

Effective APRIL 5, 2011



May 18, 2010

Protecting, maintaining and improving the health of all Minnesotans

Robert O'Neel

RE: MDH File Number: HDC08013

Dear Mr. O'Neel:

Based on the facts and law in this matter as described in the enclosed Staff Determination, the Minnesota Department of Health (MDH) has determined that you obtained money from a consumer through the use of undue influence and high pressure sales tactics, in violation of Minnesota Statutes, section 153A.15, subdivision 1(8). Therefore, MDH is publically reprimanding you and assessing a civil penalty in the amount of \$1,222.00, representing the costs of the investigation and proceedings to date. This action is authorized under Minnesota Statutes, section 153A.15, subdivision 2.

This decision will be made final and effective 30 days from the date it is received by you. During that 30-day period, you have the right to challenge this decision in a contested-case hearing, as provided under Minnesota Statutes, Chapter 14. Requests for a hearing should be made in writing and include specific grounds for challenging the Department's decision. If you wish to request a hearing, please send a written hearing request, within 30 days of your receipt of this letter, to:

Tom Hiendlmayr, Health Occupations Program Director
Minnesota Department of Health
PO Box 64882
Saint Paul, MN 55164-0882

You may also deliver your request to 85 East Seventh Place, Suite 220, Saint Paul, MN; or fax it to Tom Hiendlmayr at (651) 201-3839. If you have any questions about this matter, please contact Catherine Dittberner Lloyd at (651) 201-3706.

Sincerely,

A handwritten signature in black ink, appearing to read "Darcy Miner", is written over the typed name.

Darcy Miner, Director
Compliance Monitoring Division

Enclosure

cc: Tom Hiendlmayr, Director of the Health Occupations Program

**HEALTH OCCUPATIONS PROGRAM
MINNESOTA DEPARTMENT OF HEALTH**

**A Determination In the Matter of
Robert O'Neel
Hearing Instrument Dispenser Practitioner**

AUTHORITY

1. Pursuant to Minnesota Statutes, section 153A.15, subdivision 1(8), in pertinent part, a hearing instrument dispenser is prohibited from obtaining money, property, or services from a consumer through the use of undue influence or high pressure sales tactics.
2. Minnesota Statutes, Section 153A.15, subdivision 2 authorizes the Department to take disciplinary action against hearing instrument dispensers. The types of disciplinary action the Department may impose include censure or reprimand, revocation, suspension, renewal of certificate or impose, for each violation, a civil penalty not to exceed \$10,000 that deprives the dispenser of any economic advantage gained by the violation and that reimburses the Department for the costs of the investigation and proceedings resulting in the discipline, and any other action reasonably justified by the individual case. Pursuant to Minnesota Statutes, Section 13.41, disciplinary actions are public data.

FINDINGS OF FACT

1. Robert O'Neel (hereinafter "Practitioner") was approved as a hearing instrument dispenser trainee effective August 10, 2006 and held this status until December 21, 2006. Practitioner was certified as a hearing instrument dispenser effective January 23, 2007. Practitioner's certificate to dispense hearing instruments was renewed on November 1, 2007 and November 1, 2008. During this period, Practitioner was employed by Avada Audiology and Hearing Care (hereinafter "Company A").
2. On February 27, 2008, the Department received information concerning Client 1, a female age 85 years, and her transactions with Practitioner. According to the information received, Practitioner went to Client 1's home to "convince" her she needed a hearing instrument telling her, "I think you are hard of hearing." At a later date, Practitioner went back to Client 1's home with a hearing instrument, and Client 1 met Practitioner at the door and refused to accept delivery of the hearing instrument. Practitioner insisted Client 1 try the hearing instrument to "see what she was missing." Client 1 again refused to accept delivery of the hearing instrument. Several days later, Client 1 received a refund check in the amount of \$245, rather than the \$500 down payment Client made towards the hearing instrument. On January 20, 2008, Client 1 sent a written request for a refund of the remaining \$255 of the \$500 down payment.

