

FN 53172
Eff. 01-29-1991

STATE OF MINNESOTA
COUNTY OF HENNEPIN

BEFORE THE MINNESOTA
COMMISSIONER OF HEALTH

In the Matter of Craig Farrell,
Hearing Instrument Seller

STIPULATION
AND CONSENT ORDER

IT IS HEREBY STIPULATED AND AGREED by Craig Farrell, (hereinafter "Permittee"), and the Minnesota Department of Health (hereinafter "Department"), and that without trial or adjudication of any issue of fact or law herein and without any evidence or admission by any party with respect to any issue:

1. Permittee has a valid hearing instrument seller permit issued by the Commissioner of Health;
2. On August 22, 1990, Department staff notified Permittee in writing that:
 - a. staff had information that on September 27, 1989, a Pipestone County Conciliation Court Judgement was docketed against Permittee in favor of Ernest and Elvira Kraft in the amount of \$968 representing the \$950 refund amount owed plus \$18 in filing fees;
 - b. Permittee used a purchase contract that did not comply with Minnesota Statutes, sec. 145.43, subd. 1a (a);
 - c. In Permittee's hearing instrument seller permit application dated February 22, 1990, Permittee answered "no" to the question, "Have you ever been subject to a court order or judgement issued to manage your activities in selling hearing instruments?";
 - d. In Permittee's hearing instrument seller permit application dated February 22, 1990, Permittee answered "no" to the question, "Have you ever violated a state or federal court order or judgement issued to manage your activities in selling hearing instruments?";
 - e. In Permittee's hearing instrument seller permit application dated February 22, 1990, Permittee signed his name under the statement, "The information I have provided in this application is true and accurate to the best of my knowledge and belief.";
 - f. Minnesota Statutes, sec. 145.43, subd. 1a (a) states that "no person shall sell a hearing aid in this state unless: (a) The seller provides the buyer with a 30-day money-back guarantee. The guarantee must permit the buyer

to cancel the purchase for any reason within 30 days after receiving the hearing aid by giving or mailing written notice of cancellation to the seller.";

g. Minnesota Statutes, sec. 145.43, subd. 1a (b) requires hearing instrument sellers to provide the following language on all contracts, "MINNESOTA STATE LAW GIVES THE BUYER THE RIGHT TO CANCEL THIS PURCHASE FOR ANY REASON AT ANY TIME PRIOR TO MIDNIGHT OF THE 30TH CALENDAR DAY AFTER RECEIPT OF THE HEARING AID(S). IF THE BUYER DECIDES TO RETURN THE HEARING AID(S) WITHIN THIS 30-DAY PERIOD, THE BUYER WILL RECEIVE A REFUND OF \$..... ";

h. Minnesota Statutes, sec. 153A.15, subd. 1 (6) prohibits hearing instrument sellers from engaging in conduct likely to deceive, defraud, or harm the public; or demonstrating a willful or careless disregard for the health, welfare, or safety of a consumer;

i. Minnesota Rules, Part 4692.0025, subp. 2.C. requires sellers to notify the Commissioner of Health within 30 days of the occurrence of a settlement or award based on the negligence or intentional acts committed in the selling of hearing instruments by the seller;

j. Minnesota Rules, Part 4692.0025, subp. 5.A.(e) allows the Commissioner of Health to impose an enforcement action against a hearing instrument seller if there is evidence that the permit holder violated a state or federal court order or judgement issued to manage the activities of the applicant in the hearing instrument selling business;

k. Minnesota Rules, Part 4692.0030, subp. 5.A.(2) allows the Commissioner of Health to impose an enforcement action against a hearing instrument seller if there is evidence that the permit holder submitted false or misleading information to the Commissioner;

l. Minnesota Statutes, sec. 153A.15, subd. 2 states that when the Commissioner of Health finds that a seller of hearing instruments has violated one or more provisions of sections 153A.13 to 153A.16, the Commissioner may impose an enforcement action against the seller;

m. Permittee was requested to respond in writing to the Department's letter by September 2, 1990;

3. On August 24, 1990, Department staff received Permittee's response in which Permittee included the following documents:

a. Copy of letter August 16, 1990, from Ms. Mary Ann De Groot, Deputy Court Administrator of Pipestone County, to Permittee, in which she stated that she was in receipt of Permittee's check in the amount of \$968 and that Permittee had to send the check directly to Ernest and Elvira Kraft to satisfy the Judgement;

b. Copy of the purchase contract used in this hearing instrument sales transaction and dated April 25, 1989;

c. Copy of Permittee's check dated August 15, 1990, made payable to Pipestone County Court Administrator;

d. Copy of the Pipestone County Conciliation Court Judgement which was docketed on September 27, 1989;

e. Copy of the Medical Waiver signed by E.K. on April 25, 1989;

f. Copy of a letter sent to Permittee from E.K. on June 7, 1989, in which Kraft stated that she was very dissatisfied with the aids and she wanted her money back;

