

Eff 10/10/98

BEFORE THE MINNESOTA
COMMISSIONER OF HEALTH

In the Matter of Jean Wirz,
Hearing Instrument Dispenser

STIPULATION AND
CONSENT ORDER

HDC 96911

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

1. On or around July 7, 1996, a Notice of Case Conference with the Minnesota Department of Health was served on Practitioner, receipt of which is hereby acknowledged by Practitioner;
2. On August 7, 1996, Practitioner appeared before Department staff members Susan E. Winkelmann, Investigations and Enforcement Supervisor, and Diane Gnotta, Legal Analyst, to discuss allegations made in the Notice referenced above. Susan A. Casey, Assistant Attorney General, represented the Department at the conference. Ms. Carol Wirz, Practitioner's mother-in-law was also present as an observer. Although Practitioner was reminded of her right to counsel, she voluntarily waived such right, stating that she understood her right and waiver;
3. Except as otherwise specified herein, this Stipulation and Order, investigative reports, and related documents shall constitute the entire record of the proceedings herein upon which this Stipulation is based and shall be filed with the Department. Any report or other material related to this action and received after the date of this Stipulation is executed shall become part of the record and may be considered by the Department in future aspects of this proceeding. The items in the record shall maintain the data classification to which they are entitled under the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13 (hereinafter "MGDPA"). They shall not be considered a part of this Stipulation and shall not, to the extent they are not already public documents, become public merely because they are referenced herein. This Stipulation is public data pursuant to the MGDPA. The following shall constitute the factual basis for the order;
 - a. On May 2, 1995, the Department approved Practitioner as a hearing instrument dispenser trainee. Practitioner dispensed hearing instruments as a trainee for Mr. George Simmons at his Miracle Ear Center (hereinafter "ME"), located at 3333 Division Street, Suite 115, St. Cloud, Minnesota, 56301-3783. Practitioner received a copy of the relevant laws governing hearing instrument dispensing when she received the trainee application from the

Department;

b. From May 2, 1995 until the fall of 1995, Practitioner's Certified Dispenser Trainee Supervisor was Ms. Alice DeVowe, who also dispensed hearing instruments at Mr. Simmon's ME business. Ms. DeVowe terminated her employment with ME in the fall of 1995. After Ms. DeVowe's departure, Mr. Simmons assumed the role of Practitioner's trainee supervisor. Although Practitioner had thought otherwise, the Department never approved a change in Practitioner's Certified Dispenser Trainee Supervisor from Ms. DeVowe to Mr. Simmons;

c. During the fall of 1995, Mr. Simmons hired Mr. Jeffrey Dockman as a receptionist and data entry clerk. Shortly thereafter, Mr. Dockman assumed the duties consistent with those of an office manager. Among his duties Mr. Dockman negotiated payment plans with all ME business creditors except manufacturers;

d. Since Practitioner's date of hire at ME on May 2, 1995, Practitioner was aware of ME's financial difficulties. By December 1995, Practitioner realized that ME's financial situation was serious when ME was unable to refund consumers for returned hearing instruments;

i) On October 28, 1995, while a dispenser trainee at ME, Practitioner sold hearing aids to M.J. in the amount of \$2,335.80. M.J. received the hearing aids on November 9, 1995. M.J. experienced static and noise when wearing the hearing aids and returned the aids for a refund on November 29, 1995. M.J. did not receive her refund within the 30 day period pursuant to Minn. Stat. § 153A.19, subd 2;

e. On February 1, 1996, the Department granted a certificate to dispense hearing instruments to Practitioner. Practitioner received a copy of the relevant laws governing hearing instrument dispensing at the time of her application for certification;

f. During February 1996, Practitioner met with Mr. Simmons and Mr. Dockman to discuss Mr. Simmons' proposal to close his ME franchise and form a new dispensing business. No written agreement was executed among the parties pertaining to the specific roles and obligations each party was to assume under the new dispensing business;

g. On February 15, 1996, Mr. Simmons and Mr. Dockman began doing business as MHC, and Practitioner began work as an employee of MHC on that date. Mr. Dockman established an MHC bank account. Practitioner, under Mr. Simmons' direction, set up MHC business accounts and inventory, using Quickbooks computer software provided by Mr. Simmons;

h. Practitioner handled the MHC checkbook and account payable activities at Mr. Simmons' insistence. During the month of February 1996, Mr. Simmons and Mr. Dockman directed Practitioner to write eight MHC account payable checks to various ME creditors and to note in MHC business records that these payments were loans to Mr. Simmons;

