

Effective 11/28/2011

**BEFORE THE MINNESOTA
DEPARTMENT OF HEALTH
HEALTH OCCUPATIONS PROGRAM**

**In the Matter of Christopher G. Vail
Hearing Instrument Dispenser**

**STIPULATION AND
CONSENT ORDER**

IT IS HEREBY STIPULATED AND AGREED by Christopher G. Vail, (hereinafter "Practitioner"), and the Minnesota Department of Health (hereinafter "Department" or "MDH"), and that without trial or adjudication of any issue of fact or law herein:

Except as otherwise specified herein; this Stipulation and Consent Order (hereinafter "Stipulation"), investigative reports, and related documents shall constitute the entire record herein upon which this Stipulation is based and shall be filed with the Department. This Stipulation is public data pursuant to the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 ("MGDPA"). All other data comprising the record shall not be considered a part of this Stipulation and shall maintain the data classifications to which they are entitled under the MGDPA.

LEGAL AUTHORITY

1. Minnesota Statutes, section 153A.14, subdivision 4, in pertinent part, states it is unlawful for any person not holding a valid certificate to dispense hearing instruments. A person who dispenses a hearing instrument without the certificate required by this section is guilty of a gross misdemeanor. Minnesota Statutes, section 153A.14, subdivision 4a states a person who is not certified under this section may dispense hearing instruments as a trainee for a period not to exceed 12 months if the person submits an application on forms provided by MDH; is under supervision of a certified dispenser; meets all

requirements for certification except passage of the examination, and uses the title, "dispenser trainee" in contacts with patients, clients or consumers.

2. Minnesota Statutes, section 153A.14, subdivision 6 authorizes the Department to ensure that hearing instruments are dispensed in compliance with state requirements and the requirements of the United States Food and Drug Administration and failure to comply with state or federal regulations may be grounds for enforcement actions under section 153A.15, subdivision 2.
3. The Department has statutory authority to discipline hearing instrument dispensing practitioners under Minnesota Statutes, Section 153A.15. The types of disciplinary action the Department may impose include one or more of the following: deny the application for certification, revoke or suspend the certificate, impose for each violation a civil penalty that deprives the dispenser of any economic advantage gained by the violation and that reimburses the Department for costs of the investigation and proceedings, censure or reprimand the dispenser, revoke or suspend the right to supervise or be a trainee, impose a civil penalty not to exceed \$10,000 for each separate violation or any other action reasonably justified by the individual case. Pursuant to Minnesota Statutes, Section 13.41, disciplinary actions are public data.
4. Pursuant to Minnesota Statutes, section 153A.15, subdivision 1(19), the Department may take enforcement action against a practitioner for violating any of the provisions of sections 148.5195, subdivision 3, clause 20; 148.5197; 148.5198; and 153A.13 to 153A.18.

FACTS

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

1. On May 20, 2009, MDH received Practitioner's application for the hearing instrument dispenser certification examination (hereinafter "examination") and the examination fees of \$95.00 made payable to the International Hearing Society and \$405.00 made payable to the Treasurer, State of Minnesota. Practitioner's employer and supervisor (hereinafter "Managing Supervisor") signed the checks on behalf of Donaldson White, LLC, DBA Miracle Ear Center (hereinafter "Employer") on May 15, 2011. The application Practitioner submitted was for the May 7, 2009 examination, which had already taken place. Practitioner signed the application on May 6, 2009 and affirmed he read and received a material packet which included the HID Certification Examination Information Sheet, HID Certification Application, HID Examination Overview, Bibliography, Sample Informed Consent Agreement and Minnesota Law.
2. On June 8, 2009, Practitioner sent an email to MDH and stated his Employer asked if he was on the schedule for taking the August 2009 examination and asked if he had trainee status. On June 10, 2009 MDH responded and stated, "You are on the list to receive an application for the August exam. The applications will be mailed next week and they are accepted on a first-come, first-served basis. As far as being approved as a trainee, I do not show that you have ever filled out an application to be approved. You are not able to work as a trainee unless you apply and are approved. If you would like an application to become a trainee, please let me know." On June 11, 2009, Practitioner sent an email to MDH and requested a HID trainee application. Practitioner later confirmed receipt of the

HID trainee application and stated that he had completed it and submitted it to his Employer's accountant and for payment of the trainee application fee and mailing to MDH.

