

Effective: 6/21/2012



May 11, 2012 *Protecting, maintaining and improving the health of all Minnesotans*

Frank John Pacovsky

RE: MDH File Number: 05022

Dear Mr. Pacovsky:

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 during the period between 2001 and February 2008, you failed to disclose to consumers you shared fifty percent of the proceeds from hearing aids sales with another practitioner in violation of Minnesota Statutes, section 148.5195, subdivision 3(12). Therefore, you are being assessed a disciplinary civil penalty in the amount of \$5,000.00 that deprives you of any economic advantage gained by the violations and that reimburses the Department of Health for costs of the investigation and proceedings resulting in disciplinary action. In addition, you must successfully complete two continuing education (CE) units in ethics within twelve months. The course must be approved by the Department. You must also provide a copy of this Determination to any employer who hires you within two years of the effective date of this Determination. This disciplinary action is authorized by Minnesota Statutes, section 148.5195, subdivision 4.

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, Director, Health Occupations Program
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 Mr. 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 cursive script, appearing to read "Darcy Miner".

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
Frank John Pacovsky
Audiologist Practitioner**

AUTHORITY

1. Pursuant to Minnesota Statutes, section 148.5195, subdivision 3(12), the Department may take disciplinary action against a practitioner for failure to disclose to the consumer any fee splitting or any promise to pay a portion of a fee to any other professional other than a fee for services rendered by the other professional.
2. Pursuant to Minnesota Statutes, section 148.5195, subdivision 4, if the Department finds that a practitioner should be disciplined according to subdivision 3, the Department may take any one or more of the actions: refusal to grant or renew licensure, suspend licensure for not more than one year, revoke license, take any reasonable lesser action, and impose for each violation a civil penalty not to exceed \$10,000 that deprives the licensee of any economic advantage gained by the violation and that reimburses the Department for the costs of the investigation and proceedings resulting in disciplinary action. Pursuant to Minnesota Statutes, Section 13.41, disciplinary actions are public data.

FINDINGS OF FACT

1. Frank Pacovsky (hereinafter "Practitioner") was registered and licensed as an audiologist on June 14, 1995. Practitioner renewed his audiology registration annually until May 31, 2000 and his audiology license biennially since June 1, 2000.
 - a. In his licensing application, Practitioner identified himself as a self-employed audiologist providing services in Albert Lea, Faribault, Mankato, New Ulm, St. James, Gaylord, and Mountain Lake Minnesota.
 - b. In his renewal applications, Practitioner used the following business names, or a combination of the following business names: Professional Hearing Aid Service, Frank's or Frank Pacovsky Professional Hearing Aid Service, Community Hearing Centers, Frank's or Frank Pacovsky Community Hearing Centers (hereinafter "Franks et al."), Key City Hearing Aid Service (KCH), and New Ulm Clinic (hereinafter "NUMC").
2. Practitioner was certified to dispense hearing instruments on May 26, 1994 and renewed his certificate annually until his certificate expired on October 31, 2005. Effective August 1, 2005, Practitioner was no longer required to hold a certificate to dispense hearing instruments. Between the initial application in 1994 through the expiration of his hearing instrument dispensing certificate on October 31, 2005, Practitioner indicated he

was self-employed and used the business names as identified in paragraph #1 above. In Practitioner's 2001 renewal application and under the business name, The Ear Specialty Center (hereinafter "ESC") Practitioner wrote "subcontractor."