- i) Chk. #2001 in the amount of \$250.00 to the Federal Dept. of Revenue;
- ii) Chk. #2002, 2003, 2055 for a total of \$285.23 to the MN Dept. of Revenue;
- iii) Chk. #2004 in the amount of \$500.00 to Hearing Services Int.;
- iv) Chk. #2005 in the amount of \$500.00 to US West;
- v) Chk. #2006, 2050 for a total of \$400.00 to Beneficial;

i. Practitioner was directed by Mr. Simmons and Mr. Dockman to use MHC funds to pay other ME related debts which were not characterized as personal loans to Mr. Simmons:

i) \$1,416.63 to Medica on 3/22/96 for employee premiums which included January and February ME premiums;

ii) \$2,500.00 to Dorsey and Whitney on 3/22/96 for legal advice concerning Dahlberg's claim that Mr. Simmons defaulted on his franchise agreement and whether Dahlberg, Inc. could take equipment per terms of the note;

iii) consumer refunds concerning ME transactions which included a partial refund of \$500 on 3/25/96 to M.K. and a refund of \$592.90 on 3/14/96 to D.D.;

j. During mid to late February 1996, Practitioner had a conversation with Mr. Simmons in which they discussed the closing of ME and a letter Mr. Simmons was drafting to Dahlberg Inc., his franchise. On February 29, 1996, Mr. Simmons closed his franchise operation and "discharged" all of his ME staff;

k. MHC operated with little or no start up capital and conducted business with its manufacturer vendors, Micro-Tech, Lori Medical Laboratories and Hearing Services International, primarily on a cash with order basis. The business offices which remained open under MHC included the Buffalo and St. Cloud offices. The service centers which remained open under MHC included the Paynesville and Sauk Centre service centers. MHC relied substantially upon the ME customer and prospective client base to generate business;

l. The general order processing procedure utilized by MHC was as follows: 1) Practitioner and Mr. Simmons forwarded customer receipts to the St. Cloud office for deposit; 2) Practitioner and Mr. Simmons prepared the hearing instrument orders and informed Mr. Dockman when the orders were ready for payment; 3) Mr. Dockman approved the hearing instrument orders for payment and instructed Practitioner to issue checks to the manufacturer;

m. From March 1, 1996 to April 18, 1996, Practitioner dispensed hearing instruments as

a certified dispenser through MHC. At MHC, Practitioner's duties included servicing hearing aids, testing client's hearing, recommending and fitting hearing aids, selling hearing aids, data entry, MHC's bookkeeping and ordering supplies and products. Practitioner conducted approximately ten to fifteen sales through MHC. As a matter of routine, Ms. Wirz informed customers at the time of sale that the hearing instruments would be delivered within two to three weeks. By March 14, 1996, Practitioner was aware that orders were not being turned around in a timely manner. Eleven of Practitioner's MHC customers paid a total of \$18,193.76 for hearing instruments which were neither delivered through MHC, nor for which purchase money was refunded:

i) On February 20, 1996, Practitioner sold hearing instruments to H.A. through MHC in the amount of \$1,224.00. H.A. paid in full by his check number 1947. On or around February 20, 1996, Mr. Dockman received check number 1947, in the amount of \$1,224.00, for H.A.'s order. Mr. Dockman deposited this amount on February 26, 1996 in MHC's First Bank account number 173101426505. H.A.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instruments;

ii) On March 5, 1996, Practitioner sold hearing instruments to A.J. through MHC in the amount of \$2,536.13. A.J. paid in full at the time of purchase by her check number 5855. On or around March 5, 1996, Mr. Dockman received check number 5855, in the amount of \$2,536.13, for A.J.'s order. A.J.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instruments;

iii) On March 11, 1996, Practitioner sold hearing instruments to M.H. through MHC in the amount of \$1,320.90. M.H. paid in full at the time of purchase by her check number 15308. On or around March 11, 1996, Mr. Dockman received check number 15308, in the amount of \$1,320.90, for M.H.'s order. Mr. Dockman deposited this amount on March 12, 1996 in MHC's First Bank account number 173101426505. M.H.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instruments;

