the sponsor is responsible for all work being done and gives final approval to work performed by the trainee. The sponsor or hearing aid specialist designated by the sponsor must be physically present in the same room at the time a hearing aid is delivered to the client, and the receipt required by Section 484.051, Florida Statutes, must have the signature and license number of the sponsor or hearing aid specialist designated by the sponsor.

34. Stephens was not physically present in the room when Wright delivered the hearing aids to J.F. and did not sign and place his license number on the sales receipt. These acts are violations of Subsection 484.053(3), Florida Statutes; however, these activities were not included in the Administrative Complaint and cannot now form the basis for discipline against Stephens. See Marcelin v. Dept. of Business and Professional

Regulation, 753 So. 2d 745 (Fla. 3rd DCA 2000); Ghani v. Dept. of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998).

35. In Count III of the Administrative Complaint in Case No. 03-0405PL, the Department alleges that Stephens aided an unlicensed person to practice hearing aid dispensing in violation of Subsection 455.624(1)(j), Florida Statutes, which provides that a licensee may be disciplined for:

Aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this part, the chapter regulating the profession, or the rules of the department or the board.

36. The Department has failed to establish by clear and convincing evidence that Stephens violated Subsection 455.624(1)(j), Florida Statutes. No evidence was presented to establish that either Wright or Stephens knew that Wright had failed the examination and was no longer eligible for trainee status. The Administrative Complaint did not allege that Stephens allowed Wright to deliver hearing aids when Stephens was not present or that Stephens failed to sign and place his license number on the sales receipt.

37. Rule 64B6-7.002, Florida Administrative Code, sets the guidelines for the disposition of disciplinary cases for hearing aid specialists. It provides that the penalty for a violation of Subsection 484.051(2), Florida Statutes, ranges from a reprimand to six months' suspension and an administrative fine

from \$500 to \$1,000. The penalty range for a violation of Subsection 484.056(1)(h), Florida Statutes, is reprimand to revocation and an administrative fine of \$500 to \$1,000.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered:

1. In Case No. 03-0404PL, finding that Donald Stephens violated Subsections 484.0512(1) and 484.056(1)(h), Florida Statutes, as set forth in Count I of the Administrative Complaint; Subsection 484.051(2), Florida Statutes, as set forth in Count II of the Administrative Complaint; and Subsection 484.056(1)(h), Florida Statutes, and Rule 64B6-6.010, Florida Administrative Code, as set forth in Count IV of the Administrative Complaint.

2. In Case No. 03-0404PL, dismissing Count III of the Administrative Complaint.

3. In Case No. 03-0404PL, issuing a reprimand and imposing administrative fines of \$1,000 for the violations set forth in Count I, \$500 for the violations set forth in Count II, and \$500 for the violations set forth in Count IV.

4. In Case No. 03-0405PL dismissing the Administrative Complaint.

DONE AND ENTERED this 25th day of June, 2003, in
Tallahassee, Leon County, Florida.

Susan B. Kirklund

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 2003.

ENDNOTES

1/ All references to the statutes in Chapters 455 and 484, Florida Statutes, are to the 1999 version.

2/ The style of the Administrative Complaint identified the Respondent as Don Stephens. Based on the evidence presented at the final hearing Don Stephens and Donald Stephens are the same individual.

3/ In the Administrative Complaint, the Department alleged that Stephens violated Rule 64B6-010, Florida Administrative Code, by failing to provide the address of the Department of Health, AHCA, on the sales receipt. It is clear from reading the Administrative Complaint that such citation was a scrivener's error and the correct citation should be Rule 64B6-6.010, Florida Administrative Code, which requires the address of the Department of Health to be placed on a sales receipt.

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.