3. On January 25, 2005, the Department received a complaint alleging Practitioner was splitting the fees he received from the sale of hearing instruments with an ear, nose and throat physician (hereinafter "ENT #1").
4. By letters dated May 1, 2009, July 14, 2009 and May 20, 2010, the Department requested Practitioner explain his relationship with ENT #1, ESC and the NUMC. The Department requested Practitioner provide the type of services he provided, the financial arrangement for payment of his services, whether his clients were aware of the nature of his relationship with ENT #1 and to supply Practitioner's tax returns representing income he received from ENT #1 and/or ESC.
5. On May 27, 2009 and June 15, 2010, the Department received Practitioner's response.
 - a. From 2001 through February 2008, Practitioner had a verbal agreement with ENT#1 to provide audiological services that were required of an ENT practice that also dispensed hearing aids.
 - b. On February 8, 2008, Practitioner entered into a written employment agreement with ENT #1. In July 2008, Practitioner sold his businesses and became an employee of a hearing instrument business entity.
 - c. Practitioner stated he was the owner operator for all names listed on his applications and an employee of ENT #1.
 - d. Practitioner stated he was a part-time employee of ENT #1 and worked one day per week at the ESC, located in the NUMC. Practitioner did not rent space or equipment and did not employ staff. Practitioner stated he was told what day to be at ESC, what time of day and who he would be testing. Practitioner stated he concluded he was a part-time employee and this was the verbal agreement he had with ENT #1 from 2001 to February 2008.
 - e. Practitioner did not inform clients about his financial relationship with ENT#1 or ESC. Practitioner used forms with the ESC logo. Practitioner printed his hearing instrument dispenser certificate number on each purchase agreement.
 - f. Practitioner stated he did not receive a medical referral from ENT #1 for the clients he saw at ESC. Practitioner stated he gave clients a recommendation, written on a form titled, "Hearing aid recommendation." The form included a statement, "This prescription or recommendation may be filled by, and hearing instruments may be purchased from, the certified dispenser of your choice."
 - g. Practitioner stated he referred most clients to ENT #1 if they needed a medical evaluation. Practitioner referred clients to their primary physician or other ENT clinics depending on insurance requirements.
 - h. When Practitioner sold hearing aids to a client at ESC, and the sale originated at ESC, the client made the check payable to the ESC. When Practitioner received payments directly from the clients at his Mankato office for hearing aid sales, he sent the checks to ENT #1's clinic if the sale originated at the ESC.

- i. When Practitioner sold hearing aids to a client at ESC, and the sale originated at ESC, the client made the check payable to "ESC." If the hearing aid sale or service did not originate at NUMC, the client made the check payable to Practitioner or one of his business names and sent the payment to Practitioner's business in Mankato.
 - j. Practitioner kept client records at the ESC in the NUMC, his Mankato office or both. Practitioner gave ENT #1 a copy of the hearing tests and purchase agreements from sales started at the ESC.
 - k. Practitioner was paid a "commission" based on new hearing aid sales. The commission was calculated by taking the difference between the cost of the hearing aid from the manufacturer and the price the consumer paid for the hearing aid, and then dividing by two, or one-half of the revenues from hearing aid sales.
 - l. The ESC reported Practitioner's remuneration on an IRS Form 1099-Miscellaneous Income for the years 2006, 2007, and 2008. Practitioner stated he did not receive an IRS Form W-2 from ESC. Practitioner earned \$6,726.26 in 2001; \$5,573.56 in 2002; \$3,037.34 in 2003; \$9,555.88 in 2004; \$9,042.89 in 2005; \$16,077.28 in 2006; \$12,335.06 in 2007; and \$1,909.35 in 2008.
 - m. Practitioner did not tell clients he received payments from ENT#1 for hearing aids he sold to them.
 - n. Practitioner did not tell clients they could not see other hearing aid dispensers or other physicians in the area.
6. Practitioner stated he did not report being an employee of ESC or ENT #1 on his renewal applications because the percentage of business he performed at NUMC was such a small percentage of his business income he did not think it was relevant.
7. By letter dated June 14, 2010 and September 6, 2011, the Department sent a letter to ENT #1 regarding the audiology and hearing instrument services provided by Practitioner. The Department received ENT #1's response on July 15, 2010 and October 5, 2011. ENT #1 stated:
 - a. Practitioner provided audiologic services as a representative of ESC and the NUMC.
 - b. Practitioner provided diagnostic testing and hearing aid dispensing.
 - c. Practitioner was an independent contractor during the years 2001 through 2007 and stopped providing the services on July 11, 2008.
 - d. Practitioner was paid a commission on hearing aid sales.
 - e. ENT #1 retained all patient case medical histories, notations and charts. No hearing aid records were retained by ENT #1 or the ESC.
 - f. Individual client billing and reimbursement for diagnostic audiological services were billed by ESC.
 - g. Practitioner retained all client hearing aid related records and charts, including adjustments, programming, repair, warranty service records, invoices, waivers, purchase agreements and manufacturer invoices.

