

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
HEARING AID SPECIALISTS,

Petitioner,

vs.

Case No. 15-6246PL

ROSALYN RUNAE JOHNSON WHITE,
H.A.S.,

Respondent.

_____ /

RECOMMENDED ORDER

On March 8, 2016, a duly-noticed hearing was held by video teleconference at locations in West Palm Beach and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Octavio Simoes-Ponce, Esquire
Sharmin Royette Hibbert, Esquire
Matthew George Witters, Esquire
Christopher R. Dierlam, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C65
Tallahassee, Florida 32399

For Respondent: Lee Hollander, Esquire
Law Offices of Hollander and Hanuka
2681 Airport Road South, Suite C-101
Naples, Florida 34112

STATEMENT OF THE ISSUES

Whether Respondent violated the provisions of chapter 484, Florida Statutes (2010),^{1/} regulating hearing aid specialists, as alleged in the Third Amended Administrative Complaint, and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On March 30, 2015, Petitioner, Department of Health (Petitioner or Department), filed a Third Amended Administrative Complaint against Ms. Rosalyn Runae Johnson White (Respondent or Ms. White), on behalf of the Board of Hearing Aid Specialists (Board), alleging that Respondent had violated several sections of chapter 484 in connection with her interactions with Patient B.P.

Petitioner served Respondent with Requests for Admission, Interrogatories, and Requests for Production on December 31, 2015. Respondent did not respond. On February 17, 2016, Petitioner filed a Motion to Compel Discovery and to Deem Petitioner's Requests for Admissions Admitted. No response to the motion was filed by Respondent.^{2/} The motion was granted, and an Order to Compel was issued on February 25, 2016, recognizing that the Requests for Admission were deemed admitted by operation of Florida Rule of Civil Procedure 1.370 and directing Respondent to respond to the Interrogatories and Requests for Production. Respondent did not comply with that Order.

After several joint motions for continuance were granted, the case was heard on March 8, 2016. At hearing, Petitioner presented no live testimony, but offered four exhibits. Petitioner's Exhibits P-A through P-C and Exhibit P-E were admitted into evidence, with the caveat that portions of Exhibit P-B were hearsay and would only be considered to explain or supplement other competent evidence and could not alone support a finding of fact. Respondent offered no witnesses or exhibits.

The one-volume Transcript was filed on March 28, 2016. Both parties filed proposed recommended orders, which were carefully considered.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of health care professionals pursuant to section 20.43 and chapter 456, Florida Statutes. The Board is the professional licensing board charged with final agency action with respect to discipline against hearing aid specialists pursuant to chapter 484.

2. At all relevant times, Ms. White was licensed to practice as a hearing aid specialist in the state of Florida, holding license number AS 4137. Ms. White was the owner, manager, and operator of a hearing aid dispensing practice known as Serenity Sounds Hearing Care Center, Inc.

3. On or about March 7, 2011, Ms. White fitted Patient B.P. for a set of Audina half-shell hearing aids for which Ms. White billed B.P. \$3,200.00. The sales receipt for this purchase did not contain the serial number of the hearing aids.

4. When Ms. White fitted Patient B.P. on March 7, 2011, Patient B.P. was a 93-year-old man.

5. In a Confidential Patient Analysis Chart that B.P. filled out for Serenity Sounds Hearing Care Center, Inc., he admitted that he had noticed changes in his ability to remember.

6. On or about July 13, 2011, Ms. White fitted Patient B.P. with Audina OTE hearing aids for \$4,500.00. The sales receipt for this purchase did not contain the serial number of the hearing aids.

7. On or about October 21, 2011, Patient B.P. presented to Ms. White with the Audina OTE hearing aids broken into pieces.

8. The broken Audina OTE hearing aids would have been covered under a loss and damage policy requiring a \$100.00 deductible to replace the broken aids.

9. Instead, on or about October 21, 2011, Ms. White sold Patient B.P. a new pair of hearing aids for \$3,000.00.

10. On or about December 20, 2011, Ms. White received a loan in the approximate amount of \$20,000.00 from B.P.

11. On or about January 25, 2012, Ms. White used Patient B.P.'s Citi Dividends credit card to purchase three round-trip airline tickets.

12. On or about February 14, 2012, Ms. White submitted an application to Citigroup for a Citi Card credit card using Patient B.P.'s personal information.

13. On or about February 14, 2012, Ms. White submitted an application to Capital One for a credit card using Patient B.P.'s personal information.

14. On or about February 14, 2012, a check in the amount of \$3,000.00 was written from Patient B.P.'s account and deposited into a PNC Bank account belonging to Ms. White's business, Serenity Sounds Hearing Care Center, Inc.