3. Between June 12, 2009 and June 25, 2009, the Practitioner's training supervisor (hereinafter "Training Supervisor"), the Employer's accountant and the Managing Supervisor exchanged emails amongst themselves and MDH regarding Practitioner's application and fees. The emails evidence confusion among the Practitioner, Training Supervisor, Employer's accountant and Managing Supervisor about the trainee and exam applications and fees. MDH Credentialing responded to the emails to MDH with information about the examination applications and fee it had received, but not about a trainee application and fees it had never received.
4. On June 23, 2009, MDH sent Practitioner the application for the August 20, 2009 examination. On July 8, 2009, MDH received Practitioner's application for the August 20, 2009 examination, deposited Practitioner's examination fees referenced in paragraph one above and scheduled him for the examination.
5. By letter dated September 10, 2009, MDH notified Practitioner he did not receive a qualifying score on all portions of the examination and offered to send Practitioner an application for the November 5, 2009 examination. On October 15, 2009, MDH received Practitioner's application for the November 5, 2009 examination. On October 22, 2009, MDH received Practitioner's examination fees from Practitioner's Employer and scheduled him to retake portions he did not pass.
6. By letter dated November 30, 2009, MDH notified Practitioner he did not receive a qualifying score on the portion of the examination he had to retake and again offered to

send Practitioner an application for the next examination. On February 2, 2010, MDH received Practitioner's application for the 2010 examination dates. On March 18, 2010, MDH received Practitioner's examination fees from Practitioner's Employer and scheduled him for the May 13, 2010 examination.

7. By letter dated June 9, 2010, MDH notified Practitioner he received a qualifying score on the HID Certification Examination. MDH enclosed a HID certification application with instructions and notices about certification fees, timeline to complete the application, and unauthorized practice.
8. On June 21, 2010, MDH received Practitioner's application for certification as a hearing instrument dispenser and the application fees of \$350.00, paid by Practitioner's Employer. In the space after questions 12 and 13 of the certification application, Practitioner wrote "Donaldson White, LLC dba Miracle-Ear," as the name of his employer, and "Miracle-Ear, Sears Hearing Center" as all business names used by his employer. Practitioner wrote "Miracle Ear 1600 Miller Trunk Duluth MN 55811" in the space after question number 18, which stated, "Business name(s) and addresses (s) under which your hearing instrument dispensing and activities directly related to hearing instrument dispensing took place in the last three years. Include your trainee status, if any. Provide the dates, by month, day and year that are applicable to the names and addresses provided." Practitioner signed the application on June 16, 2010.
9. By email dated June 23, 2010, MDH Credentialing staff asked Practitioner to provide the telephone number and the dates of employment for dispensing as requested in question number 18 of the application for certification. Between June 24, 2010 and July 1, 2010,

Practitioner and Credentialing Staff exchanged emails regarding Practitioner's dispensing activities and Practitioner's response to question 18 on the application.

10. By email and attachment dated July 1, 2010, Practitioner provided the dates of employment and telephone numbers as requested by Credentialing staff. According to Practitioner, he began employment with the employers identified in paragraph eight above on April 1, 2009 through the "present" date. Practitioner started training as a hearing instrument dispenser in July 2009.
11. By letter dated July 21, 2010, Credentialing staff sent Practitioner a certificate to dispense hearing instruments effective July 21, 2010. In its letter, MDH notified Practitioner that based on the information included with his application, it appeared he may have dispensed illegally. MDH notified Practitioner that the issuance of his certification would not affect MDH's pursuit of its determination and action regarding illegal practice.
12. In a second letter dated July 21, 2010, Credentialing staff requested Practitioner complete an Employment and Practice Verification form for completion by Practitioner's employer.
13. By email dated August 6, 2010, Practitioner requested a copy of his application for certification as a HID. MDH sent a copy of the application on August 24, 2010.
14. By email dated September 7, 2010 and letter dated September 16, 2010, Practitioner requested a copy of his application for trainee status. Practitioner stated he had no record of receipt of approval of his trainee status. On October 13, 2010, Credentialing responded and advised Practitioner MDH did not have a record indicating he received approval to be a trainee in the state of Minnesota and wrote, "Our office would need to have received a trainee application and an application fee. When issued, the trainee would receive the

original application in the mail stating the issue and expiration date. A copy would also be sent to the supervisor.”

