

eff 11/08/95
File Number 95779

STATE OF MINNESOTA
COUNTY OF HENNEPIN

BEFORE THE MINNESOTA
COMMISSIONER OF HEALTH

In the Matter of
David E. Rich, Petitioner

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

The above-entitled matter came before Administrative Law Judge Susan R. Weisman for hearing on June 13, 1995 and continued on June 15, 1995. The hearing continued on the morning of August 7, 1995. The hearing continued on the morning of August 29, 1995 and concluded on that date. The record remained open for receipt of post-hearing briefs. The record closed on September 5, 1995 with the receipt of post-hearing briefs from each party. The record was re-opened on October 2, 1995 for clarification of certain exhibits. The record re-closed on October 6, 1995 with the receipt of said clarifications.

Susan A. Casey, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106 appeared on behalf of the Minnesota Department of Health ("Department"). Roger C. Justin, Rinke-Noonan, Suite 700, Norwest Center, Box 1497, St. Cloud, Minnesota 56302 appeared on behalf of David E. Rich ("Petitioner"). The Administrative Law Judge ("ALJ") issued her Findings of Fact, Conclusions of Law and Recommendations on November 8, 1995. The Department and Petitioner filed exceptions to the ALJ's Report on December 11, 1995.

FINDINGS OF FACT

The Commissioner adopts Findings of Fact Nos. 1 through 135 as contained in the ALJ's Report dated November 8, 1995 ("ALJ Report").

CONCLUSIONS OF LAW

The Commissioner adopts Conclusions of Law Nos. 1 through 20 and 22 through 23 as contained in the ALJ's Report dated November 8, 1995.

The Commissioner accepts the ALJ's Conclusion of Law No. 21 but adds the following language after "Chapter 153A": impose a civil penalty not to exceed \$10,000 for each separate violation.

Based upon the foregoing Findings and Conclusions of Law the Commissioner orders that Petitioner be denied a certificate to dispense hearing instruments for a period of two years, such period to run from November 1, 1994 through October 31, 1996. The commissioner further orders that Petitioner pay \$12,724.20 for the cost of the investigation and a civil penalty of \$3,500 for 35 sales of hearing instruments made without a permit. Petitioner may not apply for a certificate to dispense hearing instruments until such time as Petitioner has paid the above penalty and costs, or has entered into an approved schedule for paying those amounts.

Dated: _____

7/2/96



Barbara C. Colombo, Assistant Commissioner
Minnesota Department of Health

MEMORANDUM

Plaintiff has been in the business of selling hearing aids within the State of Minnesota since approximately 1982. Beginning in March, 1990, a permit was required to legally sell hearing instruments in Minnesota. Petitioner first applied for and was granted a permit to sell hearing instruments in 1990. This permit expired July 31, 1990. Petitioner applied to the Department for a permit in 1990, 1991, 1992, 1993 and 1994. Petitioner was granted a permit by the Department for each of the following periods: August 1, 1990 through July 31, 1991; August 1, 1991 through July 31, 1992; August 18, 1992 through July 31, 1993; August 10, 1993 through July 31, 1994; and September 12, 1994 through October 31, 1994.

In 1990 Minnesota adopted rules which limited the use of the titles "hearing instrument dispenser," "hearing instrument specialist," "hearing aid dispenser" and "hearing aid specialist" to persons who voluntarily applied for and were granted registration status by the Department. Petitioner applied for registration in July 1992. In September, 1992 the Department denied Petitioner's registration application on the grounds that he had submitted false or misleading information on his application. Petitioner has never been registered as a hearing instrument dispenser in Minnesota.

In July, 1993 Minnesota adopted a new regulatory system that required all hearing instrument dispensers to receive certification by the Department, regardless of whether or not they had been granted permits and/or had been registered by the State previously. Effective November 1, 1994, only those persons who had applied for and been granted certification may legally dispense hearing instruments within Minnesota. In August, 1994 the Department

received Petitioner's application for certification as a hearing instrument dispenser. The Department denied Petitioner's application for certification by letter dated February 21, 1995. The basis of the denial was the submission of false and misleading information on Petitioner's certification application, selling approximately 35 hearing aids without a valid permit and making a sale using a card falsely representing himself as a hearing instrument specialist (illegal use of the protected title "hearing instrument specialist")

In 1991 Petitioner entered Stipulation and Consent Orders with the Department based on his failures to make timely refunds to purchasers of hearing aids. In 1992 Petitioner entered Stipulation and Consent Orders with the Department based on Petitioner's failure to comply with the 1991 Order and filing of false or misleading reports to the Department regarding these refunds. As indicated above, Petitioner's application for registration for the restricted title was rejected by the Department in 1992 on the grounds that he submitted false or misleading information on his registration application. In addition, there is a 1988 consent judgment with the Attorney General's Office not to use the title "hearing instrument specialist."

