

2-5-04

Final Order No. DOH-04-0316-FOFMOA

FILED DATE - 3-22-04

Department of Health

By: Erica S. Porine
Deputy Agency Clerk

**STATE OF FLORIDA
BOARD OF HEARING AID SPECIALISTS**

DEPARTMENT OF HEALTH,

Petitioner,

vs.

KENT A. BROY,

Respondent.

AP

DOH Case No. 2001-19941

DOAH Case No. 03-3452PL

LJS-Clos

MAR 23 11:46
ED

FINAL ORDER

THIS CAUSE came before the Board of Hearing Aid Specialists (Board) pursuant to section 120.569 and section 120.57(1), Florida Statutes, on March 5, 2004, in Fort Lauderdale, Florida for the purpose of considering the Administrative Law Judge's Recommended Order (attached hereto).

Attorney Steven Graham represented Petitioner. Respondent was not present, but was represented by attorney E. Raymond Shope II.

Upon review and consideration of the Recommended Order and after a review of the available record in this case, including Petitioner's Exceptions to the Recommended Order, the Board arrived at the following findings of fact, conclusions of law, and recommendation:

RULINGS ON EXCEPTIONS

1. Petitioner filed exceptions to specified paragraphs in the Findings of Fact, Conclusions of Law, and Recommendation portions of the Recommended Order.

2. The Board individually considered and discussed each of these filed exceptions.

3. The Board granted Petitioner's exception to Paragraph 12 of the Findings of Fact because the word "non-refundable" was omitted.

4. The Board granted Petitioner's exception to Paragraph 13 of the Findings of Fact correcting the omissions contained within the quotation of the Return Policy.

5. The Board granted Petitioner's exception to Paragraph 23 of the Conclusions of Law correcting the reference to Rule 64B6-7.005(1), Florida Administrative Code.

6. The Board granted the exception to Paragraph 29 of the Conclusions of Law correcting the reference to the "Agency for Health Care Administration."

7. The Board granted Petitioner's exception to Paragraph 37 of the Conclusions of Law because the Return Policy in the Purchase Agreement violates Section 484.0512(1), Florida Statutes.

In Paragraph 13 of the Recommended Order the Respondent's Return Policy is quoted. As stated above in the exception to Paragraph 13, the Recommended Order omitted some of the language of the Return Policy. Nevertheless, the language contained within the Recommended Order as written by Judge Sartin includes the relevant language that supports the conclusion reached by the Board.

Section 484.0512(1), Florida Statutes, provides, in relevant part, as follows: "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." Mr. Broy's Return

Policy contains the following language: "A request for return must be submitted in writing, within 30 days" The Recommended Order adopted Respondent's interpretation of Section 484.0512(1), Florida Statutes, which is that a licensee may limit a Purchaser's ability to return a hearing aid to only one of the methods listed in Section 484.0512(1), Florida Statutes. The Board's interpretation of Section 484.0512(1), Florida Statutes, is that this statute gives the Purchaser the option of choosing how he/she wishes to return the hearing aid, as opposed to giving the licensee the authority to limit how the hearing aid may be returned. The Board's interpretation of this statute is more consistent with the intent of the statute which is to protect consumers and is, thus, more reasonable.

Section 484.056(1)(j), Florida Statutes, provides as follows:

(j) 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.

Based upon the foregoing, Respondent's Purchase Agreement contained a representation that was misleading, deceiving, or untruthful, in violation of Section 484.056(1)(j), Florida Statutes. Therefore, the exception to Paragraph 37 was granted.

8. The Board denied the exception to Paragraph 38 of the Conclusions of Law.

9. The Board granted the exception to Paragraph 43 of the Conclusions of Law because the facts found in Paragraph 14 of the Recommended Order support a conclusion that Respondent violated Section 484.056(1)(m), Florida Statutes. Section 484.056(1)(m), Florida Statutes, provides as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(m) 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.

In Paragraph 43 of the Recommended Order, the Court incorrectly sites to the requirement in Section 484.051(2), Florida Statutes, that a receipt with guarantor identification be provided "at time of delivery" of the hearing aid, as the basis for concluding that Section 484.056(1)(m), Florida Statutes, had not been violated as alleged in Count V of the Administrative Complaint.