- h. On February 8, 2008, ENT #1 and ESC entered into a written employment agreement with Practitioner. Shortly thereafter, ENT #1 and ESC ceased offering hearing instrument products or services.
8. Department review of an October 7, 2008 corrective action concerning ENT #1 determined Practitioner entered into a verbal agreement that Practitioner would provide audiological and hearing instrument dispensing services one day per week for ESC at NUMC. ENT #1 provided equipment, staff and paid the rent. Practitioner and ENT #1 each received one half of the profit for hearing aid sales. ENT #1 referred clients to Practitioner for hearing tests; and Practitioner referred clients to ENT #1 for a medical evaluation. ENT #1's patients were not given a written disclosure of the financial relationship between Practitioner and ENT #1 and patients were not notified they were free to see a different practitioner.
9. On May 13, 2011, the Department presented the issues in the case to audiologist members of the Speech Language Pathologist and Audiologist Advisory Council Competency Review Committee (CRC). The CRC made the following comments:
 - a. Practitioner is not an employee of ENT #1 or ESC as evidenced by use of IRS 1099 forms, renewal applications indicating ownership of dispensing businesses and ENT #1's statements.
 - b. Even if Practitioner was unaware of the laws, he should have disclosed the fee splitting arrangement to his clients.
 - c. Engaging in a fee splitting arrangement without notice to consumers affected by the arrangement is a conflict of interest.

CONCLUSION

Practitioner did not comply with Minnesota Statutes, section 148.5195, subdivision 3(12) because he failed to disclose an arrangement to share a portion of profits he received with another professional based on the sale of the hearing instruments he dispensed. Practitioner benefitted financially when he sold hearing instruments to clients he referred to ENT#1 for a medical evaluation and to clients ENT#1 referred to him. Practitioner further benefitted financially from the transaction because he did not pay rent, did not pay office staff and did not provide or pay for equipment or business forms. Practitioner was able to expand the reach of his business to a potential source of clients who would purchase hearing instruments. The evidence further demonstrates Practitioner was not paid as an employee of ENT #1 or ESC based on his federal tax records; and Practitioner described himself as a subcontractor to ESC and self-employed on his applications for licensure renewal. While Practitioner stated he did not make recommendations based on his financial interest, consumers who purchased hearing instruments had a right to know the profits from hearing aid sales were split between Practitioner and ENT #1.

DETERMINATION

1. Practitioner should pay a civil penalty of \$3,905.00, representing the economic advantage gained by violating Minnesota Statutes, section 148.5195, subdivision 3(12) and \$1,095.00 to reimburse the Department for the costs of the investigation and proceedings to date.
2. Practitioner may pay the total \$5,000.00 civil penalty in monthly installments. If Practitioner chooses to make installments, he must notify the Department 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, P.O. Box 64882-0882, within 30 days of receipt of this document.
3. 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. Each payment is due by the last day of each month; however, Practitioner may prepay at any time.
4. 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 the Department 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.
5. Within two years of the effective date of this Determination, Practitioner must provide any employer who hires him as an audiologist in the State of Minnesota with a copy of this Determination.
6. Within twelve (12) months of the effective date of this Determination, Practitioner shall successfully complete two (2) continuing education (CE) units on coursework related to ethics as approved by the Department. The classes shall be in addition to the continuing education requirements of Minnesota Statutes, section 148.5193.