3. By letter dated March 7, 2008, the Department requested Client 1 provide copies of her written request for a refund and asked Client 1 to sign a records release form.
4. On March 13, 2008, the Department received the requested information from Client 1. Client 1 stated she did not keep a copy of the letter she sent to Practitioner. Client 1 provided the Department with an authorization to release her medical records, which was signed by Client 1's Power of Attorney (hereinafter "POA"). Client 1 also provided copies of three letters she received from Practitioner's employer (hereinafter "Company A"). In its letters, Company A told Client 1, "Your contract states that you can cancel your contract and you will receive a refund of less \$250 (plus the 2% MN Care Tax that we are required by the state to collect). The statement 'prior to midnight of the 45th calendar after receipt of the hearing aid' just defines the end of the time frame that you can cancel. Whether or not you take delivery of the hearing aid does not affect our right to the fee." By letter dated January 17, 2008, Company A gave Client 1 a \$245 refund.
5. By letters dated May 19, 2008 and June 27, 2008, the Department asked Practitioner to respond to questions and provide documentation regarding his transactions with Client 1 regarding hearing instruments. On June 23, 2008 and August 5, 2008, the Department received Practitioner's response:
 - a. Practitioner stated he did not contact Client 1 prior to his appointment to test her hearing. Practitioner explained that Client 1 was on a list purchased by Company A. On November 1, 2007, and to follow-up on a letter sent directly to Client 1, Practitioner reported a "tele-professional that takes inbound and makes outbound calls" telephoned Client 1 and scheduled a hearing evaluation for November 16, 2007. Practitioner provided a copy of the "tele-professional's" notations, summarized in part: *"11-1-07 I called Client 1 She was tested a few months ago with a loss. She felt aids too expensive. She has Medicare and Senior Gold as a supplement. She was told Senior Gold would give her a discount for [Brand B] only. We will meet [Brand B] discount. Problems: tv loud (she says condo has thin walls). Hear but not understand, groups, low voices, she said son is tired of repeating [sic]. Her niece is Power of Attorney. She will try to get her sister in law to bring her She still drives, but will not come if bad weather. I am sending her a patient information form, but she said friend or niece will have to help her fill out because her hands are shaky. She asked price, I told her depends on loss. She said not interested in spending \$1,300. She is putting in a new wood floor."*
 - b. On November 16, 2007, Client 1 went to Practitioner's office in Hutchinson, Minnesota accompanied by her sister-in-law. Practitioner tested and evaluated Client 1's hearing and recommended she purchase two hearing instruments. According to Practitioner, Client 1 explained to Practitioner she had problems that limited her mobility, which included "tremors in her hands." Client 1's sister-in-law signed the personal hearing assessment form, the HIPAA notice form, the medical insurance information form, the waiver of a medical evaluation, and the purchase agreement on behalf of Client 1.

- i. Practitioner asked Client 1 for a down payment so he could order the hearing instrument from the manufacturer. Client 1 explained to Practitioner that her niece helped her with finances and stated she would ask her niece to deliver a check for the deposit on the hearing instrument.
 - ii. The contract signed November 16, 2007 by Practitioner and Client 1's representative indicate Client 1 purchased a right In-the-Ear (ITE) hearing instrument in the amount of \$1,100 plus \$22 tax for a total of \$1,122. The contract terms included a lifetime service plan, one-year warranty and one-year loss and damage insurance (with a 25% of list price deductible). The amount of \$500 was written on the contract next to the term, "Less amount paid with order," and in the blank line following the terms, "Balance due on delivery" is \$622. The contract included the correct statutory language requiring a 45-calendar-day guarantee and buyer right to cancel, which included a cancellation fee of no more than \$250.
 - iii. Practitioner explained why he did not note on the written purchase agreement the actual date he received the \$500 deposit. Practitioner stated, he was "led to believe Client 1's intention was to go forward and did not anticipate the deposit would not occur until 12/7/2007. There were no notations or amendments [on the purchase agreement] because I failed to make them, in retrospect, I should have."
 - iv. Practitioner stated he gave Client 1 a copy of the MDH brochure about purchasing a hearing instrument and read the cancellation provisions to Client 1.
- c. On November 19, 2007, and according to Practitioner's notations, Client 1 called to cancel her hearing instrument order and stated she could not afford the purchase.
- d. Practitioner stated he went to Client 1's home twice, on December 7, 2007 and January 4, 2008 because "she invited me." Practitioner explained when Client 1 went to his office for the initial appointment, she "outlined numerous physical problems which limit her mobility" and stated she needed hearing aids. Practitioner stated Client 1 "elected to purchase two hearing aids, but due to her tremor had her sister-in-law sign the contract for her and explained her niece helped her finances and would deliver a deposit check in order for us to have the aids manufactured." Practitioner stated Client 1 called Practitioner's office, reconsidered her decision, and canceled the order stating the hearing aids were too expensive. As a "courtesy," Practitioner called Client 1 and "once again she reconsidered and decided to order the hearing aids." Practitioner told Client 1 in order to proceed, he needed a deposit. Practitioner stated Client 1 "lived two miles from his office, the weather was inclement, and I agreed to personally receive the deposit at her home." Client 1 stated no other family member was present, and he did not call Client 1's POA or representative because Client 1 "did