g. Copy of a letter sent to Permittee from E.K. and her husband on June 13, 1989, in which E.K. acknowledged the fact that Permittee was to undergo surgery and that she wanted a refund on the aids she purchased from Permittee;

h. Copy of a letter sent to Permittee from E.K.'s husband on June 20, 1989, in which E.K.'s husband stated that he still had not received the refund for the hearing aids that were returned to Permittee;

i. Copy of a letter sent to E.K. and her husband from Permittee in which Permittee stated, "Your hearing instruments have been returned to the factory with a request for full credit. To date we have not heard from them, but we have no doubt that full credit will be approved as they have never failed us yet. They are a very large organization and things have to go "through channels" which does take some time. We apologize for our inability to come to our regular service center sites during May and June. Surgery was certainly not planned for and definitely not intended for the purpose of inconveniencing anyone. Your refunded [sic.] will be forwarded to you as soon as possible.";

j. Copy of a letter sent to E.K. from "FARRELL'S World of Sounds Hearing Aid Center" on July 29, 1989, in which the Permittee stated, "Your hearing instrument refund has been delayed due to an unforeseen family difficulty which has prevented Mr. Farrell from resuming his route. Therefore, to reimburse you fairly, FARRELL'S will add 12% to your refund when the difficulty is resolved, or the liability on his back is settled, whichever comes first. Thank You! Sincerely, FARRELL'S World of Sounds Hearing Aid Center.";

k. Copy of a letter sent to Permittee from E.K. and her husband on June 26, 1990, in which the E.K. stated, "We were wondering what you intend to do about the money you owe us on the return of the hearing aids. Would you please advise us."

1. Copy of a letter sent to E.K. and her husband from Permittee on July 8, 1990, in which Permittee states, "In response to your communication dated June 21, 1990, I intend to refund your cost of the hearing instruments, plus court charges, as soon as I have some money. The insurance company has still not paid for medical expenses incurred through spinal surgery last year, and I am still unable to close on the property in Minneapolis, which is costing me more money every day that passes. The story of what has transpired reads like fiction, but it can be verified with my attorney, my credit union, my bank, and the realtors. Nothing would make me happier right now than to be able to pay my bills and go back to work. My hands are tied until these things are settled."

4. On August 31, 1990, Permittee mailed a money order made payable to E.K. in the amount of \$968 to Ernest and Elvira Kraft;

5. Permittee expressly waives the formal hearing and all other procedures before the Commissioner of Health to which he may be entitled under the Minnesota and/or United States constitutions, statutes, or rules;

6. This stipulation shall constitute the entire record herein;

7. In the event the Commissioner in her discretion does not approve this settlement, this stipulation is withdrawn and shall be of no evidentiary value and shall not be relied upon nor introduced by either party. Permittee agrees that if the Commissioner rejects this stipulation and this case proceeds to hearing, Permittee will assert no claim that the Commissioner was prejudiced by her review and discussion of this stipulation or of any records relating hereto;

8. Permittee does not contest the facts referred to below:

a. Permittee sold two ITE hearing instruments to E.K. for the price of \$950;

b. E.K. returned the aids for a refund and provided a written cancellation to Permittee on June 9, 1989;

c. Permittee agreed to provide E.K. with a refund pursuant to Minnesota Statutes, sec. 145.43, subd. 1a (a);

d. Permittee did not provide E.K. with their refund within 30 days after receiving the written cancellation and the returned aids as required by Minnesota Statutes, sec. 145.43, subd. 1a (b);

e. On September 27, 1989, the Pipestone County Conciliation Court docketed a Judgement against Permittee in favor of Ernest and Elvira Kraft in the amount of \$968 representing the refund amount of \$950 and \$18 in filing fees incurred by the Krafts;

- f. Permittee used a purchase agreement that did not contain language as is specifically required by Minnesota Statutes, sec. 145.43, subd. 1a (b);
- g. In Permittee's hearing instrument seller permit application dated February 22, 1990, Permittee answered "no" to the question, "Have you ever been subject to a court order or judgement issued to manage your activities in selling hearing instruments?";
- h. In Permittee's hearing instrument seller permit application dated February 22, 1990, Permittee answered "no" to the question, "Have you ever violated a state or federal court order or judgement issued to manage your activities in selling hearing instruments?";
- i. In Permittee's hearing instrument seller permit application dated February 22, 1990, Permittee signed his name under the statement, "The information I have provided in this application is true and accurate to the best of my knowledge and belief.";
9. Permittee acknowledges that the facts and conduct specified in paragraphs two and eight above may constitute a violation of Minnesota Statutes, sec. 145.43, subd. 1a (a), (b), 153A.15, subd. 1 (6), Minnesota Rules, Part 4692.0030, subp. 5.A.(1), subp. 5.A.(2), subp. 5.A.(3);
10. Permittee and the Department acknowledge that Permittee's conduct specified in paragraphs two and seven above was not exercised in bad faith;
11. Permittee acknowledges that proof at hearing of any one or more of the facts and conduct specified in paragraphs two and seven above, including proof by the Department's introduction of admissions made by Permittee to Department's staff, would authorize the Commissioner of Health to take action against the Permittee's permit pursuant to Minnesota Statutes, sec. 153A.15, subd. 2 (1988);
12. This stipulation shall not in any way or manner limit or affect the authority of the Commissioner to proceed against Permittee by initiating a contested case hearing or by other appropriate means on the basis of any act, conduct, or admission of Permittee justifying disciplinary action which occurred before or after the date of this stipulation and which is not directly related to specific facts and circumstances set forth herein;
13. In consideration of the facts contained herein, the Permittee agrees to the following terms and conditions:
- a. Permittee agrees to remit to the Department the amount of \$96.80 representing the economic advantage gained by the failure to provide E.K. with the amount of their refund in a timely manner;
- b. Permittee agrees to remit to the Department the amount of \$124.00