15. On October 18, 2010, MDH received a letter and the completed Employment and Practice form from Practitioner’s Managing Supervisor. According to the Managing Supervisor:
- a) Practitioner began employment on April 24, 2009 as a district manager.
 - b) On June 16, 2009, Practitioner applied for Certification as a Hearing Instrument Dispenser.¹
 - c) Practitioner’s formal training and supervision for HID certification began on August 3, 2009. The Managing Supervisor wrote, “Apparently due to confusion on our end, we failed to properly submit an application for a Trainee Certificate at that time.”
 - d) On July 21, 2010, Practice received notice of his certification as a hearing instrument dispenser. The Managing Supervisor wrote, “While it is easy to see how you may perceive that Practitioner has held himself out to be a Hearing Instrument Dispenser, I feel that what we have here is a misunderstanding, as our intentions were to uphold the intent of the program and the Department.”
 - e) On the employment and verification form, the Managing Supervisor indicated Practitioner held himself out as a Trainee from August 3, 2009 to July 21, 2010.

¹ Practitioner could not have applied for certification as a hearing instrument dispenser in Minnesota on June 16, 2009 because he had not passed the certification examination required by Minnesota Statutes, section 153A.14, subdivision 2h. MDH’s procedure was to not send a copy of the HID certification application until an individual received a qualifying score on all sections of the written and practical examination.

16. On November 3, 2010, Credentialing staff notified Practitioner the matter regarding information on the employment and verification form was referred to the MDH Investigations and Enforcement Unit (I/E).
17. By letter dated December 27, 2010, I/E staff sent Practitioner a letter requesting he provide an explanation of the types of services rendered and the titles he used during the period from August 3, 2009 to July 21, 2010. MDH asked Practitioner to provide the number of clients he saw, a copy of the audiograms and related hearing tests, purchase agreements and corresponding manufacturer invoices during the period of illegal practice. Practitioner was asked to explain how he was supervised and the locations in which he dispensed hearing instruments.
18. On January 25, 2011, MDH received a letter of representation from Dorsey & Whitney LLP, attorney for Practitioner and Practitioner's employer, Miracle Ear. Practitioner and his Employer's attorney also contacted MDH telephonically and asked that Practitioner be allowed to submit a list of consumer names or a random selection of the records MDH requested due to the volume of Practitioner's transactions during the period of illegal practice.
19. By letter dated January 26, 2011, MDH agreed to accept a list of Practitioner's transactions including consumer names, date of hearing testing and evaluation, date of purchase, purchase price and delivery date. MDH agreed to review the documents and randomly select client records for full review to determine Practitioner's compliance with hearing testing protocol. MDH also requested an explanation of how Practitioner was supervised, the name of Practitioner's supervision and location where Practitioner dispensed hearing instruments.

20. On March 8, 2011, MDH received Practitioner's response which included a list of Practitioner's hearing instrument sales, returns, cancellations, and exchanges. In addition, Practitioner submitted a copy of his eight-week training protocol he completed while under the supervision of the Training Supervisor.
21. By letter dated March 17, 2011, MDH advised Practitioner that MDH was satisfied with Practitioner's and Employer's training documentation and that MDH would not need detailed client case histories, audiograms, purchase agreements and related medical records for review. MDH requested Practitioner provide the manufacturer invoice cost for the hearing instruments dispensed by Practitioner during the period of illegal practice. On April 7, 2011, MDH received the invoice cost for hearing instruments dispensed by Practitioner.
22. MDH recognizes Practitioner did not intentionally violate the law regarding hearing instrument dispenser trainee statutes and Practitioner's Employer did not intend to illegally employ Practitioner as a hearing instrument dispenser. However, in their communications Practitioner and his Employer apparently confused the type of application and application fees they had submitted to MDH and while Practitioner's Employer submitted the Practitioner's examination fees, there is no evidence the Training Supervisor or Managing Supervisor signed and submitted a trainee application or paid the trainee application fees. The facts demonstrate Practitioner submitted four applications to take and then retake the written and practical examinations and in doing so, affirmed receipt of a material packet which included the laws regulating dispensing. In addition, although MDH advised Practitioner on June 10, 2009 he was not an approved trainee and had not paid the trainee application fees, he started to dispense hearing instruments on

August 3, 2009 without receipt of MDH's written approval of his status as a dispenser trainee, which would have included, in part, approval of the supervisor, and the effective and expiration dates of his trainee status.