not request any additional person present.” During the visit, Practitioner stated Client 1 asked him to complete the blanks on her check for the \$500 deposit, which he did. “When the hearing instruments arrived [at Practitioner’s office] Client 1 again stated she did not know if she could afford them.” Practitioner stated, “Since the hearing instruments were custom made for her I felt the least I could do was check fit and confirm her intentions.” Practitioner stated the fit was fine and Client 1 refused delivery. Client 1 asked Practitioner about the cancellation fee and Practitioner told her it would be applied to her. Client 1 sent Practitioner two letters, which he forwarded to his employer for response.

- e. According to Practitioner, Client 1 verbally canceled the purchase on November 19, 2007 and January 4, 2008; and Company A received her written cancellation on January 31, 2008.
 - f. On January 17, 2008, Company A sent a refund check to Client 1. On February 15, 2008, Practitioner’s employer responded to Client 1’s letters requesting the remaining amount of her deposit. Company A responded and denied her request.
6. On November 20, 2008, the issues in the case were presented to the Hearing Instrument Dispenser Advisory Council Competency Review Committee (CRC). CRC members recommended the Department require Practitioner to reimburse Client 1 \$255 and require Practitioner to pay for the costs of the investigation. The CRC stated Practitioner’s actions were unethical and constituted undue pressure in pursuit of the sale of hearing instruments and cancellation fee. The CRC stated:
- The fact that Practitioner went to Client 1’s house after she had already canceled to see if she would change her mind is just bad [judgment] and too much pressure for an 85-year-old woman. Client 1 may have been afraid to tell him, “no” at that point and she was alone in her home.
 - Practitioner did not collect the \$500 down payment as written on the purchase agreement dated November 16, 2007; rather Practitioner collected the \$500 when he went to Client 1’s home and completed the blanks on her check in order to collect the down payment. Client 1 had already canceled her purchase, therefore, Practitioner’s actions indicate he went to her home to see if she would change her mind in order to get the \$500 down payment; and once she refused delivery, Practitioner collected a cancellation fee. Practitioner’s actions in this case, including undue pressure in the sale of a hearing instrument were unethical. Practitioner should return the remaining \$255 to the consumer and pay for the costs of the investigation.
 - Practitioner needs to amend the purchase agreement to include the three-day right to cancel for a full refund if Practitioner is soliciting home sales.
7. By letter dated November 21, 2008, the Department requested Client 1 provide a copy of the front and back of the check for the \$500 down payment.

8. On December 1, 2008, the Department received a copy of a check, made payable to Company A, in the amount of \$500, and dated December 7, 2007. Client 1 and her POA are listed as joint checking account owners.
9. By letter dated December 23, 2008, the Department issued a Determination regarding Practitioner's conduct in this matter and gave Practitioner 30 days to appeal the Department's findings and request a contested case hearing as provided under Minnesota Statutes, Chapter 14, The Department notified Practitioner his request for a hearing must be in writing and include specific grounds for challenging the Department's decision.
10. Between December 23, 2008 and March 20, 2009, Practitioner sent two unsigned statements in response to the determination. On March 20, 2009, the Department received Practitioner's complete response, which included Practitioner's signature, title, and hearing instrument dispenser certificate number. Practitioner made the following comments concerning the Department's Determination:
 - a. Practitioner stated his employer, Company A, agreed to refund Client A \$255 representing the cancellation fee.
 - b. Practitioner stated he had been in professional sales for thirty years and had never been accused of using undue influence, high pressure sales tactics, harassment or duress. Practitioner stated he works with many "octogenarians and seniors who are impaired or vulnerable," and it was his opinion Client 1 was very "capable of making her own decisions." Practitioner acknowledged Client 1 had some physical limitations and stated Client 1's ability to recognize and repeat words in a quiet environment went from 20% correct response to 76% correct response with amplification. Practitioner stated during the initial consultation, Client 1 "was concerned about two things: the cost of the hearing instruments and her ability to successfully handle them due to her tremor, her other obvious physical problems." Practitioner stated Client 1 agreed to purchase one instrument "despite what she felt was excessive cost." Client 1's sister-in-law completed the signatures on the paperwork and Client 1 stated her "niece helped her with paper work and would do a deposit in a week." Practitioner indicated Client 1 did not mention she had a POA, did not state she needed a POA to reach a decision, and did not state a POA handled her finances.
 - c. On December 7, 2007, Practitioner stated he called Client 1 and asked if she had "indeed chosen not to help her hearing." Practitioner stated a "conversation ensued during which she changed her mind." Practitioner "explained that in order to proceed, she would need to make a deposit for partial payment of the instrument. She agreed and requested that I stop at her residence to receive payment. This was done as a courtesy to Client 1 who stated she did not want to go out in the harsh December weather."