15. On February 17, 2012, Ms. White wrote a letter on behalf of B.P. The letter confirmed that B.P. had loaned Serenity Sounds Hearing Care Center, Inc., more than \$35,000.00 and stated that B.P. was changing this "from a loan into a gift." It stated that Ms. White could use the money without worrying about having to pay it back and that any loan agreements were no longer valid. It went on to state that Ms. White "is a friend of mine and I want nothing but what is best for her." The letter was signed by B.P. and by Ms. White.^{3/}

16. On or about February 22, 2012, Ms. White submitted an application for an American Express credit card using Patient B.P.'s personal information.

17. On that same day, B.P.'s patient records indicate that a push button was missing on his hearing aid, and it was turning red in the charger. Ms. White sent the aids to Rexton for repair.

18. On or about February 28, 2012, Ms. White submitted an application for a Discover credit card using Patient B.P.'s personal information.

19. On or about March 14, 2012, B.P. entered into a motor vehicle retail installment contract for the purchase of a 2011 Lexus GS350 automobile, obligating him to pay the sum of \$43,877.00 over a term of 65 months. He also purchased a vehicle protection etch stencil, a deficiency waiver addendum, 24-hour lockout assistance, insurance, and a vehicle service contract for the automobile.

20. The Lexus GS350 purchased by Patient B.P. was for Ms. White's use.

21. On or about March 16, 2012, Patient B.P. purchased \$4,277.87 worth of jewelry from Zales for Ms. White.

22. On or about March 17, 2012, Ms. White charged an additional \$693.49 to Patient B.P.'s American Express credit card when she exchanged a watch for a bracelet.

23. On or about March 19, 2012, a charge was made to Patient B.P.'s Discover credit card for \$699.58 at Radio Shack for items for Ms. White.

24. On or about March 22, 2012, a charge was made to Patient B.P.'s Citi Card in the amount of \$1,100.00 to Progressive Insurance for a policy held by Ms. White.

25. An entry in B.P.'s patient records on March 28, 2012, shows that the Audina hearing aids were broken in many pieces. It is noted that B.P. asked about Starkey hearing aids, saying that his friends wore them.

26. On or about March 31, 2012, a charge was made to Patient B.P.'s Discover credit card in the amount of \$133.99 to Macy's in Palm Beach Gardens, Florida, for items for Ms. White, for which she signed the receipt.

27. On or about April 2, 2012, a charge was made to Patient B.P.'s Citi Card in the amount of \$492.00 to Siemen's for a patient of Ms. White's that was not B.P.

28. An entry in B.P.'s patient records on April 3, 2012, shows that B.P.'s hearing was retested. The note indicates that Starkey was called and that they suggested the Starkey "X Series 90." The note indicates that B.P. said he would go home and talk to his wife.

29. An entry in B.P.'s patient records on April 4, 2012, shows that B.P. had talked with his wife and that he wanted to get

the Starkey hearing aids. His wife wrote a check for \$8,600.00 to "Serenity Hearing Aids."

30. On or about April 5, 2012, Ms. White submitted an application for a joint Wells Fargo bank account with Patient B.P.

31. On or about April 5, 2012, Patient B.P. took out a loan from Wells Fargo in the amount of \$48,694.75.

32. On or about April 5, 2012, Ms. White received a cashier's check for approximately \$48,500.00 from the loan proceeds received by Patient B.P.

33. B.P.'s patient records indicate the Starkey hearing aids were delivered to B.P. on April 10, 2012.

34. On April 27, 2012, Ms. White wrote and signed a note saying that she had returned the 2011 Lexus GS350 with VIN JTHBE1KS4B0052280 to B.P. and indicating the mileage was 8,520.

35. Even assuming that the December 20, 2011, loan was included in the amount mentioned in the February 17, 2012, note, Ms. White or Serenity Sounds Hearing Care Center, Inc., received at least \$83,500.00 in loans or gifts from B.P.

36. In addition, Ms. White or Serenity Sounds Hearing Care Center, Inc., received at least \$7,000.00 from B.P. in the form of other purchases or gifts from stores or businesses, including jewelry and insurance.

37. No evidence of prior discipline was introduced.

38. There was no evidence that Ms. White was under any legal restraints or constraints at the time of the alleged violations.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1), Florida Statutes (2015).

40. Petitioner seeks to take disciplinary action against the hearing aid specialist license of Respondent. A proceeding to impose discipline against a professional license is penal in nature, and Petitioner bears the burden to prove the allegations in the administrative complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

41. Clear and convincing evidence has been said to require:

[T]hat 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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

42. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011). Any ambiguities must be construed in favor of the licensee. Lester v. Dep't of Prof'l Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

Count One

43. Section 484.056(1)(w) provided that violating any provision of chapter 484, or any rules adopted pursuant thereto, is grounds for disciplinary action.

