

BEFORE THE BOARD OF HEARING AID DISPENSERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-11-0361-HAD REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 2024-2011
TREATMENT OF THE LICENSE OF)	
DON VAN DE RIET,)	
License No. 179.)	
)	

**PROPOSED FINDINGS OF FACT;
CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

I. INTRODUCTION

The Business Standards Division (BSD) filed a complaint against the hearing aid dispenser’s license of Don Van de Riet. The complaint alleges that Van de Riet committed unprofessional conduct in violation of Mont. Code Ann. § 37-16-411(2)(o) (failing to cooperate with an investigation undertaken by the Board), Mont. Code Ann. § 37-16-411(2)(e) and (l) (obtaining a fee by making a sale by fraud or misrepresentation or engaging in unethical conduct or gross incompetence or negligence in the performance of professional duties), Mont. Code Ann. § 37-1-316(4), (5), and (18).

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on September 23, 2011. Michael Fanning, agency legal counsel, appeared on behalf of BSD. Kraig Kazda, attorney at law, appeared on behalf of Van de Riet. Van de Riet, Robert Nystrand, Tom Bradshaw, and Terry Smith all testified under oath. BSD’s Exhibits 1 through 14 and Van de Riet’s Exhibits A through D were admitted into evidence. The parties provided the hearing officer with post-hearing briefing and the briefs were timely submitted on November 2, 2011 at which time the record in this matter closed. Based on the evidence and argument adduced at hearing, the following findings of fact, conclusions of law, and recommended decision are made.

II. FINDINGS OF FACT

1. At all times pertinent to this case, Van de Riet has held license number 179 issued by the Montana Board of Hearing Aid Dispensers. At all times pertinent to

this case, Van de Riet was the owner of Hearing Aid Institute, a Montana registered corporation. That corporation was dissolved in December 2010.

2. Robert Nystrand suffered partial hearing loss due to his military service and previous employment with the Department of Defense. By May of 2009, Nystrand, then 79 years of age, decided that his hearing had deteriorated such that he should consider obtaining hearing aids.

3. On May 5, 2009, he went into the Hearing Aid Institute office in Helena. Van de Riet assisted him during that visit. During the visit, Van de Riet tested Nystrand and told Nystrand that he needed hearing aids.

4. Van de Riet suggested to Nystrand that he purchase Rhapsody hearing aids. The purchase price of the hearing aids was \$7,490.00. Exhibit 1. Van de Riet gave Nystrand a \$500.00 credit toward the purchase price of the hearing aids, resulting in the hearing aids price being reduced to \$6,990.00.

5. Van de Riet was always concerned about making a sale. His preference was to keep a customer in the store. If a sale is not closed during the customer's first visit, there was an 80% to 90% chance that the customer would not return to purchase a hearing aid.

6. Van de Riet conducted his business with an eye toward closing purchases on the customer's first visit. He would do this by, among other things, arranging credit for the customer to complete a purchase while the customer was in the store on the first visit.

7. Consistent with his desire to close the sale before Nystrand left the store (closing the deal on the first visit), Van de Riet arranged for Nystrand to purchase the hearing aids by arranging for Nystrand to receive a GE Money Bank Care Credit line of credit. After testing Nystrand's hearing and recommending hearing aids, Van de Riet called his business manager in the Great Falls office, Tom Bradshaw, to have Bradshaw get Nystrand approved for Care Credit. Van de Riet supplied the information Bradshaw needed to get Nystrand approved. Bradshaw then immediately got the approval and called Van de Riet back. Bradshaw selected the amount of the credit line based upon the purchase price of the hearing aid plus a small buffer, in this case securing a total credit line for Nystrand of \$7,100.00. Exhibit 1.

8. On the credit card application, Bradshaw wrote that Nystrand was self employed with a monthly salary of \$54,000.00. Nystrand did not provide either Van de Riet or Bradshaw that information. In fact, Nystrand has been retired for many

years and his monthly income is but a fraction of the amount stated on the application.