Petitioner alleged in Count IV of the Administrative Complaint that Respondent had violated Section 484.051(2), Florida Statutes, which requires that the guarantor be identified at time of delivery of the hearing aid, because Respondent's Purchase Agreement failed to identify the guarantor. However, Petitioner abandoned Count IV at the beginning of the hearing conducted by Judge Sartin.

In Count V of the Administrative Complaint Petitioner alleged that Respondent had violated Section 484.056(1)(m), Florida Statutes, which requires full disclosure of the identity of the guarantor in all representation, advertisement, or implication that a hearing aid or its repair is guaranteed. In Paragraph 14, Judge Sartin found: "The Purchase Agreement did not identify the guarantor for the refund." The Board concluded that as a matter of law Respondent's Purchase Agreement contained a representation, advertisement, or implication that a hearing aid or its repair was guaranteed but did not contain the identity of the guarantor for the refund, in violation of

Section 484.056(1)(m), Florida Statutes. Therefore, Petitioner's exception to Paragraph 43 was granted.

10. The Board denied the exception to Paragraph 44 of the Conclusions of Law.

FINDINGS OF FACT

11. The findings of fact set forth in the Recommended Order as revised by the granted exceptions are adopted and incorporated herein by reference.

CONCLUSIONS OF LAW

12. The Board has jurisdiction of this matter pursuant to sections 120.569 and 120.57(1), and part II of chapter 484, Florida Statutes.

13. The conclusions of law set forth in the Recommended Order as revised by the granted exceptions are consistent with the findings and are adopted and incorporated herein by reference.

14. Paragraph 37 of the Recommended Order is amended to read as follows: "Respondent's Purchase Agreement contained a representation that was misleading, deceiving, or untruthful, in violation of Section 484.056(1)(j), Florida Statutes."

15. Paragraph 43 of the Recommended Order is amended to read as follows: "Respondent's Purchase Agreement contained a representation, advertisement, or implication that a hearing aid or its repair was guaranteed but did not contain the identity of the guarantor for the refund, in violation of Section 484.056(1)(m), Florida Statutes."

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Ruling on Exceptions, the Administrative Law Judge's recommendation is hereby amended. The

Board of Hearing Aid Specialists find that Respondent, Kent A. Broy, violated section 484.056(1)(j), Florida Statutes (2001), as alleged in Count II of the Administrative Complaint. In addition, Respondent violated section 484.056(1)(m), Florida Statutes (2001), as alleged in Count V of the Administrative Complaint. Counts I and III of the Administrative Complaint are dismissed. The violations found warrants discipline. Respondent shall pay a fine in the amount of \$1000.00 for the violation of Count II. Respondent shall pay a fine in the amount of \$1000.00 for the violation of Count V. Respondent is suspended from practicing as a Hearing Aid Specialists for three (3) months and is placed on probation for a period of two (2) years.

IT IS HEREBY ORDERED AND ADJUDGED:

Respondent's license shall be suspended for three (3) months. Respondent's license is placed on probation for a period of two (2) years. Respondent shall pay an administrative fine in the amount of \$2,000.00. The Board reserved jurisdiction to hear a motion to assess costs. Payment of the fine and costs shall be made payable to the Department of Health and shall be mailed to the Department of Health, Division of MQA, Attn: Hearing Aid Specialists Compliance Officer, P.O. Box 6320, Tallahassee, Florida 32399-6320.

This Final Order shall take effect upon filing with the Agency Clerk of the Department of Health.

DONE AND ORDERED this 22 day of March 2004.

BOARD OF HEARING AID SPECIALISTS

 for
Sue Foster, Board Executive Director

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the agency clerk of the Department of Health and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. mail to: Larry J. Sartin, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; to E. Raymond Shope II, Esquire, 1404 Goodlette Road, North, Naples, Florida 34102; to Steven Graham, Assistant Attorney General, 110 S.E. 6th Street, 9th Floor, Fort Lauderdale 33301; and by interoffice mail to Cassandra Pasley, Senior Attorney, Department of Health, Office of the General Counsel, 4052 Bald Cypress Way, Bin A-02, Tallahassee, Florida 32399, this 22 day of March 2004.



Deputy Agency Clerk