

effective 8-11-94

STATE OF MINNESOTA
COUNTY OF HENNEPIN

BEFORE THE MINNESOTA
COMMISSIONER OF HEALTH

In the Matter of Don Pfau,
Hearing Instrument Seller

STIPULATION AND CONSENT ORDER 93535

IT IS HEREBY STIPULATED AND AGREED by Don Pfau, (hereinafter "Practitioner"), 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. During all times herein, Practitioner has been and is subject to the jurisdiction of the Commissioner of Health from whom he held a permit to sell hearing instruments in the State of Minnesota from February 22, 1990 to May 31, 1994 when his permit expired;

2. The Department alleges and the Practitioner unconditionally admits for purposes of these and any future disciplinary proceedings the following allegations:

a. On January 9, 1993, MS bought two hearing aids from Practitioner for a total price of \$1,590.00. Practitioner delivered the hearing aids to MS on January 23, 1993. On that same day, MS's daughter, PS, gave MS \$1,600.00 to cover the cost of the hearing aids. On January 26, 1993, MS died. On January 27, 1993, Practitioner was informed of MS's death by family members. Practitioner told MS's family that he would not refund the purchase price of the hearing aids to MS's wife. Practitioner maintained that language in the purchase agreement which read: "(Estates non-applicable)", allowed him to deny any refund to MS's family members.

b. On February 3, 1993, PS called Practitioner and again requested a refund on behalf of her mother. Practitioner again refused to give her a refund because of the contract language. Instead, Practitioner offered to rebuild the hearing aids for \$185.00, if MS's sister would buy the hearing aids. After discussing the situation with the Department, PS sent a written cancellation of the contract to Practitioner and returned the aids to him on February 10, 1993, well within 30 days of delivery. Practitioner failed to refund the money to PS within 30 days as required Minnesota Statute § 153A.19, subd. 2(a).

c. On the purchase agreement that Practitioner used for the sale to MS, the refund language required by Minnesota Statutes § 153A.15, subd. 2(b) is displayed in a box. Practitioner did not fill in the amount of refund to be expected by MS. Practitioner placed a legal cite of "Minnesota Statutes 153A.15, subd. 3a", at the beginning of the refund language. At the end of the statutorily required refund language, Practitioner added the phrase: "(Estates non-applicable)".

d. On June 24, 1993, the Department notified Practitioner by certified mail that it had completed its investigation into the above-referenced complaint.

The Department determined that Practitioner violated Minnesota Statutes §§153A.15 subd. 1(6) and (9), and 153A.19 subd. 2(a) and (b). The Department enclosed three copies of a proposed Stipulation and Consent Order for Practitioner's review and signature.

e. On August 5, 1993, Practitioner issued a cashier's check to MS's wife in the amount of \$1,590.00. This amount represented the full purchase price of the hearing aids.

f. On September 1, 1993, Practitioner remitted to the Department a check for \$120.00. This amount represented a civil penalty referenced in the proposed Stipulation and Consent Order to reimburse the Department for the cost of its investigation. Practitioner did not sign the proposed Stipulation and Consent Order at that time.

3. For purposes of this Stipulation, Practitioner expressly waives all procedures and proceedings before the Commissioner of Health to which Practitioner may be entitled under the Minnesota and/or United States constitutions, statutes, rules and also waives the right to any judicial review or appeal under the Administrative Procedures Act, by writ of certiorari under Minn. Stat. §480A.06 or otherwise from the order issued by the Commissioner of Health pursuant to this stipulation;

4. Except as otherwise specified herein, this Stipulation and Consent Order, investigative reports, and related documents shall constitute the entire record of the proceedings herein upon which this order is based and shall be filed with the Department. Any reports or other material related to this action and received after the date this Stipulation and Consent Order is executed shall become part of the record and may be considered by the Department in future aspects of this proceeding. These items shall maintain the data classification to which they are entitled under the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13. They shall not be considered a part of this Stipulation and Consent Order and shall not, to the extent they are not already public documents, become public merely because they are referenced herein;

5. In the event the Commissioner in her discretion does not approve this settlement, or a lesser remedy than specified herein, this Stipulation and Consent Order shall be null and void and shall not be used for any purpose by either party hereto; provided however, that this should occur and thereafter an administrative contested case is initiated pursuant to Minn. Stat. Ch. 14 and §153A.15, Practitioner agrees that he will not raise any objection on any administrative level or in any court action to the Department's proceeding and hearing the case on the basis that the Commissioner has become disqualified due to her review and consideration of this Stipulation and record. In exchange for this agreement by Practitioner, the Commissioner agrees, in the event she does not approve this stipulation, to grant Practitioner all legal rights and remedies available to him under the Minnesota and United States constitutions, Minnesota Statutes; and rules of the Department, except as expressly provided for in this paragraph;