9. Care Credit is not subject to any of the state laws that regulate hearing aid dispensers.

10. Neither Van de Riet nor anyone in his store disclosed the Care Credit financing terms to Nystrand at the time of the sale. In addition, Van de Riet never gave Nystrand any type of credit card disclosure nor was Nystrand made aware of the terms of the Care Credit credit line. The single page Care Credit application (Exhibit 2) does not contain any information about the terms of the credit line. It does state, however, that the applicant for credit should read “the GE Money Bank key credit terms and initial cardholder disclosure statement before signing this application.”

11. Van de Riet and Hearing Aid Institute sold the hearing aids to Nystrand on Care Credit financing having never informed Nystrand of (1) the annual percentage rate of his credit card, (2) the methodology determining the finance charge and the balance upon which that finance charge would be determined, (3) the amount of the finance charge, (4) the amount to be financed, the total number of payments, or (5) the due dates or period of payments to repay the amount charged. Indeed, the application for credit specifically notes “If my application for credit is approved, the care credit agreement (“Agreement”) will be sent to me and will govern my account.” Exhibit 2. In fact, Nystrand was unaware that he had even applied for a Care Credit credit card.

12. Nystrand received his first billing statement from Care Credit prior to the time he actually received his hearing aids. There was also a finance charge of \$29.34 on his purchase at that time even though he had not yet received his hearing aids. Nystrand’s first payment on the credit line was due on June 7, 2009 before the rescission date expired. It was not until he received his statement that Nystrand learned for the first time that he would be paying \$163.00 per month for his hearing aids, that he had an interest rate of 13.9%, and that he learned of the credit line’s other material terms.

13. Nystrand received his hearing aids from Hearing Aid Institute on May 21, 2009. From the time he received the hearing aids, Nystrand had trouble with them. He returned to Hearing Aid Institute two to three times per week to get them fixed, to no avail. When Nystrand would bring the hearing aids in, the Hearing Aid Institute staff would tell him that he would eventually get used to the hearing aids. Because of the representations of the staff, Nystrand did not exercise his rescission right.

14. After trying several times to have the problems taken care of, on August 7, 2009, Nystrand asked to return the hearing aids and demanded a refund. Van de Riet and Hearing Aid Institute refused to take the hearing aids back. As a result, on August 7, 2009, Nystrand filed a complaint with the Board of Hearing Aid Dispensers.

15. After receiving the complaint, the Board initiated an investigation of the complaint. As part of the investigation, the Board requested that Van de Riet provide the Board with Nystrand's financing contract for the purchase of the hearing aids as well as all other documents related to the credit loan application. Exhibit 9, Board's April 21, 2010 letter to Van de Riet. Van de Riet produced nothing but the Care Credit application to the Board (Exhibit 2). He could not produce any of the financing disclosures because he did not have them and did not in the first place ever disclose to Nystrand the terms of the credit agreement that Nystrand was entering into with Care Credit.

16. The Board has previously sanctioned Van de Riet's license. In August 1996, Van de Riet entered into a consent decree wherein he acknowledged that his conduct violated Title 37, Chapter 16 of the Montana Codes Annotated. The conduct that formed the basis of the consent decree included making a sale or obtaining a fee by fraud or misrepresentation. Exhibit 11. On May 14, 2004, the Board entered its final order adopting a hearing officer's recommended decision that found that Van de Riet, among other things, violated Board rules in making two sales "through misrepresentation of the maximum dispensing fee." Exhibit 12, Bates stamp 000009. As a result of this finding, Van de Riet was fined and ordered to disgorge wrongfully obtained dispensing fees. Exhibit 12, Bates stamp 000011.

III. CONCLUSIONS OF LAW¹

A. *Van de Riet Violated Professional Standards.*

1. The Department bears the burden of proving by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show that any sanction it seeks is appropriate under the circumstances of the case.