iv) On March 14, 1996, Practitioner sold a hearing instrument to E.M. through MHC in the amount of \$560.40. E.M. paid in full at the time of purchase by her check number 23913. On or around March 14, 1996, Mr. Dockman received check number 23913, in the amount of \$560.40, for E.M.'s order. Mr. Dockman deposited this amount on March 15, 1996 in MHC's First Bank account number 173101426505. E.M.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instrument;

v) On March 14, 1996, Practitioner sold hearing instruments to E.W. through MHC in the amount of \$1,765.62. E.W. paid in full at the time of purchase by his check number 6315. On around March 14, 1996, Mr. Dockman received check number 6315 in the amount of \$1,765.62 for E.W.'s order. Mr. Dockman deposited this amount on March 15, 1996 in MHC's First Bank account number 173101426505. E.W.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instruments;

vi) On March 14, 1996, Practitioner sold hearing instruments to V.K. through MHC in the amount of \$1,479.00. V.K. paid in full at the time of purchase by her check number 1259. On or around March 14, 1996, Mr. Dockman received check number 1259 in the amount of \$1,479.00 for V.K.'s order. Mr. Dockman deposited this amount on March 15, 1996 in MHC's First Bank account number 173101426505. V.K.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instruments;

vii) On March 15, 1996 Practitioner sold hearing instruments to M.F. through MHC in the amount of \$2,548.98. M.F. made a partial payment of \$1,275.00 at the time of purchase by her check number 10928. On March 15, 1996, Mr. Dockman received a consumer deposit, check number 10928, from M.F. in the amount of \$1,275.00. Mr. Dockman deposited this amount in MHC's First Bank account number 173101426505 on March 15, 1996. M.F.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instruments;

viii) On March 19, 1996, Practitioner sold hearing instruments to H.S. through MHC in the amount of \$1,948.61. H.S. paid in full at the time of sale by his check number 4374. On or around March 19, 1996, Mr. Dockman received check number 4374, in the amount of \$1,948.61, for H.S.' order. H.S.' check was not applied to the hearing instrument manufacturer's order for processing of the hearing instruments;

ix) On April 4, 1996, Practitioner sold a hearing instrument to J.L. through MHC in the amount of \$912.90. J.L. paid in full at the time of purchase by his check number 5294. On or around April 4, 1996, Mr. Dockman received check number 5294, in the amount of \$912.90, for J.L.'s order. Mr. Dockman deposited this amount on April 5, 1996 in MHC's First Bank account number 173101426505. J.L.'s check was not applied to the hearing instrument manufacturer's order for processing of the hearing instrument;

x) On April 8, 1996, Practitioner sold hearing instruments to V.S. through MHC in the amount of \$1,948.61. V.S. paid in full at the time of purchase by her check number 7476. On April 8, 1996, Practitioner sold hearing instruments to A.S. through MHC in the amount of \$1,948.61. A.S. paid in full at the time of purchase by his check number 7476. On April 8, 1996, Mr. Dockman received check number 7476 from A.S. and V.S., in the amount of \$3, 897.22, for their orders. Mr. Dockman deposited this amount in MHC's First Bank account number 173101426505 on April 10, 1996. A.S. and V.S.' check was not applied to the hearing instrument manufacturer's orders for processing of the hearing instruments;

n. By early April, customers began calling Practitioner and other MHC staff about delivery of their hearing instruments. Practitioner was aware that consumer purchase money was not being applied to manufacturers' orders and reported the complaints to Mr. Dockman. Practitioner did not initiate the contact with customers to explain the delays in the orders;

o. On April 8, 1996 and April 11, 1996, Mr. Dockman made a series of withdrawals, totaling approximately \$5,000.00, from the MHC account. The following week, Mr. Dockman explained to Practitioner that the withdrawn funds were used to pay for attorneys' fees related to

a company audit;

p. By April 18, 1996, due to disagreements among them as to why orders were not being filled and why a large sum of money had been withdrawn from the MHC bank account, Mr. Dockman terminated Practitioner from her position with MHC. Practitioner contacted the Department and expressed her concerns about Mr. Dockman's business practices. Mr. Simmons removed Mr. Dockman from his St. Cloud office. Mr. Dockman removed some of the MHC client records and bank receipts from the office;

q. The Department received Practitioner's *Notification of Intention NOT to Renew* her certificate to dispense hearing instruments in September 1996. During the August 7, 1996 conference with Department staff, Practitioner informed the Department that it was her intent to complete a graduate speech-language pathology program;