44. Section 484.051(2) provided in part:

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.

45. The evidence clearly showed that the sales receipt for the March 7, 2011, purchase of a set of Audina half-shell hearing aids did not contain the serial number of the hearing aids. The evidence also clearly showed that the sales receipt for the July 13, 2011, purchase of Audina OTE hearing aids did not contain

the serial number of the hearing aids. Respondent did not contest this charge.

46. Petitioner proved by clear and convincing evidence that Respondent violated section 484.056(1)(w) by violating section 484.051(2).

Count Two

47. Section 484.056(1)(v) provided that exercising influence on a client in such a manner as to exploit the client for financial gain of the licensee or of a third party is grounds for disciplinary action.

48. The offense requires proof of more than influence. Section 484.056(1)(v) provides that the influence must be exercised in such a manner "as to exploit the client for financial gain." The parties did not cite, and research did not reveal, any case law interpreting section 484.056(1)(v), but statutes regulating other professions have identical or substantially similar wording, and there are several cases interpreting it.

49. Cases finding violations under these similar statutes usually involve a licensee performing unnecessary tests or procedures, or charging for unperformed procedures or medications. See, e.g., Hasbun v. Dep't of Health, 701 So. 2d 1235, 1236 (Fla. 3d DCA 1997) (procedures which did nothing for the patient, who was in terminal condition, constituted exploitation of the patient for

financial gain of physician); Dep't of Health, Bd. of Med. v. Rubinstein, Case No. 09-5267PL (Fla. DOAH Feb. 1, 2011; Fla. DOH Apr. 11, 2011) (use of position to convince patient that unnecessary allergy tests were needed was exploitation of patient); Dep't of Health, Bd. of Med. v. Reich, Case No. 04-3222PL (Fla. DOAH May 5, 2006; Fla. DOH Oct. 11, 2006) (ordering unnecessary and excessive tests constitutes the exploitation of a patient for financial gain under section 458.331(1)(n), Florida Statutes).

50. Less commonly, exploitation cases involve other types of financial transfers during the course of the professional relationship. In Department of Professional Regulation, Board of Medicine v. Tandon, Case No. 88-3115, 1989 Fla. Div. Admin. Hear. LEXIS 6224 (Fla. DOAH May 3, 1989), Tandon, a physician, was charged with influencing his patient, G.L., so as to exploit him for financial gain. Tandon had been treating G.L. for about eight years, had occasionally advanced him small sums of money, and had given him drug samples. G.L. owed Tandon a little less than \$1,000.00 in unpaid medical fees. When G.L. was involved in an automobile accident, Tandon referred G.L. to Tandon's attorney. Tandon later prepared a letter for G.L. to sign that gave Tandon half of a \$25,000.00 recovery arranged by the attorney. G.L., who was 73 years old and had only a third grade education, signed it. The Recommended Order found Tandon guilty

of exploitation, concluding, "Respondent's overreaching of G.L. was facilitated partly by G.L.'s ignorance, but partly by the trust that G.L. placed in [Tandon] as his physician." The Board of Medicine agreed.

51. The record here shows the following:

a. B.P. was a 93-year-old man, with admitted memory problems, who consulted Respondent as a hearing aid specialist.

b. After selling three sets of hearing aids to B.P., Respondent obtained a \$20,000.00 loan from him. Within a couple of months after this, she had obtained loans totaling at least \$35,000.00. Within two more months, she had obtained loans or gifts totaling at least \$83,500.00 from B.P.

c. Respondent received other property and services, including jewelry and items from Radio Shack, from the use of B.P.'s credit cards, sometimes signing for purchases herself. She had full use of an automobile that B.P. purchased for her use.

d. Respondent actively procured these transfers: applying for credit cards with B.P.'s personal information, drafting documents for him to sign to convert loans into gifts, and even opening up a joint bank account with him.

e. Respondent did so with the intent, and the result, of benefiting herself, not B.P.

f. Throughout all of the financial interactions, Respondent stood in a position of professional trust and confidence with respect to B.P.

52. The exact relationship between Respondent and B.P. was never shown. While it was alleged that Respondent might have entered into a "romantic and/or sexual relationship" with B.P., there was no evidence of this in the record. What was clearly shown, however, was that while she continued in her client relationship with B.P., Respondent actively procured significant financial transfers to herself and to her business. This is sufficient to show exploitation. Cf. Dep't of Health, Bd. of Nursing v. Morrow, Case No. 00-1637 (Fla. DOAH Oct. 5, 2000; Fla. DOH May 3, 2001) (no exploitation proven where no professional nursing relationship was shown). Under all of the circumstances, it is concluded that Respondent exploited her client B.P. for her financial gain.