representing the costs of investigation in this matter;

c. Permittee agrees accept a written letter of reprimand from the Commissioner of Health for failing to disclose an outstanding conciliation court judgement on Permittee's permit application;

d. Permittee understands that pursuant to Minnesota Statutes, sec. 13.41, subd. 4, final action in this matter is public information;

e. Permittee agrees to comply with Minnesota Statutes, sec. 145.43, subd. 1a (b);

f. Permittee agrees to comply with Minnesota Statutes, sec. 153A.15, subd. 1;

g. Permittee agrees to comply with Minnesota Rules, Part 4692.0025, subp. 2.C.;

14. Permittee's violation of any of the terms and conditions specified in this Stipulation and Consent Order constitutes a basis for further action by the Commissioner of Health under Minnesota Statutes, sec. 153A.15, subd. 2 (1988);

15. Once the Order is signed by the Commissioner, it shall become effective upon service upon Permittee;

16. Permittee hereby acknowledges that he has read and understood this Stipulation and Consent Order, and agrees to this Stipulation and Consent Order and has freely and voluntarily signed the Stipulation without threat or promise by the Commissioner or any of her employees, or agents. When signing the stipulation, Permittee acknowledges that he is fully aware that the Stipulation and Consent Order will take effect upon service of the document;

17. If the Commissioner or one of her employees or agents receives evidence that Permittee has violated the terms of the Stipulation and Consent Order, or has made misrepresentations to the Department, the Commissioner shall so notify the Permittee in writing at his last known address. Permittee shall have the opportunity to contest the allegations by submitting a written request to so contest within 30 days after service of the Notice of Opportunity to Contest Allegations:

a. If Permittee does not submit a written request to contest the allegations within 30 days of service of the notice, the issues set forth in the notice may be taken as true or deemed proven without further evidence. Upon a report to the Commissioner of such allegations and of Permittee's failure to contest, the Commissioner may impose additional disciplinary action. Any Commissioner order issued under this paragraph shall be final and binding upon Permittee and shall not be subject to judicial or administrative

review or to a judicial stay pending any attempts to seek such review;

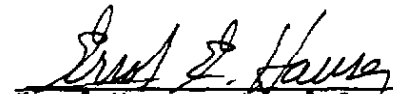
b. If Permittee submits a written request to contest the allegations, the Commissioner may initiate either a proceeding conducted pursuant to Minnesota Statutes, chapter 153A or a contested case hearing pursuant to Minnesota Statutes, chapter 14 to determine whether Permittee can show cause as to why additional disciplinary action should not be imposed. In any such proceeding, the Commissioner shall have the burden of going forward to provide a sufficient factual basis supporting the allegations. The Commissioner shall provide sufficient evidence to meet the substantial evidence standard used by appellate courts in reviewing administrative actions, that is, evidence demonstrating that the Commissioner is not acting unreasonably, arbitrarily, or capriciously, and that some reasonable evidence exists to support the allegations. Upon such a showing by the Commissioner, the burden of proof as to why additional disciplinary action should not be imposed shall be upon the Permittee;

18. This Stipulation contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies this stipulation;


Dated: 1/22, 1991.


Craig Farvell, Permittee

Dated: 1/22, 1991.


Errol Hauser, Legal Counsel for
the Permittee

Dated: 1/22, 1991.


Tom Hiendlmayr, Director
Health Occupations Program
Minnesota Department of Health

IT IS SO ORDERED:

Permittee is hereby reprimanded based on the following facts:

1. Permittee did not provide E.K. with a refund within 30 days after receiving the written cancellation and returned aids from E.K. in accordance with Minnesota Statutes, sec. 145.43, subd. 1a(a);

2. Permittee did not disclose to the Commissioner of Health the existence of a Pipestone County Conciliation Court Judgement entered against Permittee on September 27, 1989 in favor of E.K. in the amount of \$968; and

3. Permittee used a purchase contract that did not comply with Minnesota Statutes, sec. 145.43, subd. 1a(a).

MINNESOTA COMMISSIONER OF HEALTH

Dated: January 24, 1991.

Roney J. Feldman