

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

**LINDA EARLE, Owner and Person in Charge,
P.M.Q. ENTERPRISES, INC., d/b/a
COLONIE HEARING CENTER,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on November 24, 1998 at the office of the Department of State located at 41 State Street, Albany, New York.

The respondent having been advised of her right to be represented by an attorney chose to represent herself.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that in failing to make refunds for returned hearing aids, and in using contracts that did not contain required information, the respondent violated General Business Law (GBL) §§792[3] and [4] and 19 NYCRR 191.11 and 191.12, and engaged in fraud or fraudulent practices, and that she has failed to pay a lawfully obtained judgement.¹

FINDINGS OF FACT

¹ An additional charge that the respondents violated GBL §792[1] was withdrawn by the complainant. In any case, that charge could not have been sustained inasmuch as the provisions of that section of the statute, as renumbered by L.1988, c. 113, §2, have been held to have been preempted by Federal statute (21 USC §360 et seq). *NY State Hearing Aid Society v State of NY*, No. 76 C 1565 (EDNY, 1978).

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on September 24, 1998 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, a duly registered hearing aid dealer as the person in charge of P.M.Q. Enterprises, Inc., d/b/a Colonie Hearing Center (hereinafter "Colonie") (State's Ex. 1), a business of which she is the owner.

3) On July 25, 1997 Donald Bowker entered into an agreement with Colonie to purchase two "UHS" hearing aids for \$1,500.00 each, and paid Colonie a deposit of \$1,500. On August 5, 1997 he took delivery of the hearing aids, and paid Colonie the balance due of \$1,500 (State's Ex. 1).

4) The only contracts or other documents given to Mr. Bowker were in the nature of receipts (State's Ex. 2). Those receipts stated that there was a one year warranty for repairs, but did not state that there was a thirty day money back guarantee should the devices be returned in the same condition as when purchased, ordinary wear and tear excluded, did not state the respondent's registration number, did not indicate whether the devices were new, used, or reconditioned, and did not contain a statement that "this hearing aid will not restore normal hearing nor will it prevent further hearing loss" (State's Ex. 1).

5) Several days after receiving the hearing aids Mr. Bowker returned to the respondent's store to complain that they were not working properly. The (unidentified) employee with whom he dealt confirmed that the devices were defective, and said that they would have to be returned to the manufacturer for replacement. Several days after that, and less than thirty days after his receipt of the hearing aids, he returned and requested a refund. He was told by the respondent that it would take three to four weeks, but no refund was ever made.

6) Mr. Bowker sued the respondent in the small claims part of the Town Court of the Town of Colonie, and on March 19, 1998 was granted a judgement for \$3,000.00 plus costs, interest, and poundage fees of \$232.62 (State's Ex. 1). The respondent has paid \$25.00 of that judgement to the sheriff.

7) In addition to the money owed to Mr. Bowker, the respondent acknowledges owing the following refunds for other returned, defective UHS hearing aids: Rose (first name not disclosed), \$4,400.00, return date 8/23/97; Marie Wagner, \$1,550.00, return date 6/27/97; Helen Carey, \$690.00, return date 8/1/97; Mel Petit, \$1,600.00, return date 10/31/97; Elsie Jeram, \$1,600.00, return date 11/18/97; Iva Mastromarchi, \$900.00, return date 11/11/97; Mildred Bernardi, \$200.00, return date 11/18/97; and Sandra Miers, \$2,400.00, return date 1/9/98 (State's Ex. 1).

8) When the respondent returned the defective hearing aids to UHS she received a credit against her outstanding balance due. She did not receive any actual refunds.

9) The respondent continues to operate Colonie. Any money received from the sale of hearing aids is immediately used to pay back rent for the store so as to avoid eviction.

OPINION AND CONCLUSIONS OF LAW

I- The individual respondent does not personally hold a registration as a hearing aid dealer. Rather, she is listed as the "person in charge" of Colonie, a corporation registered pursuant to GBL Article 37-A.

Where a corporation is the applicant for registration as a hearing aid dealer, the application must contain the name and address of each of the corporate officers and of each stockholder of the corporation holding a stock interest of more than 10% (GBL §790[2][a]).

19 NYCRR 191.1, enacted pursuant to the powers granted by GBL §§790[2][c] and 795[1], requires that a corporate application for registration contain, in addition to the names and addresses of officers and stockholders: the names of the officers or employees who will manage each location of the business; a statement as to whether an officer has had a license or registration denied, suspended or revoked; a statement as to whether any charges or complaints have been brought against any officer; a statement as to whether any officer has been convicted of a crime or offense; a statement as to whether any officer has ever engaged in the hearing aid business; and the name of the officer responsible for the supervision of the overall hearing aid business. In addition, an application for a new business must be accompanied by references attesting to the reputation in the community of the corporate officer executing the application.