53. Petitioner proved by clear and convincing evidence that Respondent violated section 484.056(1)(v).

Count Three

54. Section 484.056(1)(g) provided that proof that the licensee is guilty of misconduct in the practice of dispensing hearing aids is grounds for disciplinary action.

55. Actively arranging the financial transactions involved here with a 93-year-old client with memory problems during the

time that Respondent was in a position of trust and confidence with respect to that client also constitutes misconduct.

56. Petitioner proved by clear and convincing evidence that Respondent is guilty of misconduct, in violation of section 484.056(1) (g).

Penalties

57. Section 456.079, Florida Statutes, provided that each board shall adopt by rule and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board pursuant to the respective practice acts.

58. The Board adopted Florida Administrative Code Rule 64B6-7.002(2) (w), which provided in part that the penalty for a first offense of violating a provision of chapter 484 (in this case section 484.051(2), by failing to provide the serial number of hearing aids) in violation of section 484.056(1) (w) shall normally range from a minimum fine of \$300.00 or a letter of concern to a maximum fine of \$7,500.00 and revocation.

59. Rule 64B6-7.002(2) (v) provided in part that the penalty for a first offense of exercising influence for financial gain in violation of section 484.056(1) (v) shall normally range from a minimum fine of \$1,000.00 or restitution of improper gains and six months of probation to a maximum of suspension of license for two years followed by probation and a fine of \$8,000.00.

60. Rule 64B6-7.002(2)(g) provided in part that the penalty for a first offense of fraud, deceit, negligence, incompetency, or misconduct in the practice of a hearing aid specialist in violation of section 484.056(1)(g) shall normally range from a minimum fine of \$300.00 or two years of probation, to a maximum fine of \$5,000.00 and up to one year of suspension followed by up to two years of probation.

61. Rule 64B6-7.002(3) provided:

Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:

- (a) Exposure of patient or public to injury or potential injury, physical or otherwise;
- (b) Legal status at the time of the offense: no restraints, or legal constraints;
- (c) The number of counts or separate offenses established;
- (d) Actions taken by the licensee to correct the violation or to remedy complaints;
- (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
- (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
- (g) Any other relevant mitigating or aggravating factors.

62. There was no evidence of previous disciplinary history, or legal restraints or constraints at the time of the charged conduct. On the other hand, Respondent exposed Patient B.P. to substantial financial injury and received considerable direct pecuniary benefit, which outweigh the mitigating factors.

63. The aggravating circumstances do not warrant deviation from the wide range of penalties already permitted within the guidelines, however.

64. Section 455.227(4), Florida Statutes, provided that in addition to any other discipline imposed for a violation of a practice act, a board shall assess costs related to the investigation and prosecution of the case.

RECOMMENDATION

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Board of Hearing Aid Specialists:

Finding Rosalyn Runae Johnson White in violation of sections 484.056(1)(g), 484.056(1)(v), and 484.056(1)(w), Florida Statutes, as charged in the Third Amended Administrative Complaint; directing that she provide restitution to B.P. in the amount of \$90,000.00; imposing an administrative fine on her of \$8,000.00; assessing reasonable costs related to investigation and prosecution of the case; and revoking her license to practice as a hearing aid specialist.

DONE AND ENTERED this 14th day of April, 2016, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

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

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2016.

ENDNOTES

^{1/} Except as otherwise indicated, references to statutes and rules are to versions in effect in early 2011 through early 2012, when the counts against Respondent are alleged to have taken place. No changes to the relevant statutes were enacted during this time.

^{2/} Respondent did not assert any Fifth Amendment privilege, either in response to the discovery, or later in response to the motion. See Purcell v. Dep't of Bus. & Prof'l Reg., 708 So. 2d 1019 (Fla. 5th DCA 1998).

^{3/} This note was written from the perspective of B.P. and was signed by him as his statement. However, Ms. White prepared the statement and her signature indicates her agreement with the statement. It is, therefore, an adoptive admission by Ms. White under section 90.803(18)(b), Florida Statutes, and so an exception to the hearsay rule. It is competent evidence that B.P. loaned Serenity Sounds Hearing Care Center, Inc., \$35,000.00.

COPIES FURNISHED:

Lee Hollander, Esquire
Law Offices of Hollander and Hanuka
2681 Airport Road South, Suite C-101
Naples, Florida 34112
(eServed)

Octavio Simoes-Ponce, Esquire
Sharmin Royette Hibbert, Esquire
Matthew George Witters, Esquire
Christopher R. Dierlam, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C65
Tallahassee, Florida 32399
(eServed)

Nichole C. Geary, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701
(eServed)

Jennifer Wenhold, Executive Director
Board of Hearing Aid Specialists
Department of Health
4052 Bald Cypress Way, Bin C08
Tallahassee, Florida 32399-3257
(eServed)

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.