ORDER

1. Upon this Stipulation, and without any further notice of proceedings, the Division Director hereby *ORDERS*:
 - A. Within 30 days of the effective of this Stipulation, Practitioner shall pay a civil penalty of \$5,422.00 as authorized under Minnesota Statutes, section 153A.15, subdivision 2(4) and 2(8) to deprive the Practitioner of the economic advantaged gained by violating one or more provisions of Minnesota Statutes, section 153A.13 to 153A.15 and any other action reasonably justified by the individual case. Of the total civil penalty, \$745.00 represents the cost of the investigation. 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, Health Occupations Program, Minnesota Department of Health, PO Box 64882, Saint Paul, MN 55164-0882
 - B. Practitioner may pay the \$5,422.00 civil penalty in monthly installments of up to twenty-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. Each payment is due by the last day of each month and Practitioner can prepay at any time. Practitioner must send this information to:

Catherine Dittberner Lloyd, Health Occupations Program, Minnesota Department of Health, PO Box 64882, Saint Paul, MN 55164-0882, within 30 days of receipt of this document.

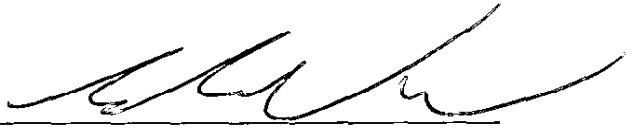
- C. Regarding the civil penalty described above in paragraph A, the penalty may be referred to the Minnesota Collection Enterprise (MCE) in the Minnesota Department of Revenue, or other source for collection, if Practitioner misses a monthly payment by 14 calendar days after the deadline. When this Stipulation for a penalty becomes public and the Department refers the matter to MCE, MCE is authorized by Minnesota Statutes, section 6D.17, to obtain a judgment against Practitioner without further notice or additional proceedings.
2. This Stipulation shall not in any way or manner limit or affect the authority of the Department to proceed against Practitioner by initiating a contested-case hearing or by other appropriate means, based on any act, conduct, or admission of the Practitioner which justifies disciplinary action and occurred either before or after the date of this Stipulation and which is not directly related to specific acts and circumstances set forth herein.
3. In the event the Division Director in her discretion does not approve this settlement or a lesser remedy than specified herein, this Stipulation shall be of no evidentiary value and shall not be relied upon or used for any purpose by either party. If this should occur and thereafter an administrative contested case is initiated pursuant to Minnesota Statutes Chapter 14 and Minnesota Statutes, Section 153A.15, Practitioner agrees to assert no claim that the Division Director was disqualified due to the review and consideration of this Stipulation or any records relating hereto.

4. This Stipulation contains the entire agreement between the Department and the Practitioner, there being no other agreement of any kind, verbal or otherwise, which varies this Stipulation. Practitioner understands that this agreement is subject to the Division Director's approval. If the Division Director either approves the Stipulation or makes changes acceptable to the Practitioner, the Division Director will issue the Stipulation. Upon this Stipulation and all other evidence made available to the Division Director, once the Division Director has approved it, the Division Director may issue the Stipulation to Practitioner at any time without further notice.
5. A copy of this Stipulation, when issued by the Division Director, shall be served by first class mail on Practitioner, at Dorsey & Whitney LLP, Suite 1500, 50 South Sixth Street, Minneapolis, Minnesota 55402. Service via first class mail shall be considered as personal service upon Practitioner, at which time this Stipulation shall become effective. Any appropriate federal or state court shall, upon application of the Director, enter an order of enforcement of any or all of the terms of this Stipulation.


CONSENT

Practitioner hereby acknowledges that he has read, understood, and agreed to this Stipulation and has freely and voluntarily signed it.

Dated: 11/1, 2011

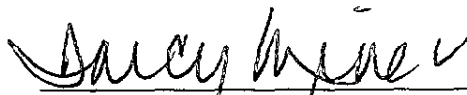

Christopher G Vail

Dated: 11/8/11, 2011


Tom Hiendlmayr, Director
Health Occupations Program

Upon consideration of this Stipulation and all the files, records, and proceedings herein by the Division Director, **IT IS HEREBY ORDERED** that the terms of this Stipulation are adopted and implemented by the Division Director on this 15th day of November, 2011.

STATE OF MINNESOTA
DEPARTMENT OF HEALTH

A handwritten signature in cursive script, appearing to read "Darcy Miner", is written over a horizontal line.

Darcy Miner, Director
Division of Compliance Monitoring