6. Practitioner admits and acknowledges that for the purpose of this Stipulation and Consent Order only, the facts and conduct specified in paragraph 2 above constitute violations of Minn. Stat. §§153A.15, subd. 1(6),

and (9); 153A.19, subd. 2 (a), and (b), and are grounds for disciplinary action by the Commissioner. Practitioner further acknowledges and admits that the Commissioner has a reasonable basis of law and fact to justify the actions specified in the order and waives any argument that no such reasonable basis exists.

7. This Stipulation shall not in any way or manner limit or affect the authority of the Commissioner to proceed against Practitioner by initiating a contested case hearing or by other appropriate means on the basis of any act, conduct, or admission of Practitioner 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;

8. Upon this Stipulation and Consent Order and all of the facts, records, and proceedings herein, and without further notice or hearings herein, Practitioner does hereby consent that the Commissioner may make and enter an Order for the following:

a. that Practitioner remove the incorrect statutory cite from his printed contract form. Practitioner shall remove the language "(Estates not applicable)" from the box containing the refund language on his printed contract form. Practitioner shall fill in the blank space listing the refund amount to be expected on all future contracts he enters into. Practitioner shall have all buyers sign the contract when purchasing hearing aids. Practitioner shall provide the Department with a copy of his corrected contract form within 90 days of receiving this signed Stipulation and Consent Order from the Commissioner. The copy of the corrected contract form should be mailed to: Mary Beth Gossman, Legal Analyst, Health Occupations Program, 121 East 7th Place, Suite 400, P.O. Box 64975, St. Paul, MN 55101.

b. that Practitioner remit to the Department the amount of \$165.00 as a civil penalty. This amount represents the original \$120 civil penalty assessed in the previously proposed Stipulation and Consent Order mailed June 24, 1993, plus an additional \$45 to reimburse the Department for the costs incurred in investigating this matter since September 1, 1993. Practitioner shall make the check payable to "Treasurer, State of Minnesota", and mail it to the attention of: Mary Beth Gossman, Legal Analyst, Health Occupations Program, 121 East 7th Place, Suite 400, P.O. Box 64975, St. Paul, MN 55101. Practitioner's check for \$120 dated September 1, 1993, is enclosed with this Order and returned at this time.

9. Any appropriate federal or state court shall, upon application of the Commissioner, enter an order of enforcement of any or all of the terms of this Stipulation and Consent Order;

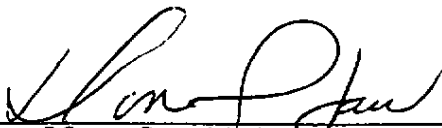
10. Practitioner hereby acknowledges that he has read, understood, and agreed to this Stipulation and Consent Order and has freely and voluntarily signed it. In signing this Stipulation and Consent Order, Practitioner acknowledges that he is fully aware that it must be approved by the Commissioner. The Commissioner may either approve the Stipulation and Consent Order as proposed, approve it subject to specified changes or reject it. If the Commissioner approves the Stipulation or makes a change acceptable to the Practitioner, the

Commissioner will issue the Order and the Stipulation will take effect. If the changes are unacceptable to Practitioner or the Commissioner rejects the Stipulation and Consent Order, it will be of no effect;

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


12. Upon this Stipulation and Consent Order and all other evidence made available to the Commissioner, the Commissioner may at any time after she has approved this Stipulation and Consent Order issue it to Practitioner without further notice. A copy of the Stipulation and Consent Order when issued by the Commissioner shall be served by first class mail on Practitioner, which service will be considered personal service upon Practitioner. This Stipulation and Consent Order is effective upon service.

Dated: 7-20-, 1994



Don Pfau, Practitioner

Dated: 7/25-, 1994



Susan Winkelmann, Supervisor
Investigations and Enforcement
Health Occupations Program

Upon consideration of this stipulation and all the files, records and proceedings herein by the Commissioner,

IT IS HEREBY ORDERED that the terms of this stipulation are adopted and implemented by the Commissioner this 8th day of August, 1994.

STATE OF MINNESOTA
DEPARTMENT OF HEALTH



MARY JO O'BRIEN
Commissioner of Health