The clear legislative and regulatory intent is that there must be some individual who is responsible for the operation of a registered corporation, and that such individual must meet certain standards as to his or her background and character. This tribunal must, therefore, have jurisdiction to, in the appropriate circumstances, debar an individual from serving as an officer or manager of a corporate registrant, and to revoke a corporate registration because of the acts of the holder of more than 10% of the corporation's stock.

II- Pursuant to GBL §792[4] and 19 NYCRR 191.12, the purchaser of a hearing aid has an absolute right to, within thirty days of purchase, return a hearing aid in the same condition, ordinary wear and tear excluded, to the dealer, and to receive a refund of the full purchase price less a cancellation fee not to exceed \$30.00 per hearing aid or ten percent of the purchase price, whichever is lesser. The statute further provides that such right to a refund shall not be in lieu of or in any way affect the right of the purchaser to recover the full amount paid and for any damages sustained for a breach of warranty of fitness for use. In addition, the dealer is entitled to assess a cancellation charge for the cost of any custom ear mold and a thirty day supply of batteries.

Colonie sold Donald Bowker two defective hearing aids. He returned those hearing aids to Colonie, and requested a refund, well within the statutory thirty day cancellation period. Thus, pursuant to the statute, he was entitled to a refund. Further, since the hearing aids were defective, he was entitled to avoid paying a cancellation charge. In spite of that, of her acknowledging Mr. Bowker's right to a refund, and of the judgement obtained by Mr. Bowker against Colonie, the respondent has refunded only \$25.00 to him. In addition, she has failed to make refunds which she acknowledges are due to eight other persons. She is, therefore, clearly guilty of multiple violations of both the statute and the regulation.

III- Pursuant to GBL §792[3] and [4] and 19 NYCRR 191.11 every contract for sale of a hearing aid must be accompanied by the guarantee discussed in II, above, and must include, among other things, the dealer's registration number, and a statement as to whether the aid is new, used, or reconditioned. 19 NYCRR 191.11 also requires that the contract contain the statement "this hearing aid will not restore normal hearing nor will it prevent further hearing loss." The receipts given to Mr. Bowker, the only contracts received by him, did not comply with those requirements.

IV- Fraudulent practices "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading. Since the purpose of such restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." *Allstate Ins. Co. v Foschio*, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted). A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. *Division of Licensing Services v Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989).

According to the respondent's testimony all of the money received by Colonie for the sale of hearing aids was used for the operation of the business, with no provisions being made for the possibility that purchasers would request refunds during the thirty day period following the sales. The failure to make such provisions resulted in the thirty day guarantee being illusory. As a result, the respondents' method of doing business constituted a fraudulent practice.

V- Where a registrant has received money to which he, she, or it is not entitled, that registrant may be required to return it, together with interest, as a condition of retention of the registration. See *Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990); *Edelstein v Department of State*, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962).

VI- In determining what sanctions to impose on the respondent, I have considered her testimony that she lacks sufficient assets to make

the refunds and to satisfy Mr. Bowker's judgement. However, I have also considered the fact that, according to her testimony, she continues to operate Colonie in a manner in which it is impossible for her to honor the thirty day guarantee on new sales, as the funds from hearing aid sales continue to be paid to her landlord prior to the expiration of the thirty day guarantee periods. That method of doing business requires that this tribunal take prompt action to protect the public.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Linda Earle has violated General Business Law §§792[3] and [4] and 19 NYCRR 191.11 and 191.12, and has engaged in a fraudulent practice, and accordingly, pursuant to General Business Law §791, the registration as a hearing aid dealer of P.M.Q. Enterprises, Inc. d/b/a Colonie Hearing Center, Linda Earle person in charge, is suspended effective immediately and until such time as the respondent shall submit proof satisfactory to the Department of State that: the judgement in *Donald Bowker v Colonie Hearing Center*, Town Court, Town of Colonie, index No. 98-062, has been fully satisfied; full refunds, together with interest at the legal rate for judgements (currently 9% per year) have been made to the persons listed as entitled to such refunds in finding of fact #7, above; Colonie Hearing Center has made proper provisions to be able to honor the statutory thirty day guarantee; and she has paid a fine of \$1,000.00 to the Department of State. The respondent is directed to deliver the hearing aid dealer registration certificate of P.M.Q. Enterprises, Inc. to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208 either in person within five business days of her receipt of this decision, or by registered or certified mail postmarked no later than three days following her receipt of this decision (GBL §791[3]).

Roger Schneier
Administrative Law Judge

Dated: November 30, 1998