¹ Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

2. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

* * *

(4) unprofessional conduct consisting of signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

* * *

(5) a misleading, false or fraudulent advertisement or other representation in the conduct of the profession or occupation;

* * *

(18) conduct that does not meet the generally accepted standards of practice.

3. Mont. Code Ann. § 37-16-411 provides in pertinent part:

(2) A licensee . . . may be sanctioned as provided in 37-1-312 for any of the following causes:

* * *

(e) obtaining a fee or making a sale by fraud or misrepresentation;

* * *

(l) unethical conduct or gross incompetence or negligence in the performance of professional duties

4. A licensee can be found to have violated a provision of 37-1-316 or a rule of professional conduct without proof that the licensee acted purposefully, knowingly or negligently. Mont. Code Ann. § 37-1-320.

5. The preponderant evidence in this matter shows that Van de Riet violated Mont. Code Ann. § 37-1-316(4) and (5) and Mont. Code Ann. § 37-16-411(2) when, in order to sell Nystrand hearing aids, Van de Riet induced Nystrand to enter into the Care Credit credit card agreement without disclosing to Nystrand the essential terms of the credit line before the sale of the hearing aids. At a minimum, the failure to ensure disclosure of the material terms of the credit card line before inducing Nystrand to buy the hearing aids was a misrepresentation within the meaning of those two statutes.

6. The evidence fails to show that the licensee did not cooperate with the Board's investigation. Van de Riet caused all documentation that he had to be disclosed to the Board.

B. The Appropriate Sanction.

7. A regulatory board may impose any sanction provided for by Montana Code Annotated Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(e). Among other things, Montana Code Annotated § 37-1-312 provides that a regulatory board may impose probation upon the licensee, may impose a fine not to exceed \$1,000.00, and may require the licensee to refund costs and fees collected from the consumer.

8. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

9. BSD has recommended a fine, probation, and a refund of costs and fees incurred by Nystrand. The licensee, while not proposing a sanction, suggests that the Department's position on a sanction is too harsh because it fails to take into account the fact that Van de Riet has had only two preceding disciplinary actions in 40 years of practice. The most recent of these violations occurred just over eight years ago.

While it is true that the most recent of the actions occurred over eight years ago, it is troubling that the two Montana actions involved a purposeful failure to use a purchase contract with clients that provided for a 30 day rescission required by law (the 1995 violation) and a finding of misrepresentation with respect to the retention of a dispensing fee (the 2003) violation. It appears that at a minimum Van de Riet has to date displayed a cavalier attitude about utilizing ostensibly deceptive business practices because he is more concerned about closing a sale than maintaining professional standards. Sharp business practices which amount to actionable misrepresentation such as Van de Riet's sale to Nystrand cannot be countenanced. The appropriate remedy in this case, both in order to protect the public and ensure the licensee's rehabilitation, must include a fine and imposition of probation. It must also include payment to Nystrand of the costs and fees he has incurred in the purchase of the hearing aids.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that the Board enter its order placing Van de Riet's license on probation for a period of two years with the terms:

1. That Van de Riet, within 30 days of the date that the recommended decision in this matter becomes final,

(a) refund the purchase price of the hearing aids to Nystrand,

(b) refund the interest which Nystrand has paid on his Care Credit revolving account as a result of the hearing aid purchase up through and including Nystrand's Care Credit statement immediately following the date that the recommended decision becomes final, and

(c) pay a fine in the amount of \$750.00.

2. That Van de Riet shall obey:

(a) all provisions of Title 37, Chapters 1 and 16, Montana Codes Annotated,

(b) all provisions of Title 24, Chapter 156, and

(c) all requirements or directives imposed by the Board.

3. That in the event Van de Riet fails to comply with any of the above terms and conditions of his probation, that his license be summarily suspended pursuant to Montana Code Annotated § 2-4-631 until such time as he comes into compliance with the terms of this license probation.

DATED this 1st day of December, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.