- d. Practitioner stated the dates he believed were "contentious and where key facts may have been overlooked by the Department began December 14, 2007." Practitioner stated:
- i. On December 7, 2007, "Corporate" sent Client 1 a "thank you letter" and her response was, "NO PHONE CANCELLATION."
 - ii. On December 27, 2007, a Company A representative called Client 1 to schedule delivery for January 4, 2008 and there was "NO MENTION OF CANCELLATION."
 - iii. On January 2, 2008, a Company A representative called Client 1 to confirm the delivery and "NO CANCELLATION." The representative made written notations indicating Client 1 was "not anxious to get aid . . . it's too darn much money to pay for them, might have to pay by the month."
 - iv. On January 4, 2008, went to Client 1's home and Client 1 informed Practitioner she did not want to complete the transaction. Practitioner stated he was "curious why she did not cancel after receipt of the thank you letter or during any of the calls from Company A. Was it a last minute decision not to accept delivery?" Practitioner also stated, "I was curious about whether she could insert and remove and also whether she would be able to hear better with the device. Both better hearing and ability to handle were demonstration." Practitioner stated he left Client 1's home and reiterated since Client 1 lived less than two miles from his office, it was "less of a physical burden for me than for her to complete the appointment at her home." Practitioner's case notations, in which he highlighted for Department review, state Client 1 "Refused delivery/financial. Did insert and remove/still thinks the 300 dollars her dead husband spent was what she should spend. Put this aside as a learning experience. Changed her mind again, delivery unsuccessful. Made no promise of full refund."
- e. In response to the HID CRC comments, Practitioner stated he did not go to Client 1's home on December 7, 2007 to see if she would change her mind. Prior to the visit, Practitioner spoke to Client 1 over the telephone, and that is when she changed her mind and decided to make the purchase. Practitioner stated Client 1 invited him to her home due to "inclement weather and her reluctance to drive."
- f. Practitioner stated he made an "extra effort" to assist Client 1. He did not harass or intimidate Client 1 and his visits to her home were for her conveniences and were "not sales presentations."
- g. Practitioner provided his and Company A's case notations to demonstrate his appeal to the Department's Determination, including a notation from his

November 16, 2007 appointment, which read in pertinent part, "Client 1 has . . . concerns about cost, benefit and her ability to change batteries . . . wants the least expensive. Needs aids/will be difficult to satisfy." Practitioner restated, and highlighted portions of his case notations indicating Client 1 called and canceled and/or changed her mind about the purchase several times, including November 16, 2007; November 19, 2007; December 7, 2007; December 27, 2007 and January 4, 2008.