4. It is the Department's position that proof at hearing of Practitioner's failure to deliver hearing instruments or return purchase money to consumers for sales transactions she conducted, as referenced in paragraph 3m, would constitute a violation of Minn. Stat. §153A.15, subd. 1(7) (engaging in conduct likely to deceive, defraud, or harm the public) and justify action by the Commissioner to suspend or take other action under Minn. Stat. §153A.15 against Practitioner's certification. Practitioner does not admit that this conduct constitutes a violation, but acknowledges that this Stipulation is enforceable against her.

5. Practitioner expressly waives the formal hearing and all other procedures before the Commissioner of Health to which Practitioner may be entitled under the Minnesota or United States constitutions, statutes, or rules;

6. Upon this Stipulation and record, as set forth in paragraph 3 above, and without any further notice of proceedings, the Commissioner hereby **ORDERS**:

a. Practitioner's certificate to dispense hearing instruments in the State of Minnesota is hereby subject to a one-year suspension. The one-year suspension period shall commence on the date this Stipulation and Consent Order becomes effective;

b. Practitioner shall pay a civil penalty, in the amount of \$ 714.99 as authorized by Minnesota Statutes section 153A.15, subd. 2(4) representing the economic advantage described in paragraphs 3 and 4. Practitioner shall make payments in monthly installments beginning on the first day of the first month after the effective date of the Stipulation. Practitioner shall mail each payment to Susan Winkelmann, Minnesota Department of Health, Health Occupations Program, P.O. Box 64975, St. Paul, MN 55164-0975, and each check will be made payable to "State Treasurer, Minnesota". Practitioner shall remit \$119.16 per month for the six months following the effective date of the Stipulation. Practitioner may prepay at any time without penalty;

7. This Stipulation and Consent Order 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 the

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. In the event the Commissioner in her discretion does not approve this settlement or a lesser remedy than specified herein, this Stipulation and Order 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 Minn. Stat. Ch. 14 and Minnesota Statutes section 153A.15, Practitioner agrees she will assert no claim that the Commissioner was prejudiced by her review and consideration of this Stipulation or any records relating hereto;

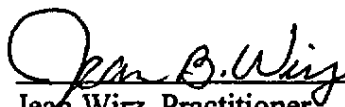
9. This Stipulation contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies this Stipulation. Practitioner understands that this agreement is subject to the Commissioner's approval. If the Commissioner either approves the Stipulation or makes changes acceptable to the Practitioner, an Order will be issued by the Commissioner. Upon this Stipulation and Consent Order and all other evidence made available to the Commissioner, once the Commissioner has approved it, the Commissioner may issue the Stipulation and Consent Order to Practitioner at any time without further notice;

10. A copy of the Stipulation and Consent Order when issued by the Commissioner shall be served by first class mail on Practitioner, at Practitioner's last known address and to the Practitioner's attorney. Service via first class mail shall be considered personal service upon Practitioner, at which time this Stipulation and Consent Order shall become effective. Any appropriate federal or state court shall, upon application of the Commissioner, enter its decree enforcing the Order of the Commissioner;

CONSENT:

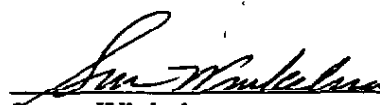
Practitioner hereby acknowledges that she has read, understood, and agreed to this Stipulation and Consent Order and has freely and voluntarily signed it.

Dated: 9-26-, 1998



Jean Wirz, Practitioner

Dated: 10/2, 1998

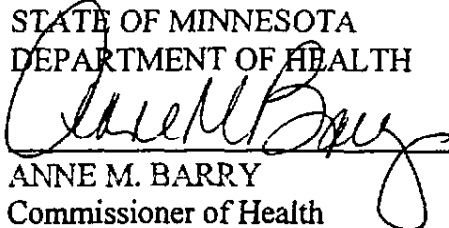


Susan Winkelmann
Investigations and Enforcement Supervisor
Health Occupations Program

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 on this 10th day of October, 1998

STATE OF MINNESOTA
DEPARTMENT OF HEALTH



ANNE M. BARRY
Commissioner of Health