The Department has based its denial of Petitioner's application for certification as a hearing instrument dispenser on the following grounds: submission of false or misleading information on the application for certification; use of a card misrepresenting himself as a hearing instrument specialist in connection with a sale in 1992, in violation of the protected title rules; 35 sales of hearing instruments made between August 1, 1994 and September 11, 1994 when Petitioner did not have a valid permit to sell.

Minn. Stat. §153A.15, Subd. 2 provides several remedies once the Department has determined that this statute has been violated. The ALJ determined that the remedies initially proposed by the Department, i.e., denial of certification for a period of two years, recovery of Petitioner's 20% profit margin from the illegal sales and repayment of the Department's costs, were warranted. The 20% profit margin would result in a penalty of approximately \$22,000 and the repayment of the Department's costs would result in an amount of approximately \$13,000. Thus, the ALJ supported a total monetary award against Petitioner of roughly \$35,000. In its Exceptions to the ALJ's Report, the Department requested that the record be left open for it to prove up the final costs of this enforcement action.

The Commissioner has determined that denial of a certificate to Petitioner as a hearing instrument dispenser for a period of two years is appropriate based upon the record presented. Denial of certification will deprive Petitioner of the ability to practice his profession during this two year period and will result in considerable loss of income to Petitioner. Denial is necessary in order to impress upon Petitioner the severity of his actions. A two year denial will protect the public welfare by ensuring that an individual with a record of repeatedly providing false and misleading information on the application forms will not be granted a certificate to dispense hearing instruments to the public. The provision of accurate, truthful information to regulatory authorities is key to effective enforcement of this section. See, Minn. Stat. §153A, Subd. 1. Petitioner has evidenced disregard for the

integrity of the certification process by submitting false and misleading information on his application form. This is the most recent in a series of applications which have included false and misleading information. Petitioner should therefore be denied the benefits of certification for a period of time sufficient to impress upon him the need to provide accurate and complete information to the Department. At the end of the two year period, Petitioner may submit a new application for certification.

In addition, sales without a permit and the one instance in which the title hearing instrument specialist was used in making the sale, justify this remedy. Both violations evidence casual disregard for compliance with regulations and orders of courts and agencies. In the instance of sales without a permit, Petitioner clearly ignored the fact that one had to have a current permit in order to make sales. Rather than make direct inquiry as to the status of the permit review or seek a waiver to allow for continued operation, Petitioner simply ignored the expiration of his permit. The sale of a hearing instrument using the term "specialist" in the job title was in conflict with a 1988 Consent Judgment entered with the Attorney General and the rejection of Petitioner's application for registration as a hearing instrument specialist.

In reviewing this matter the ALJ found that in addition to the certification denial, a monetary penalty of approximately \$22,000 and costs of approximately \$13,000 were also justified. However, the Commissioner has determined that a lesser penalty is sufficient in this case since the monetary penalty is in addition to the greater penalty of the two year denial of certification.

The monetary award sought by the department is intended to deprive Petitioner of any economic advantage gained from the unauthorized sales. The actual dollar amount of the economic advantage gained is calculated assuming that 20% of the revenues received from 35 sales without a permit constitutes the profit from these sales. Although a civil penalty which deprives Petitioner of economic advantage gained from these sales is a legitimate approach to the impermissible sales, the Assistant Commissioner believes that the entire remedial scheme must be viewed as a whole to ensure that it accomplishes its intended results. Here, the sales, while independent violations, were similar in nature. While selling without a permit is not a mere technicality, as it goes to the heart of the regulatory scheme, this case does not present facts of new entrants whose permits have not been reviewed. Nor did the lapsed permit period end with the denial of the permit. Thus the harm to be remedied by the illegal sales is adequately addressed by the sanction against Petitioner's certificate and a small civil penalty for each violation. Under these circumstances, a civil penalty of \$100 per violation is sufficient to alert Petitioner to the need to always have a valid certificate to make sales. Thus a \$3,500 civil penalty is imposed pursuant to Minn. Stat. §153A.15, Subd. 2 (7).

Petitioner's actions have, however, caused great expense to the State to investigate and prosecute this matter. As such, it is appropriate for the State to recover its costs of the

investigation from Petitioner and not from taxpayers. ¹ The assessment of costs will assist in paying for the efforts of the Attorney General's Office, the Office of Administrative Hearings, and Department staff. Action to recover costs is specifically authorized by Minn. Stat. §153A.15, Subd. 2(4) and need not always be brought in tandem with recovery of profits. See, Minn. Stat. §153A.15, Subd. 2(8), granting the Commissioner authority to take whatever other action may be reasonable. It is, however, not necessary to recover every dollar spent on the investigation through an assessment of costs. As such, assessment of costs of \$12,724.20 is reasonable and the request by the Department to remand the record is denied.

BCC

¹This action is consistent with a recent amendment to Minn. Stat. §214 which requires all new health licensing boards to be fee supported.