- h. Practitioner indicated the letters sent by Client 1 and her POA sent [to Practitioner] were "far more aggressive in nature" and the allegations he forced himself into her home were not consistent with his contacts with Client 1. In response to Client 1's request for a refund, Practitioner referred Client 1 to the corporate office. Practitioner also highlighted his notations and Company A's notations for the Department's consideration, which demonstrated Client 1 called several times and requested a refund. The notations indicate Client 1 "refused to listen," was "discourteous," and "uncooperative," and "hung up" when speaking to Practitioner and other Company A representatives.
11. By letter dated April 7, 2009, the Department sent Client 1 a letter with questions concerning Practitioner's visits to her home. On April 15, 2009, Client 1 responded to the Department's questions. Client 1 stated Practitioner asked if he could come to her home on December 7, 2007. When Practitioner came to her home, Client 1 stated she met him at the door and said "I'm not going to accept the hearing aid." Client 1 stated she did not invite Practitioner to come to her home [to deliver the hearing aid], "he just showed up at the door with the hearing aid."
12. By letter dated August 12, 2009, the Department sent Client 1 a letter asking whether she received a refund from Company A in the amount of \$255. By letter dated August 18, 2009, Client 1 responded, "Yes."
13. By letter dated October 2, 2009, the Department responded to Practitioner's March 11, 2009 appeal to the Department's Determination. The Department agreed to amend the Determination to reflect Client 1 received a refund. The Department did not agree to amend the Determination concerning undue influence and high pressure sales tactics. The Department agreed there was insufficient evidence Practitioner harassed or intimidated Client 1 and agreed to remove language from the Determination. The Department advised Practitioner if the changes were not sufficient, he had a right to a hearing and provided Practitioner a copy of booklet titled, "Contested Case Hearing Guide" published by the Office of Administrative Hearings.
14. On November 3, 2009, the Department received a response from Practitioner. Practitioner stated he did not believe the POA was an issue since Client 1 requested assistance from her sister-in-law during the first transaction when the purchase agreement was signed. Practitioner stated his first visit to Client 1's home was to collect a check because Client 1 told Practitioner, over the telephone, she decided to purchase a hearing instrument. Practitioner did not agree that he focused on the sale because Client 1's

hearing loss was so severe, she had problems communicating and truly needed help. Practitioner stated he was attempting to provide help and did not believe there was ever high pressure or undue influence over Client 1. Practitioner stated the issue was Client 1's loss of the \$255 and not deception or trickery on his part.

15. By letter dated November 6, 2009, the Department sent Practitioner a brochure, published by the Office of Administrative Hearings (OAH), titled, *A Guide to Participating in Contested Case Proceedings* and provided a link to the OAH website.

CONCLUSION

Practitioner did not comply with the requirements of Minnesota Statutes, section 153A.15, subdivision 1(8). While there are conflicting statements as to whether Client 1 invited or did not invite Practitioner to her home to collect a down payment or later to fit the hearing instruments, there is sufficient evidence the consumer requested and required assistance from her POA and/or a family member concerning transactions with Practitioner or his employer. The facts establish that Practitioner's conduct was undue influence and high pressure sales tactics in the dispensing of a hearing instrument to a consumer. The evidence substantiates Client 1 advised Practitioner she had multiple impairments, including hearing, mobility, and hand tremors. Despite Client 1's needs, Practitioner went to Client 1's home, wrote a check for the \$500 down payment for Client 1's signature, and then ordered the hearing instrument from the manufacturer. This occurred after Client 1 verbally canceled and then reconsidered the purchase several times all occurring without the benefit of Client 1's POA to assist in the purchase decision or in writing a check. Though Practitioner states he was trying to help Client 1, the facts show Practitioner imposed his judgment that Client 1 needed hearing aids over Client 1's decision that she did not want them. But for Practitioner's persistent pressure, Client 1's first cancellation would have ended the transaction.

DETERMINATION

1. Practitioner is publically reprimanded.
2. Within 30 days of the effective date of this Determination, Practitioner shall pay a civil penalty of \$1,222 to reimburse MDH for costs of investigations and proceedings to date. Practitioner must make the payment by check made payable to "State of Minnesota, Treasurer" and mail the check to the attention of Catherine Dittberner Lloyd, PO Box 64882, Saint Paul, MN 55164-0882.
3. Practitioner may pay the \$1,222 civil penalty in monthly installments of up to four months after the effective date of this action. If Practitioner chooses to make installments, he must notify MDH in writing about his intentions, including how many installments he intends to make, in what amount, and over which time period. Practitioner must send this information to: Catherine Dittberner Lloyd, PO Box 64882, Saint Paul, MN 55164-0882, within 30 days of receipt of this document.

4. Each payment will be made by check payable to "State of Minnesota, Treasurer", and mailed to Catherine Dittberner Lloyd, PO Box 64882, Saint Paul, MN 55164-0882, or any other address specified by MDH. Each payment is due by the last day of each month; however, Practitioner may prepay at any time.
5. The penalty may be referred to the Minnesota Collection Enterprise (MCE), part of the Minnesota Department of Revenue, or any other source for collection, if Practitioner misses a monthly payment by 14 calendar days after the established deadline. When this Order for a penalty becomes public and MDH refers the matter to MCE, MCE is authorized by Minnesota Statutes, section 16D.17, to obtain a judgment against Practitioner without further notice or proceedings.